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CONFISCATION OF CRIMINAL PROCEEDS IN THE EUROPEAN UNION CRIMINAL LAW

M. Agheniței

Mihaela Agheniței
Faculty of Law and Public Administration,
"Dunărea de Jos" University of Galați, Galați, Romania
Institute for Legal Research "A. Radulescu", Romanian Academy, Bucharest, Romania
*Correspondence: Mihaela Agheniței, 261Cuza St., Brăila, Romania
E-mail: m_aghenitei@yahoo.com

Abstract

The confiscation of proceeds of crime has long been seen within the European Union and beyond as an important tool in the armory of weapons to fight organized crime. The rationale for focusing on the confiscation of criminal proceeds is at least two- fold. First it addresses concerns that enormous criminal wealth, generated most notably by various forms of trafficking offences, risks destabilizing financial systems and corrupting. As such the confiscation of criminal assets seeks ultimately to reduce and prevent crime by making known that criminals will not be allowed to legitimate society. Second it attempts to undermine the "raison d'être*" behind most organized crime activity, namely the maximization of profit by illicit means. As such the confiscation of criminal assets seeks ultimately to reduce and prevent crime by making known that criminals will not be allowed to enjoy their illicit wealth. By the same token, focusing on confiscation of criminal wealth can send an important message by removing negative role models from local communities.*

Keywords: *"criminal proceeds", "confiscation", "reduce and prevent", "the European Union criminal law", "Joint Action and Framework Decision".*

Introduction

Confiscation is defined by the Council Framework Decision 2005/ 212/ JHA of 24th February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property,[1] *as a judicial order "resulting in the final deprivation of property". That includes property of any description "whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property" (Council Framework Decision 2003/ 577/ JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence).*

I. Related Proceeds Instrumentalities and Property defines the notion of criminal proceeds as "any economic advantage from criminal offences". To avoid the likely dissipation of suspected criminal assets prior to a confiscation order, the latter is frequently preceded by the freezing of assets during the course of an investigation. Freezing means a court or other competent authority order "temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property" (Council of European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism of 16 May 2005).

[1] Convention Implementing the Schengen Agreement.

II. Focusing on confiscation of criminal wealth can send an important message by removing negative role models from local communities.

As such the confiscation of criminal assets seeks ultimately to reduce and prevent crime by making known that criminals will not be allowed to enjoy their illicit means[2].

The rationale for focusing on the confiscation of criminal proceeds is at least two aspects:

- it addresses concerns that enormous criminal wealth, generated most notably by various forms of trafficking offences, risks destabilizing financial systems and corrupting legitimate society.

- it attempts to undermine the "raison d'être" behind most organized crime activity, namely the maximization of profit by illicit means.

The confiscation of proceeds of crime has long been seen within the European Union and beyond as an important weapon to fight organized crime.

III. The first serious attempt at international level to promote the confiscation of criminal proceeds was the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances, named the Vienna Convention, of 1988. While focused only on drug related crime, the Vienna Convention contains far-reaching and innovative provisions on the confiscation of criminal proceeds which have shaped and influenced many other instruments addressing criminal confiscation at international, regional and local and levels[3]. To enable confiscation to take place, the states of European Union who has been notified in November 1990, the Vienna Convention must ensure that bank, financial or commercial records are available and that bank secrecy is not an obstacle. It addresses issues of international cooperation and mutual legal assistance relevant to giving effect to confiscation orders issued by competent authorities of another state. It provides for confiscation of income derived from criminal proceeds and of the confiscation of property in proportions representing the value of illicit property, where criminal proceeds have been intermingled with legitimate assets. It raises the issue of sharing confiscation assets among authorities of different states who have combined efforts to ensure effective confiscation and the possibility that confiscated assets may be used for crime prevention or other measures designed to reduce crime. Perhaps most significantly the Vienna Convention raises the possibility that states may consider reversing the onus of proof regarding the lawful origin of alleged criminal proceeds.[4]

The United Nation Convention against Transnational Organized Crime,[5] named Palermo Convention, of December 2000[6] is designed to promote cooperation to prevent and combat transnational organized crime more effectively. The Convention identifies the confiscation of criminal proceeds as an important means to achieve this aim. It requires states to introduce measures to allow the confiscation of property derived from criminal activity and raises the possibility of reversing the onus of proof in confiscation proceedings.

The United Nation Convention against Corruption, named UNCAC, of December 2005[7] is designed inter alia to promote international cooperation against corruption including in asset recovery. It contains many of the confiscation related-provisions of the above United Nations Conventions. In addition the UNCAC sets out detailed provisions on recovery and return of confiscated assets including the obligation on states to adopt legislative measures to allow them to return confiscated property to the prior legitimate owners or to compensate the victims of the crime. The UNCAC also requires states (who ratified Convention) to consider taking any necessary measures to allow confiscation of property without a criminal conviction

[2] Treaty on European Union.
[3] Hague Programme for Strengthening Freedom, Security and Justice.
[4] A. Weyembergh, *Approximation of Criminal Law, The Constitutional Treaty and the Hague Programme*, Common Market Law Review, 2005, pp. 1567-1574.
[5] Council Decision setting up Eurojust - of 28.02.2002 amended by Council Decision of 18.06.2003.
[6] Framework Decision on Euro Counterfeiting, (2000).
[7] Framework Decision on combating terrorism, 2005.

in circumstances where the offender cannot be prosecuted due to "death, flight, absence or in other appropriate cases"[8].

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, named the 1990 Strasbourg Convention, is a real milestone in promoting the confiscation of criminal proceeds. This Convention considered that one of the most effective measures to fight organized crime was the confiscation of criminal proceeds. With this objective the Convention seeks to promote international cooperation in the identification, tracing, freezing and confiscation of criminal assets. The states must adopt legislative measures to allow confiscation of proceeds of crime and provisional measures with a view to ultimate confiscation, they are obliged to cooperate to the greatest extent possible as regards investigations and proceedings aimed at confiscation and have to take provisional measures such as the freezing of bank accounts, with a view to confiscation.[9]

The Second Strasbourg Convention – May 2005 – has been supplemented by the Council of European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on Financing of Terrorism and are recognizing both the similarities and the distinctive features between money laundering and the financing of terrorism. But it has a wider scope and acknowledges that money used to support terrorist groups and carry out attacks does not necessarily have criminal origins. Like the First Convention (1990), the Second Strasbourg Convention allows for the possibility of an all crimes approach to confiscation but also allows[10] states to make reservations. The Second Convention sends an important message that mandatory confiscation may be desirable as regards certain very serious offences such as people trafficking but does not go so far as to oblige parties to legislate to this effect. On the other hand, the Second Convention does require states, in respect of serious offences to adopt legislative or other measures requiring an offender to demonstrate the lawful origin of alleged criminal proceeds.

Another significant development in the Second Strasbourg Convention includes obligations on states parties of this Convention (European Union states) to provide information to requests from other states parties as to whether a natural or legal person who is the subject of a criminal investigation, has a bank account, to provide information on banking transactions and to monitor banking transactions.[11] These provisions are largely drawn from the European Union Protocol of 16 October 2001 to the Convention on mutual assistance in criminal matters between the member states of the European Union. But there are more members in the Council of Europe, including such diverse country as Albania, Azerbaijan and Moldova and the potential impact of such provisions may go well beyond the European Union instrument from which they are inspired.

IV. The European Union Action Plan to combat organized crime of April 1997 stated: "The European Council [12]stresses the importance for each European Union states of having well developed and wide ranging legislation in the field of confiscation of the proceeds from crime…" Similarly three years later the Prevention and Control of Organized Crime: A European Union Strategy for the Beginning of the New Millennium, called European Union Millennium Strategy states that "The European Council is determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime[13]".

[8] Convention of 15.05.1972 The Council of Europe Convention on Transfer of Proceedings of 15 May 1992.
[9] Convention Implementing the Schengen Agreement.
[10] Green Paper on Conflicts of Jurisdiction and the Principe *ne bis in idem* (2005).
[11] European Commission, Directorate General Justice Freedom and Security, Unit D 2 – Fight against Economic, Financial and Cyber Crime.
[12] Council Framework Decision (2005) – 24th February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.
[13] Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property of evidence.

So, the European Union has made important steps to highlight the role of criminal confiscation and to establish European Union states approach to freezing and confiscation of criminal assets.

The Joint Action of 3rd December 1998 adopted by the Council on the basis of Article K3 of the Treaty of European Union, on money Laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime was a first attempt to ensure an European Union wide implementation of the Council of Europe Strasbourg Convention. This Joint Action was modified by a Framework Decision of 26th June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime. Taken together the purpose of the Joint Action and Framework Decision was to ensure a common minimum approach of states in terms of those criminal offences for which they should provide for confiscation.[14] The approach is generally that if an offence [15]is punishable by imprisonment of a maximum of more than one year, it must be possible under national law, to order confiscation of proceeds generated by that offence. The Joint Action and Framework Decision also require European Union states to have in place a system of value confiscation and to ensure that all requests from other European Union states relating to asset identification, tracing, freezing and confiscation, are processed with the same priority as is given to such measures in purely domestic proceedings.[16]

For example,[17] the Joint Action says that to promote mutual assistance[18] in the European Union and the European Union states should prepare and regularly update "a user-friendly guide including information about where to obtain advice" on identifying, tracing, freezing and confiscating criminal assets, and the states[19] "shall encourage direct contact between investigators… and prosecutors making appropriate use of available cooperation networks" to reduce where possible the number of formal requests for assistance. It is an apparent precursor to the Camden Assets Recovery Inter-Agency Network (CARIN) who is an informal network made up principally of European Union states experts working in the area of criminal asset identification and recovery and which aims to improve inter-agency cooperation in cross borders identification, freezing and confiscation of criminal proceeds[20].

Conclusions

In this regard, we note that the Council Act of 16 October 2001, establishing in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the member states of the European Union, requires European Union states to respond to a request from another state as to whether a natural or legal person who is the subject of criminal investigation, holds or controls one or more bank accounts on its territory[21]; to provide on request of another state the details of bank accounts and banking transactions and to request the monitoring of banking transactions.

[14] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and Financing of Terrorism of 16 May 2005.
[15] United Nation Convention against Corruption of December 2005.
[16] Strasbourg Convention on 1990 – on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.
[17] Second Strasbourg Convention – May 2005.
[18] European Union Protocol of 16 October 2001 to the Convention on mutual assistance in criminal matters between the Member States of the European Union.
[19] Prevention and Control of Organized Crime: A European Union Strategy for the Beginning of the New Millennium, 2000.
[20] Council Framework Decisions 2001-2008, International Review of Penal Law, vol.77.
[21] I. Flămînzeanu, *Criminal liability*, PRO Universitaria Publishing House, Bucharest, 2010, pp.69-73.

Bibliography

I. Flămînzeanu, *Răspunderea juridică*, Pro Universitaria Publishing House, Bucharest, 2010;

Councils Framework Decisions 2001-2008 – International Review of Penal Law (vol. 77);

Framework Decision on combating terrorism (2005);

A. Weyembergh, *Approximation of Criminal Law, The Constitutional Treaty and the Hague Programme*, Common Market Law Review, 2005, pp. 1567-1574;

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism of 16 May 2005;

Council Framework Decision (2005) – 24th February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property;

Green Paper on Conflicts of Jurisdiction and the Principle *ne bis in idem*, 2005;

Second Strasbourg Convention – May 2005;

United Nation Convention against Corruption of December 2005;

Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property of evidence;

Council Decision setting up Eurojust – of 28.02.2002 amended by Council Decision of 18.06.2003;

European Union Protocol of 16 October 2001 to the Convention on mutual assistance in criminal matters between the Member States of the European Union;

Framework Decision on Euro Counterfeiting (2000);

Prevention and Control of Organised Crime: A European Union Strategy for the Beginning of the New Millennium (2000);

Treaty on European Union;

Strasbourg Convention on 1990 – on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime;

Convention Implementing the Schengen Agreement;

Convention of 15.05.1972 – the Council of Europe Convention on Transfer of Proceedings of 15 May 1972;

European Commission, Directorate General Justice Freedom and Security, Unit D2 – Fight against Economic, Financial and Cyber Crime;

Hague Programme for strengthening freedom, security and justice.

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MERGERS' IMPLICATIONS FOR EMPLOYEES UNDER ROMANIAN LAW

F. Bejan

Felicia Bejan
The Bucharest University of Economic Studies, Department of Law
* Correspondence: The Faculty of Political Science, 24 Sfantul Stefan St., 023997, Bucharest, Romania
E-mail: felicia.bejan@fspub.unibuc.ro

Abstract

Mergers of enterprises produce profound effects over the rights of associates, creditors, and employees. Although the interests of each of the categories of persons affected are protected by national and European norms, employees enjoy a particular attention. In European law, Directive 2001/23/EC regulates the safeguarding of employees' right in the case of transfer of undertakings, businesses, and parts of undertakings or businesses. Communitarian dispositions have been transposed in Romanian law by articles 173-174 of Law 53/2003 - The Labour Code and Law 67/2006 regarding the protection of employees' rights in the event of transfer of undertakings, businesses, or parts of them, which transpose the Communitarian norms in the subject matter.

The labour contract is an intuitu personae contract, the relationship between employee and employer being one of subordination. Thus, there are at least two rationales that justify the lawmaker's preoccupation for the implications of restructuring operations over employees. Employee protection in case of transfer by merger entails, in substance, the safeguarding of their rights and obligations within the framework of the ceded entity, as they had been set by the labour contract of the cedent entity. The current study critically analyses the national law concerning the transfer of labour contracts in the context of transfer by merger. The paper also contains a number of de lege ferenda proposals, which can contribute to the improving of the existing juridical framework.

Keywords: *merger, legal transfer, employees, labour contract.*

Introduction

According to Directive 2001/23/EC concerning the safeguarding of the rights of employees in cases of transfers of undertakings, businesses, or parts of them[1], to be appropriated by member states in national law, transposed by Law 67/2006[2], the law has as object to be regulated the conditions in which the employees' rights are protected, as provided for by individual labour contracts and in the collective labour contract that applies, in the case of the transfer of undertaking, business, or parts of undertakings or businesses towards another employer, as a result of a legal transfer or merger, as provided by the law (art. 1).

In our opinion, the division, together with the merger, is part of the scope of Law 67/2006 concerning the protection of employees' rights in cases of transfer of undertakings, businesses, or parts of undertakings or businesses. As a general consideration, there is a juridical identity between mergers and divisions, with the exceptions of the particularities generated by the specifics of each of the two types of operations. The only admissible

[1] Published in the Official Journal no. L 82/2001, p. 16-20
[2] Published in the Official Journal of Romania, Part I, no. 276 of 28 March 2006, came into force the date Romania became a member of the European Union.

conclusion is that the juridical texts regarding employee protection applicable to mergers are equally applicable to divisions.

The merger and division of undertakings have as main effect the universal transfer, or the transfer with a universal title, of the patrimony of the participating entities to the beneficiary entities.

As elements of the patrimony subject to universal transfer, the contracts concluded by the absorbed, merged, or divided entities, still in force at the date of the operation, are transferred to the absorbing or beneficiary entities. Exceptions from this rule are contracts concluded intuitu personae character, which are in principle not transferrable. A continuation of contracts belonging to this category can only happen with the agreement of all parties involved.

Labour contracts are parts of the intuitu personae type of juridical acts belonging to the patrimony of a business at the moment of the restructuring operation. The intuitu personae character opposes the transfer of such contracts to the new employer in the absence of consent from the parts to a contrary preference.

Following this logic, the merger or division could constitute cause for termination of the labour contract. It is for this reason that, in order to ensure a stability for the employees of the entities participating in the process, the European legislator had to intervene and institute expressly the exception of the continuity of labour contracts, in spite of their intuitu personae character.

1. The transferral of labour contracts.

At national level, the legal transfer of individual and collective labour contracts as effect of mergers and divisions is regulated by articles 173-174 of the Labour Code, and the dispositions of Law 67/2006.

In order for the dispositions of article 173 paragraph 2 from the Labour Code and article 5 paragraph 1 from Law 17/2006 concerning the safeguarding of employee rights to be applied in the case of transfer by merger or division of businesses, the following cumulative conditions need to be met: a legal transfer to actually take place and the labour contracts to be ongoing.

a) A legal transfer to take place.

The scope of regulating employee protection is to ensure the continuity of labour contracts in the event in which the employing entity is subject to a transfer. The notion of legal transfer of an undertaking, business, or parts of undertakings or businesses, has been the object of numerous interpretations. The Court of Justice conferred a very wide interpretation to the concept. As it was established by the Allen case, essential for defining a transfer is "the change of the private or legal person responsible with undertaking an activity, in whose charge fall the obligations of an employer towards the transferred employees, no matter of whether or not the property right is transferred or not".[3]

Consistent with this line of interpretation, national courts have decided that in order to operate a transfer it is sufficient the transfer of an activity of the cedent to the cessionary, without being necessary to transfer the property rights over a determined segment of the assets.[4]

Whichever the juridical nature of the act by which a transfer is realised, in order to determine the real existence of a transfer that would impose the continuation of labour contracts, the following conditions need to be met:

[3] Case C-234/98. G. C. Allen and Others v Amalgamated Construction Co. Ltd., http://eurlex.europa.eu

[4] Civil Verdict no. 1257 of 3 December 2007, the Court of Appeal of Alba Iulia County, the Section for labour conflicts and social security. The same ruling showed that, in order to perform a transfer, the agreement of the representing syndicate is not required, nor is the formulation of an additional act to the employees' labour contracts, the only expression of will necessary being that for the completion of the transfer between the cedent and cessionary.

- the business, undertaking, or parts of undertakings or businesses subject to transfer must be an economic entity organized in a stable manner, that is an organized ensemble of people and assets that allow the carrying out of an economic activity
- the business, undertaking, or parts of undertakings or businesses subject to transfer, as defined above, must retain its identity, in such a way as to allow the continuation or the restart of activity post-transfer.

The preservation of the economic entity's identity may result from the activity of the employer, of its staff, the organization of labour, the methods of fruition of labour or of production.

In one case, the Court decided that conditions are met for employee protection "even in cases when part of the undertaking or part of the business being ceded does not maintain its organizational structure, condition being that the functional connection between the various transferred means of production be maintained, and that this connection grants the cedent the capacity to use the latter in the framework of a continuation of the economic activity that is identical or analogous".[5]

Thus, the identity of a business, undertaking, or part of undertakings or businesses may be retained independently from the preservation or loss of autonomy as a consequence of the transfer.

As an example, it has been shown that, in order to establish whether or not the identity of an entity is retained, national courts have to analyse:

- the type of transfer
- the fixed and current assets that were transferred
- the value of the transferred assets at the time of transfer
- the taking over of labour contracts by the new employer
- the transfer of clients
- the similarities between the activity prior to the transfer and post-transfer
- the potential suspension of activity of the entity prior to transfer and the duration of the suspension[6]

A particular attention must be granted to the fact that the transfer entails, beyond the transfer of tangible or intangible assets, of labour contracts, of clients, the continuation by the cessionary of the same activity or of one that is similar to that of the transferring employer. There can be no continuity of labour contracts in the absence of an activity that employees can undertake according to their qualifications. Claiming the contrary would imply the possibility of future layoffs on grounds of inadequate professional performance on the respective positions.

As it can be determined from the decisions of the Court of Justice, the criterion of preserving the same line of activity in the event of change of employer as qualifier for a transfer should not be taken strictly. The retention of identity of the business entails that the new employer undertakes an economic activity identical or similar.

As such, it is difficult to assume that a private or legal person understands to be part of a legal transfer as cessionary, with the intention to undertake activities that the transferred fixed and current assets, as well as the human capital present cannot sustain. On the other hand, an adjustment of the cessionary's activity to the market demands may generate changes in its main or secondary activity, without implying a radical stray from the initial profile.

Merger and division operations, by their nature, are susceptible to meet the prerequisite conditions for a legal transfer of the business.

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[5] Case C-175 /99, Didier Mayeur v Association Promotion de l'information messine (APIM), http://eurlex.europa.eu

[6] Case C-13/95, *Suzen*, *http://eurlex.europa.eu*

The commercial entities transferred partially or in their entirety are entities established according to the dispositions of Law 31/1990, and are organized in such a way that the activities they undertake "of a stable manner" are conducive to bringing a profit.

At the same time, what normally motivates a merger or division operation is the need to resize the activity, depending on the market demands and the resources of each participant to the economic environment. It is why any entity that takes over another entity or parts of it is interested in developing the respective activity. This means that, in principle, the identity of the merged, assimilated, or divided entity, may it be by means of merger or division, is retained.

It is however not inconceivable that the cessionary, in good faith, finds itself in the impossibility to maintain an activity identical or analogous, due to objective or subjective factors. At the same time, hypotheses cannot be excluded such that the cessionary may only be interested in the current assets of the cedent entity, or worse, intents to eliminate a competitor from the market.

In other words, if meeting the condition of the stable organization of the cedent entity does not pose a problem, the same cannot be said about the continuation of activity as part of the cessionary entity.

As a consequence, employees' rights may be affected by a potential change of the object of activity of the employer, or by future developments occurring after the transfer takes place. Irrespective of the reasons for which the new employer does not continue the previous activity, it is obvious that the regulations concerning the safeguarding of employee rights cannot protect the employees against every risk.

For such instances as the discontinuation by the new employer of the former activity, the question can be raised whether, in the absence of a transfer in the spirit of the law, the principle of universal transfer of the patrimony can compensate for the protection that the particular law guarantees whenever the warranted conditions are met.

In our opinion, in order to formulate an answer for this particular problem, it is necessary to ground our rationale on the principle of the free will of the parties involved in mergers or divisions, and on the *intuitu personae* character of the labour contract.

Thus, by virtue of the principle of autonomous will, the assimilated and the newly formed entities, in the case of mergers, respectively the beneficiary entity in the case of divisions, may not be obliged by law to set their object of activity in such a way as to maintain the activity of the assimilated, merged, or divided entities. Consequently, the dispositions of Law 67/2006 are not applicable in the case in which the transfer by merger or division does not fulfil the condition of the continuation of an activity identical or similar.

At the same time, the *intuitu personae* character of labour contracts opposes the universal transfer of rights and obligations, in the absence of the explicit accord of the parties involved.

In such conditions, the cessionary cannot be obliged to continue the labour contracts of the cedent, should it decide not to undertake an activity identical or similar to that of the cedent. In the eventuality in which, hypothesising, the cessionary would decide to preserve the labour contracts, but not the activity of the cedent, the juridical grounding of the continuation of the contracts is the will of the cessionary expressed by the continuation, and not the principle of universal transfer, and even less the dispositions of Law 67/2006. Furthermore, given these conditions, we are of the opinion that the cessionary and the employees have the freedom to negotiate a modification of the content of the labour contract, in consonance with the activity performed by the employer and considering the professional skills of the employees.

b) The labour contracts must be ongoing

Per a contrario, the employees whose labour contracts end prior to the date of the merger or of the division cannot benefit from the provisions of the law.

In other words, in order for the contracts to be preserved by the assimilating, the newly-established, or beneficiary entity, the labour contracts must be part of the current assets of the divided or assimilated business.

If in the case of mergers all the rights and obligations of the assimilated or fused entities that result from the ongoing labour contracts are transferred fully to the assimilating or newly-formed entity, in the case of divisions, respectively of breaking-offs, we have identified several issues.

The first of them refers to the criterion according to which the dividing society distributes the employees between the entities enjoying the results of the division. Similarly, in the case of break-offs, the problem being raised is by virtue of which principle do the habilitated bodies decide which are the employees that will continue their activity in the entity subject to the break-off, and which are those whose rights and obligations shall be transferred to the entities receiving the patrimony of the company being split.

A second issue being raised is whether or not the employees enjoy or not the right to oppose the decision, and the criteria that can be invoked in order to challenge the allocation to one or the other of the employers; and to have the possibility to gain the right to continue their labour contract with that of the employers with which they can demonstrate a clearly outlined relationship, both from an objective as well as subjective points of view.

De lege ferenda, in order for employers to not proceed arbitrarily in their decisions regarding the allocation of employees, the optimal solution is the setting of minimal objective criteria that should be respected.

The legislative consecration of such allocation criteria is all the more important considering how, implicitly, it would significantly limit the potential infringements of employees' rights and, consequently, would reduce the number of cases that could be challenged on grounds of allocation of employees. Also, it would offer the courts of law, if they were to be intimated in such situations, a juridical framework to facilitate the handing down of lawful and sound verdicts.

Up to the creation of such regulations, the decision of allocation of employees remains with the management bodies of the entities involved. We may presume that these will consider with precedence the relationship between the content of the labour contracts of each employee, particularly the details in the job description, and the nature of the activities each of the companies will undertake after completing the transfer. Such a solution responds simultaneously to the interests of the companies, which essentially undertake an activity with the purpose of obtaining profit, purpose towards which the available human capital brings a decisive contribution, but also to the interests of the employees, for which, beyond the economic criterion, particularly considering wages, it is important to be involved in activities consonant with their training, abilities, and professional experience.

Concerning the employee's opposition to the transfer by division, the law does not provide for such a right. In spite of all of this, in practice some situations occur in which, on the grounds of express clauses in the contract, or clause of conscience, the employee may continue their labour contract within the cedent company.

2. The transfer within the notice period.

The question being raised is what happens in the circumstances when the merger or division is concluded within the notice period, the notice period reaching its term, practically, after the transfer will have taken place. Are such contracts part of the current assets of the transferred business? And if so, what are in this situation the obligations of the cessionary entity?

In practice, the notice period is a period in which the labour contract continues to produce effect. Yet, obviously, the circumstances of the change of employer while in the notice period, time interval in which the employment relationships will continue, do not grant the employee the right to request that the new employer reconsider the layoff decision. At the same time, nothing prevents the new employer to rehire the previously laid-off employee.

Under no circumstance will the employee have the capacity to claim the exercise of the rights he/she had by virtue of the individual labour contract, invoking as grounds the dispositions of articles 173-174 of the Labour Code, and of Law 67/2006. In this line of thought, the new contract will be drafted barring new terms, the content agreed upon by both parties, that does not necessarily need to be similar with the previous contract.

3. Modifying the labour contract.

The stability of the labour force is ensured precisely by that which both European and national norms have set as goal of protecting, that is, the safeguarding of the employee rights by the new employer, with the same terms set with the former employer through the labour contract.

Still, subject to compliance with the labour contract in force, the transfer may entail a change of the labour conditions. Where such a change to be possible, concerning the foreseen measures and the labour and employment conditions, employees are entitled to be notified in writing and to be consulted through their representatives, with at least 30 days before the date of the transfer, thus respecting the terms provided by the law.

It is expressly provided for in article 8 of Law 67/2006 that, in the event that the employee resigns as a consequence of the significant worsening of the labour conditions, the respective termination is considered to manifest due to the actions of the employer.

Another question being raised is what happens in the event when during negotiations regarding the modifications of the labour contract, modifications unfavourable to employees, an accord is reached by representatives and employer. Is this accord capable of changing the prior solution of committing the employer responsibility and releasing the employer from the constraints of such responsibility?

In our opinion, even if consequent to the consultations between employee representatives and those of the entities involved have reached an agreement, should the changes in the labour conditions be significantly detrimental to the employees, the responsibility of the employer subsists, motivated by the fact the respective termination happened for reasons independent of the employees' persona. It is every employee's right, regardless of the employee representatives' decision, to decide upon the fate of their own contract. Thus, we are of the opinion that the will of the employee's representatives cannot change the consent to continue or to terminate the contract, consent that each employee has the right to express autonomously.

Determining the substantial alteration of the character of the labour contract is a matter of fact, and can be established by comparing the clauses of the cedent's labour contract with the envisioned clauses of the cessionary's contract. One ruling of the Court brought forth the notion that the employee's remuneration substantial reduction, even in case of transfer of a private business to state ownership, and the employee is obliged to submit to national norms concerning public sector employees, constitutes a substantial change of the labour conditions to the disadvantage of the employee. For this reason, a potential termination of the contract by the employee must be considered as the fault of the employer, being held responsible accordingly. In the same line of thought, the Court decided that the change of date for wage payment and its composition falls in the same category of situations modifying substantially the terms of the contract or of the labour contract, even if the amount remains the same.

4. Termination of the labour contract.

The interdiction of individual or collective termination of employment is one of the fundamental measures instituted in favour of employees by dispositions of article 173 paragraph 3 of the Labour Code and article 7 of Law 67/2006.

This does not mean that the cedent entity cannot operate contract terminations up to the moment of the merger or division, or by the cessionary entity after that point, but that such a measure cannot have as legal grounding the transfer itself.

Action to the contrary of these provisions entitles the employee with regards to which the termination of contract was enacted to bring the case to court in order to re-establish the former state of things.

A particular situation that may arise in practice is the situation in which the cedent entity decides to terminate a contract, motivated by the transfer or by other reasons, and the court finds the measure to be illegal and ungrounded.

Given that the new employer, by the principle of universal transfer or the transfer with universal title, substitutes in rights and obligations the previous employer, it is obliged to respect the court's decision. The new employer may find itself in the situation to have to continue the employment relationships with the employee in cause, if a request existed in this sense, and to pay compensations equal to the wages adjusted for inflation, increased and updated, and with the rest of the benefits that the employee enjoyed.

The Romanian law omitted to transpose the communitarian norm concerning the individual or solidary responsibility of successive employers in such situations. In spite of this, according to the Romanian law, there are legal instruments available to the cessionary entity to recuperate and potential prejudice.

As a measure of diligence, though, we consider as necessary that part of the free will agreement concerning the terms of the merger, division respectively, the entities involved to provide a solution addressing atypical cases concerning the transfer of rights and obligations generated by labour contracts, including with regard to potential transitory situations.

As to what the layoff of employees post-transfer it should be said that such a measure may be taken by the new employer, should the legal conditions be met. In practice, however, we encounter situations in which, after a certain amount of time after the transfer of an undertaking or a part of it, in good or bad faith, the new employer decides to stop the activity and dissolve the business. Although the law attempts to guarantee the stability of the labour force in the event of a transfer, the protection of employee rights is not and cannot be absolute.

Conclusions

Employee protection in case of transfer by merger and division entails, in principle, the safeguarding of rights and obligations by the employees, as set by the labour contracts concluded with the cedent enterprises, as part of the cessionary entity.

Certain conditions must be met in order for those interested to benefit from the dispositions of the law. An important condition is that the operation concerns an entity undertaking an economic activity of a stable manner, and continues its activity after the transfer, thus preserving the stability of the undertaken activity and, implicitly, the stability of the labour force. It is equally important that, at the moment of the completion of the transfer, the labour contracts whose continuity is to be protected to be ongoing. If the existence of labour contracts cannot constitute a matter of controversy unless in exceptional circumstances, establishing the real existence of a transfer continues to be a topic subject to debate and which, as a consequence, is susceptible to lead to a non-uniform implementation of the legal acts on the matter by the member states of the European Union.

The transfer accomplished in full compliance with the provisions of the law charges the cedent and the cessionary employer with the obligation of notifying and consulting with the employee representatives, as a first measure-guaranteeing employee rights protection. The fundamental perspective, employee-side, is that *ex lege*, their rights and obligations resulting from the individual and collective labour contracts be transferred together with their undertaking, business, or parts of undertakings or businesses to the new employer.

National regulations concerning the post-transfer continuation of employment is not safe from critics. For the employees to benefit from an adequate protection in the event their employer decides to operate structural changes, as previously shown, *de lege ferenda*, clarifications and additions to the existing legal framework are still necessary.

Bibliography

I.T. Stefanescu, *Theoretical treatise and the practices of the Labour Code*, "Universul Juridic" Publishing House, 2012;

O. Tinca, *Critical observations to Law no. 67/2006 regarding the employees' rights protection in the event of transfer of undertakings, businesses, or parts of undertakings or businesses*, in "Dreptul" *Review*, no. 2/2007

I.T. Stefanescu, "The Safeguarding of employees' rights in the event of transfer of undertakings, businesses, or parts of undertakings or businesses, in light of Law no. 67/2006", in ", in "*Dreptul" Review,* no. 9/2006;

N. Voiculescu, *Communitarian law, national law, and the case law concerning employees protection in the event of transfer of enterprise*, in "Revista Română de Dreptul Muncii" Review, no. 1/2006;

Civil Verdict no. 1257 of 3 December 2007, the Court of Appeal of Alba Iulia County, the Section for labour conflicts and social security;

Case C-175 /99, Didier Mayeur v Association Promotion de l'information messine (APIM), http://eurlex.europa.eu;

Case C-234/98. G. C. Allen and Others v Amalgamated Construction Co. Ltd., http://eurlex.europa.eu;

Case C-13/95, Suzen , http://eurlex.europa.eu;

Law no. 67/2006 regarding the transfer of undertakings, businesses, or parts of undertakings or businesses

Directive 2001/23/EC of the Council of 12 March 2001, regarding the safeguarding of workers' rights in case of transfer of undertakings, businesses, or parts of undertakings or businesses.

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THE NEW PENAL CODE. EUROPEAN UNION REQUIREMENT OR NECESSITY FOR ROMANIA?

W. G. Brînză

William-Gabriel Brînză
Faculty of Law, Law Department
"Dimitrie Cantemir" University, Bucharest, Romania
*Correspondence: William Gabriel Brînză, Palace of Parliament, 2-4 Izvor St., Bucharest, Romania
E-mail: william@williameuropa.eu

Abstract

Preparation and adoption of a new Penal Code represent a crucial moment in the legislative evolution of any state. The decision to proceed in preparing a new Penal Code is not a simple manifestation of political will, but is, in equal measure, a corollary of the economic and social evolution and of doctrine and case law as well.

Keywords: *Romanian Penal Code, requirement, necessity, European Union.*

Introduction

Preparation and adoption of a new Penal Code represent a crucial moment in the legislative evolution of any state. The decision to proceed in preparing a new Penal Code is not a simple manifestation of political will, but is, in equal measure, a corollary of the economic and social evolution and of doctrine and case law as well.

The deep transformations in political, social and economic plan that took place in the Romanian society in the nearly four decades that passed since the adoption of the Penal Code in force, especially in the period after 1989, do not leave place for any doubts that the adoption of a new Penal Code is necessary.

Starting from these premises, for the preparation of the new Penal Code, within the Ministry of Justice a Committee has been established, constituted from university teaching staff, judges and prosecutors, with the participation of the Legislative Council representatives.

The decision to elaborate a new Penal Code is based on a number of shortcomings within the current regulations, shortcomings highlighted in practice as well as in doctrine.

Thus, the present sanctioning criminal regime regulated by the Penal Code in force, subject to frequent legislative interventions on the various institutions, led to a non-unitary application and interpretation, with no coherence, of the criminal law, with repercussions on the efficiency and the finality of the justice act.

Also, the decision to elaborate a new Penal Code was grounded on the shortcomings of Law 301/2004[1], raised by the doctrine in the period that followed its publication, out of which, the most important are the following:

- in terms of the models that constituted the basis of the regulation, our legislative body has limited to two main models - the Penal Code in force and the French Penal Code, diverting thus from the inspiration of the Italian-Austrian tradition, developed under the former Penal Code[1];

[1] Published in the Official Gazette of Romania no. 575 of June 29th, 2004, this law on the new Penal Code has never entered into force, another draft of the Penal Code being elaborated, resulting in the publication of Law 286/2019 concerning the Penal Code, published in the Official Gazette of Romania no. 510 of July 24th, 2009.

- the classification of the infringements of law in crimes and offences, although correct from a scientific point of view, has been regulated in an faulty manner, therefore, it creates problems whose solution can not be found within the code. This is the case, for example, with the classification of the attempted murder as crime or offence. Further more, it should be noted, presently, the concepts of crime and offence do not have a legal relevance anymore, neither for specialists and, obviously, nor for the public. Their re-introduction in these circumstances would represent only a source of confusion. To make sense of this, the distinction in criminal plan should be correlated with the adoption of a corresponding institution in the procedural plan. The legal systems in which there is a classification in crimes and offences have also specific procedural institutions, that give substance to this classification, such as, for example, the Court with jury. Such institution is grounded in the tradition, the experience accumulated in time and within a certain legal culture in the civic space. In their absence, the institution would be artificial and inefficient;
- Law 301/2004 reiterated a number of provisions already declared unconstitutional by the Constitutional Court, as in the case with the obligation to remedy a prejudice by ordering certain individualization measures to suffer the sanction - articles 108, 109 of Law, and within the prior complaint regime in case of offences against State-owned assets – article 266 par. 6 of Law, etc. In addition, several other provisions raise serious constitutionality issues (for instance, the criminal immunity of all public institutions);
- the regulation of the main sanctions hierarchy in terms of offences, stipulated in Article 58 par. 4 of Law 301/2004, is not reflected in the content of other institutions. Thus, according to the law, a fine is a more severe sanction than community service work. On this grounds, and by the application of Article 35 par. 2 of Law, it is concluded that the attempt to an offence sanctioned only with fine will be sanctioned with community service work. Article 69 of the Law stipulates however, that in the case of avoiding the payment of a fine with intent, community service work could apply;
- some of the new introduced institutions are superposing the regulation of the sanctionary regime of minors, that is still grounded on old principles, leading to the creation of a more severe sanctionary regime for minors than for adults (for example, in case of postponing the punishment application or the suspension of the sanction applied to the minor, if it is also applying the obligation to provide unpaid work);
- the criminal liability of the legal entity has been taken from the initial version of the French Penal Code from 1994, version that has not been proved as viable and which consequently the French Legislative body partially renounced (for example, under the aspect of the special clause of the legal entity liability);
- in terms of the special part, it is noted in the text of the Code the introduction of many provisions from the special law, measure completely justified, but they were mostly taken as such, without being subject to rigorous selections or to an improvement of the regulation. Thus, the existing regulation parallelism between the Code and the special criminal laws has been transferred sometimes inside the Code. At the same time, some texts from the special legislation brought into the Penal Code have been repealed or modified in the meantime.

Additionally the elaboration of a new Penal Code is required by the need to re-set the sanctioning treatment within the normal limits. In this respect, the practice of the last decade has shown that not the excessive enlargement of the sanction limits is the efficient solution to fight the crime. Therefore, even the sanction for the aggravated theft is prison from 3 to 15 years according to the law in place, this legal sanction – not met in any other legal system in the European Union - has not led to a significant decrease in the number of these offences. Moreover, in the period between 2004 and 2006, approximately 80% of the ongoing sanctions of depriving of liberty for theft and aggravated theft were no more than 5 years of imprisonment, which indicates that the courts have not felt the need to apply sanctions to the upper limit provided by the law (maximum 12 years in case of simple theft, and 15, 18 and 20 years in case of aggravated theft). On the other hand, the extreme period between the

minimum and the maximum limit of the sanction (from 1 to 12 years, from 3 to 15 years, from 4 to 18 years) led in practice to many different solutions in terms of effectively applied sanctions for similar offence or to extended sanctions for low hazard offences, fact that does not ensure the predictable nature of the Act of Justice. The desirable solution is not an irrational increase of a sanction, which does not do anything more than to disregard the social values hierarchy in a democratic society (for example, stealing a car that is worth more than RON 200,000 is sanctioned just like murder by the law in place). In a State of law, the extent and intensity of the criminal repression should remain within the determined limits, firstly, by reference to the importance of the social value affected for those that infringe the criminal law for the first time, growing gradually for those who commit more crimes before being finally convicted and even more for those who are in a state of relapse. Therefore, the limits of the sanction stipulated in the special part must be correlated with the provisions of the general part, that will allow a proportional aggravation of the sanctionary regime provided for the plurality of crimes.

The analysis of the Penal Code in force evidenced another necessity for new regulations from the special part, namely to simplify as much as possible the incrimination texts, avoiding the superposition between various incrimination and with the texts in the general part. Thus, if a circumstance is provided in the general part as a general aggravating circumstance, it must not be reiterated in the incrimination content from the special part; the general text shall apply.

To provide the unity in the offences regulation, was necessary to include in the content of the new Penal Code some offences stipulated presently in special criminal laws and that have a higher frequency in the judicial practice (offences against traffic safety on the public roads, offences against the safety and integrity of computer systems and data, offences of corruption, etc.).

Thus, in the new Penal Code must be introduced all those offences incriminated in special laws, which effectively deserve a penal sanction, and in these cases, the incriminating text must be conceived so as to integrate organically in the code structure.

2. Foreseen Changes[1]

Answering the requirements of the European Commission monitoring process, the legislative process has as a starting point the need to elaborate a new Penal Code, which shall retrieve the elements that can be maintained in the current Code and from Law 301/2004 and to integrate in a unitary manner with elements taken from other reference systems and from the regulations adopted at European Union level in order to achieve a space of freedom, security and justice.

The new Penal Code follows the fulfilment of the following objectives:

1. creation of a coherent legislative framework in criminal matters, avoiding the unnecessary superposition of the existing norms in force in the current Penal Code and the in the special laws[2];
2. simplifying the regulations of material law, designed to facilitate their unitary application and with celerity within the activity of the judicial bodies;
3. complying with the exigencies resulting from the fundamental principles of criminal law, established by the Constitution and the pacts and treaties on fundamental human rights, of which Romania is a part;
4. transposition into the national criminal legislative framework of the regulations adopted at European Union level;
5. harmonization of the Romanian Criminal Law with the systems of other Member States of the European Union, as a premise of judicial cooperation in criminal matters based on mutual recognition and trust.

[2] Taken from the Statement of reasons concerning the Draft law on the Penal Code http://www.just.ro/, accessed on May 12th, 2011.

By achieving the mentioned objectives, the connection of the national criminal law to the contemporary requirements of the fundamental principles of the criminal law will be realized.

Also, in social terms, the simplification of the material law regulations, corroborated with the planned changes in the new Criminal Procedure Code, should lead to the predictability of the criminal law, as well as to an increased general confidence in the Criminal Justice Act.

In the elaboration of the new Penal Code has been followed on the one hand, the revaluation of the Romanian criminal law tradition, and on the other hand, the connection to the current regulatory systems of several reference legal systems in the European criminal law. These two directions envisaged in the code elaboration could be reconciled just through an attentive analysis of the Romanian Criminal law evolution. Thus, in the capitalization of our criminal law tradition has been started from the Criminal Law of 1936, many of its provisions being maintained in the Penal Code in force. As it is known, the code of 1936 had two main sources of inspiration - The Italian Penal Code and the Transylvanian Penal Code (in essence, of Austrian inspiration). At the same time, it is a fact that, nowadays, the criminal regulations with the widest influence in the European law belong to the German and Italian space. The convergence of regulations proposed by the new Code with these legislations, and with those they inspired (the Spanish law, the Swiss law, the Portuguese law), allowed the creative capitalization of the national tradition, together with the achievement of some regulations connected to the current trends of the European criminal law. The fidelity towards Italian and German tradition does not imply taking over some provisions of the legislation in the form they were during the elaboration of the Penal Code in 1936, but, on the contrary, considering the evolution incurred in these systems, the modern theories and regulations developed in the meantime.

For all these considerations, the Committee members have not agreed with the choice of the Committee for elaborating Law 301/2004, that has adopted the French model (abandoned by our criminal legislative body in 1936) as the main inspiration for the newly introduced regulations. This orientation of the elaboration Committee of the new code has not considered by any means to ignore the solutions adopted by other European systems, as the French, Belgian, Dutch law or of some of the Scandinavian countries.

It has been equally maintained a number of specific Romanian criminal legislation institutions, some introduced by the Penal Code in force that have proven their functionality (for example, the improper participation has been maintained, although most of the laws operate in these situation with the mediated author institution). Last but not least, a series of elements in accordance with the present trends of the European criminal laws (renouncing to the social hazard institution, the victim's consent, etc.) has been taken from Law 301/2004, but especially from the preliminary draft prepared by the Legal Research Institute underlying the elaboration of that bill.

The general part of the new Penal Code assembles the applicable rules of all offences regulated by the criminal law, regardless of their nature, creating the general framework for the application of the criminal law, defining the offence, establishing its general characteristics and the composing elements, regulating at the same time the penal responsibility, sanctions and their modality of application.

Bibliography

V. Păvăleanu, *Drept penal, partea generală*, "Universul Juridic" Publishing House, Bucharest, 2012;

V. Paşca, *Drept penal, partea generală*, "Universul Juridic" Publishing House, Bucharest, 2011;

F. Streteanu, *Disertație asupra dreptului penal, partea generală*, vol. I, C.H. Beck Publishing House, Bucharest, 2008;

V. Dongoroz, *Drept penal (Tratat)*, Institutul de Arte Grafice Publishing House, Bucharest, 1939;

C. Bulai, *Manual de drept penal, partea generală*, All Publishing House, Bucharest, 1997;

A. Ungureanu, *Drept penal român. Partea generală*, "Lumina Lex" Publishing House, Bucharest, 1995;

I. Oancea, *Drept penal, partea generală*, "Didactică şi Pedagogică" Publishing House, Bucharest, 1971.

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NOVELTIES IN SECURITY MEASURES – THE EXTENDED SEIZURE

N. E. Buzatu, A. Uzlău

Nicoleta-Elena Buzatu
Faculty of Juridical and Administrative Sciences
"Dimitrie Cantemir" Christian University, Bucharest, Romania
*Correspondence: Nicoleta-Elena Buzatu, "Dimitrie Cantemir" Christian University, 176 Splaiul Unirii, 4 District, Bucharest, Romania
E-mail: nicoleta_buzatu@yahoo.com

Andreea Uzlău
Faculty of Juridical and Administrative Sciences
"Dimitrie Cantemir" Christian University, Bucharest, Romania
*Correspondence: Andreea Uzlău, "Dimitrie Cantemir" Christian University, 176 Splaiul Unirii, 4 District, Bucharest, Romania
E-mail: stoicaandreea76@yahoo.com

Abstract

This work analyses the recent regulation, which amends the current and the future Criminal Code, in the sense of establishing, as a new security measure, the extended seizure. Analyzing the provisions of the regulation, the authors indicates, the necessity to amend the Criminal Procedure Code is underlined, with the purpose of ensuring the regulation operability within the criminal proceedings.

Keywords: extended seizure, licit property acquisition presumption, Security Measures, New Criminal Code

1. Introduction

Extended seizure is forced and free passage in State ownership of certain things, which belong to the person who has committed a crime, because of their origin from the criminal activities of the same nature, carried out by that person, constantly, over a certain period of time, prior to the offence for which the person is sentenced.

Extended seizure is a criminal sanction, which is personal and irrevocably.

A recent regulation adopted by the Romanian Parliament[1], amends the Criminal Code[2] in force, by introducing a new article art. 118^1, with marginal noun as "extended seizure", and the new Criminal Code, adopted by law No. 286/2009[3], which will enter into force on the date set by law enforcement, by introducing a new article - 118^2 with the same marginal name. The provisions that will change the new Criminal Code will take effect with it.

[1] Law No. 63/2012, published in the Official Gazette of Romania, part I, no. 258 of 19 April 2012.
[2] Law No. 15 of 21 June 1968 – The Criminal Code of Romania, published in the Official Gazette of Romania nr. 79-79 Bis of 21 June 1968, republished in the Official Gazette of Romania No. 55-56 of 23 April 1973 and then in the Official Gazette of Romania, part I, No. 65 of 16 April 1997.
[3] Law No. 286 of 17 July 2009 – The Criminal Code of Romania, published in the Official Gazette of Romania, part I, No. 510 of 24 July 2009.

The reason for issuing this law is, as shown by the initiator[4], the transposing of article 3 of Council framework decision nr. 2005/212/JHA[5] on confiscation of products, tools and other items related to crime.

According to par. (10) in the preamble to framework decision, its aim is to ensure that all Member States have effective rules governing the seizure of the products related to crime, *inter alia,* relating to the burden of proof regarding the source of assets held by a person convicted of an offence related to organized crime.

Article 3 of the framework decision confers increased powers of seizure to Member States, for goods resulting from criminal activities, carried out by the person sentenced or where it is established that the value of goods held is disproportionate in relation to the convicted person's legal income.

Thus, although currently Romania shall benefit from a coherent and comprehensive legal framework, developed in line with international standards in the matter of the seizure of criminal products, the framework has some shortcomings with regard to European requirements.

At the level of national legislation, the Council framework decision mentioned above was not entirely transposed. The transposition of art. 3 on the extended seizure was missing.

The measure must allow the seizure of property derived from criminal activities which are not directly linked to the offence for which the person is condemned. The direct connection between the offence giving rise to the conviction and assets that are seized is not proven, therefore. This is the so-called principle of extended seizure of the goods.

The analyzed framework decision is not for general, but covers a specific situation, namely that of preventing and combating organized cross-border crime, for the purpose of detection, freezing, seizing and confiscation of products relating to the offence. The regulation therefore starts from a premise, namely that of the existence of a conviction.

The acquisition of the extended seizure under national law requires the regulation of the express limited cases, in which the constant conduct of serious criminal activities by a person, over a certain period of time, combined with the absence of other regular income, it is considered a sufficient evidence to enable the Court to establish that the goods were illegally acquired. A new view of the burden of proof in matters relating to the acquisition of illicit property is established.

The existing legislation at national level may not derogate from the basic principles laid down in the European Convention on human rights and from the rule established in article 1 of additional Protocol 1, entitled “Protection of property”.

In the same connection, the article 5 of the framework decision 2005/212 may be invoked, according to which the provisions of the latter shall not have the effect of modifying the obligation to respect fundamental rights and fundamental principles, including the presumption of innocence, as enshrined in article 6 of the Treaty on European Union.

The lack of implementation, thus far, of the normative instrument of the European Union was due, in good measure, to the controversy related to the compliance of this regulation with the constitutional principle referred to in paragraph 1 (8) article 44 of the Constitution[6].

Operating exclusively in criminal proceedings, for a list of particularly serious offences and applying exclusively to a person already convicted, the extended seizure is not incompatible with the presumption of lawful acquisition of property.

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[4] The explanatory memorandum, available on the website www.just.ro.

[5] Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, published in the Official Journal of the European Union L Series No. 68 from 15 March 2005.

[6] The Romanian Constitution, as amended by the law of the revision of the Constitution of Romania No. 429/2003, published in the Official Gazette of Romania, part I, no. 758 of 29 October 2003, republished in the Official Gazette of Romania, part I, no. 764 of 31 October 2003.

This presumption is relative, so it will be down, on a case-by-case basis, through the provision of evidence convincing the Court that the property held by the sentenced person are obtained from committing crimes.

The Prosecutor would thus be obliged to prove that one particular person, over a period of time, has been involved in committing certain crimes, such as acts of organized crime. Since that time, the judge can reasonably assume that the assets acquired are the result of criminal activities carried out by the sentenced person, for a period prior to conviction that is considered reasonable by the Court. In this case, the burden of proof on the licit acquisition of the goods is the responsibility of the convicted person. If the judge concludes that the value of the held goods is disproportionate in relation to the legal revenue, he may require their confiscation from the convicted person.

The Constitutional Court has indicated in the same sense by decision no. 799 of 17 June 2011, on the draft law on revision of the Constitution, noting that the presumption of lawful acquisition of property does not prevent the legislature, pursuant to art. 148 of the Constitution - The integration in the European Union - to adopt regulations to allow full compliance with the legislation of the Union in the fight against organized crime.

In this context, in relation to the provisions of art. 44 par. (9) of the Constitution of Romania, republished, which stipulates that "goods destined for, used or resulted from crimes or offences may be confiscated only under the law", we appreciate that because the extended seizure operates exclusively in criminal proceedings, aims at a series of serious offences and shall apply exclusively to a person already convicted – introduction of such proceedings is not incompatible with the presumption of licit nature of property, ranging from art. 44 par. (8) of the Constitution of Romania, republished.

2. Conditions for taking the extended seizure measure

a. Extended Confiscation may be ordered against a person who has committed a criminal offence prescribed by the law, but also against members of the families of the persons with whom it has established relations similar to those of spouses or between parents and children, if they are living together, or legal entities to which the sentenced person has control.

In this regard, it should be noted that the meaning of the expression "member of the family" in the new criminal Code differs from the meaning of the Penal Code in force. Thus, according to art. 149^1 Criminal Code: "member of the family means spouse or close relative, if the latter lives and work together with the perpetrator."

Art. 177 of Law No. 286/2009 concerning the Criminal Code provides:

" (1) member of the family means:

a) ascendants and descendants, brothers and sisters, their children, and persons rendered through adoption, according to the law, such relatives;

b) husband;

c) persons which have established relationships similar to those of spouses or between parents and children, if they are living together.

(2) the provisions of criminal law concerning family member, within the limits laid down in paragraph 1. (1) letter a), shall apply, in cases of adoption, and the person adopted or its descendants in relation to the natural relatives".

Analyzing the laws pre-quoted, whereas the new Criminal Code enlarges the scope of persons treated as family member, in respect of the current Criminal Code was necessary to introduce a specific provision in the sense that, in the rules in force, extended confiscation applies to persons who have established relationships similar to those of spouses or between parents and children, if they are living together with the sentenced person.

b. Extent of safety is taken if there is the certitude that the person sentenced has conducted criminal activities other than those for which he was convicted, but of a similar nature.

Under this aspect, as the initiator, the regulation provide that the measure of safety applicable to all offences for which the law provides for a prison sentence of more than five years, limit referring both to the current and the new Criminal Code.

Under parliamentary procedure, it was noted that the scope of the measure must be restricted, by the provision of double-glazed conditionings. On the one hand, there have been specified categories of serious crimes for which extended seizure can be incident: human trafficking; offences relating to the traffic of drugs and precursors; crimes at the border of Romania; money laundering; infractions of the law on prevention and combat of pornography; crimes of terrorism; association for committing offences; the crime of initiation or setting up an organized criminal group or join or support any form of such a group; offences against property; offences relating to the regime of weapons, munitions, explosive materials, radioactive, nuclear; the counterfeiting of currency or other values; disclosure of secrets, unfair competition, breach of provisions relating to the import or export operations, embezzlement, breach of provisions relating to the import of wastes and residues; offences relating to gambling; trafficking in migrants; corruption offences, offences similar crimes of corruption, offences related to corruption offences, offences against the financial interests of the European Union; tax avoidance; offences relating to the customs procedure; offences committed by means of computer systems and electronic means of payment; trafficking in human organs or tissues. In relation to the new Criminal Code, the list of crimes was adapted accordingly.

On the other hand, it was intended that the penalty prescribed by law for the offence committed is imprisonment for five years or longer (i.e. imprisonment of 4 years or more in the new Criminal Code).

This regulation is, in our opinion, in line with the European regulatory action which it implements, which does not have a general, but aims at a specific situation, namely that of preventing and combating organized cross-border crime. In this regard, the provisions of art. 3 of Council framework decision nr. 2005/212/JHA shall list the categories of crimes which require regulation increased confiscation powers for the Member States, making, for example, referring to offences relating to combating trafficking in persons, combating the sexual exploitation of children and child pornography, illicit drug trafficking and other serious crimes committed in the wider criminal organizations.

c. the value of assets acquired by the person convicted, within a period of five years before and, if necessary, after the committal of the crime until the date of issue of the document instituting the proceedings, obviously exceeds the licit revenues.

Application of the measure means, therefore, setting a time interval that begins with five years before the date of the offence for which he has ordered the conviction and ending on the date of issue of the indictment. In the case of the offence continued, we appreciate that the time of 5 years shall be calculated from the date of the last act of execution, which is the date of exhaustion of criminal activity.

According to this period, will be analyzed the total amount of regular income gained by the person convicted and the difference between this amount and the total of assets acquired during the same period, in order to determine whether there is a obvious disproportion.

Property of movable or immovable property will be considered, including monies, acquired by the person convicted in his own name, the property transferred by it or by a third party of a member of the family, the person sentenced has established relationships similar to those of spouses or between parents and children, if they are living together with him, to legal persons on which the sentenced person has control well as expenditure incurred within the reference to the categories of persons mentioned.

Conclusions and suggestions *de lege ferenda*

The new provisions concerning the extent of security of extended seizure are likely to ensure at the same time the guarantee of legal reports security and the implementation of the obligations imposed by the Romanian legal norms binding the community. The settlement can be improved in several aspects.

Thus, with regard to the acquisition of goods within a period of five years prior to the committal of the crime, if there are reasonable indications as to the timing of the crime, it is not justified to extend beyond this period the seizure. If, however, the Court has reasonable evidence that the criminal activity of the nature of the crime that attracted the condemnation took place over a period of more than 5 years, is not the limitation in time, having taken into account all the period of criminal activity.

On the other hand, if his criminal activity cannot be established, but there is no indication that the person has received proceeds from criminal activities, the period of 5 years is justified.

With regard to the calculation of the reference range, we appreciate that time reporting should have regard to the moment of final decision of condemnation, with the limitations imposed by the principle of non *reformatio in pejus.*

Thus, there are times when even in the period between the time of sending to trial and the final decision, the sentenced person may acquire property through the use of income from activities of a kind that drew condemnation.

As regards the categories of persons whose assets may be covered by special seizure, we consider insufficient regulation, because, although it provides that an assessment of the illicit character of goods other than those referred to in art. 118 of the Criminal Code, account shall be taken of the value of goods transferred by the person convicted or by a third party to a family member or a legal person on whom the accused/defendant has control, from the contents of the draft normative act is not clear whether the measure can be ordered and seizure from persons concerned.

Therefore, after paragraph 2 of art. 118^2 should introduce a new paragraph, within the meaning of the provision expressly to the possibility of extended seizure and disposition of action against persons presumed by law to be intermediate, someone as a family member or a legal person of which the sentenced person has control, of course with the fulfillment of conditions stemming from regulatory action: derives from the nature of the activities which have attracted condemnation by default and should not be purchased in regular income.

This legislative solution was chosen also in the case of goods which have been used in any way, to commit an offence, if they belong to another person, if the person concerned has the purpose to be used – art. 118. 1 lit. b of the Criminal Code.

The express provision of possible confiscation of property that is located in the heritage of persons presumed by law to be intermediate, would open the way for protective measures against property belonging to them. In this regard, to the extent that the safety of extended seizure is not rendered devoid of content and thus to transform itself to an extent illusory, by the alienation of property covered by the confiscation, it is necessary, in addition to completing properly the provisions of art. 163 of the Code of Criminal Procedure and article 249 par. 1 of Law No. 135/2010 on the New Code of Criminal Procedure with the provision that protective measures are taken and expanded with a view to confiscation, also to provide the possibility of disposing of such measures against persons presumed by law to be intermediate.

De lege lata, protective measures may be taken only in respect of the accused/defendant or person responsible in the perspective of Civil Law.

Legislative intervention should be required more as the Law no. 135/2010 – New Code of Criminal Procedure provides in art. 249 par. 3 protective measures for special seizure and to ensure execution of criminal fine “can be taken only in respect of the suspect or the accused”.

At the same time, to be able to implement the new regulations is necessary to achieve other amendments to the Criminal Procedure Code[7] and the provisions of Law No. 135/2010 – New Code of Criminal Procedure[8]. Thus, taking into account new powers of investigation conferred to judicial bodies (the prosecution and courts) in respect of the identification of other goods than those mentioned in art. 118 of the Criminal Code in patrimony or heritage of the sentenced person or a family member or legal persons on which the person sentenced has control, in procedure should be made a number of additions that allow the organs of the judicial to check everything mentioned above.

Thus, the contents of articles 202 and 287 of the Code of criminal procedure, which regulates the role of the criminal investigation body, namely the role of the Court, could be expanded through the imposition of an obligation borne by the criminal prosecution authorities and the courts to collect data relating to the accused/defendant or a member of his family or legal entity over which it has control of other goods than those mentioned in art. 118 of the Criminal Code.

At the same time, we appreciate that the introduction of a transitional provisions concerning exemption cases pending judgment from the application of the measure would have been required.

The main arguments that can substantiate such regulations are as follows:

a. significant difficulties for the administration of evidence, necessary for the application of the extended seizure to cases already in the course of the trial; the identification, with specific procedural means, of the goods subject to verification (of the accused, the members of his family, with which he has established relations similar to those of spouses or between parents and children, of the legal persons on which the defendant has control) involves checks at all Bank units at land register offices, financial administrations, etc.

Given the complexity of such checks, is reportedly a significant increase of the duration of cases in the trial phase.

b. the compliance with the relevant case-law of the European Court of human rights

The extended seizure, by its extent and severity, constitutes a punishment within the meaning of the case law of the European Court of human rights (case of Engel v. the Netherlands, Judgment of 8 June 1976), so it should enjoy all procedural guarantees required by the European Convention of human rights and fundamental freedoms (hereinafter referred to as the Convention) in the case of a criminal trial.

Thus, in the absence of a text excluding cases pending judgment in applying the extended seizure, this measure will come into conflict with the Convention and also will generate a non uniform jurisprudence.

Thus, the measure is applicable to causes in the appeal phase, which will lead to the application of a punishment without granting an appeal against it; this situation is contrary to art. 2 of Protocol 7 to the Convention, on the double degree of jurisdiction in criminal matters;

Also, according to art. 12 par. (2) of the actual Criminal Code, "the law which provides for safeguard measures or educational measures are applied to the crimes which have not been definitively judged until the date of entry into force of the new law."

It appears that the courts should make the application of the extended seizure to cases pending trial. However, interpreting these provisions in the light of the Convention, dealing with the institution in its essence, the Court may take into account the principle of the

[7] Law No. 29 of November 12, 1968 - The Criminal Procedure Code of Romania, published in the Official Gazette of Romania nr. 145 of 12 November 1968, republished in the Official Gazette of Romania, Part I, no. 78 of 30 April 1997, as amended.

[8] Law No. 135 of July 1, 2010 - the Criminal Procedure Code of Romania, published in the Official Gazette of Romania, Part I, no. 486 of 15 July 2010. This code comes into force on the date which will be fixed by the implementing law.

application of the Criminal Law more favorable. Accordingly, the courts will not apply this measure cases pending judgment.

Therefore, the lack of an explicit text creates the risk of a non uniform jurisprudence.

Furthermore, for the same reasons, related to the principle of the application of the Criminal Law more favorable, the new Criminal Code no longer retain the solution governed by article 12 par. (2) of the actual Criminal Code.

Bibliography

Law No. 63/2012, published in the Official Gazette of Romania of Romania, part I, no. 258 of 19 April 2012.

Law No. 286 of 17 July 2009 – The Criminal Code of Romania, published in the Official Gazette of Romania, part I, No. 510 of 24 July 2009.

Law No. 135 of July 1, 2010 - The Criminal Procedure Code of Romania, published in the Official Gazette of Romania, part I, no. 486 of 15 July 2010. This Code comes into force on the date which will be fixed by the implementing law.

Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, published in the Official Journal of the European Union L Series No. 68 from 15 March 2005.

The Romanian Constitution, as amended by the law of the revision of the Constitution of Romania No. 429/2003, published in the Official Gazette of Romania of Romania, part I, no. 758 of 29 October 2003, republished in the Official Gazette of Romania of Romania, part I, no. 764 of 31 October 2003.

Law No. 15 of 21 June 1968 – The Criminal Code of Romania, published in the Official Gazette of Romania nr. 79-79 Bis of 21 June 1968, republished in the Official Gazette of Romania No. 55-56 of 23 April 1973 and then in the Official Gazette of Romania, part I, No. 65 of 16 April 1997.

Law No. 29 of November 12, 1968, The Criminal Procedure Code of Romania, published in the Official Gazette of Romania nr. 145 of 12 November 1968, republished in the Official Gazette of Romania, part I, no. 78 of 30 April 1997, as amended.

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THE ORIGINS OF CRIMINAL LIABILITY OF LEGAL PERSONS – A COMPARATIVE PERSPECTIVE

M. Catargiu

Magdalena Catargiu
Faculty of Law
"Alexandru Ioan Cuza" University, Iaşi, Romania
*Correspondence: Magdalena Catargiu, "Alexandru Ioan Cuza" University, 11 Boulevard Carol I, 700506, Iaşi, Romania
E-mail: m_catargiu@yahoo.com

Abstract

The criminal liability of legal persons is an intrinsic reality of everyday life. However, this particular institution had a rather tumultuous evolution which is essential in understanding its organic mechanisms.

Through this study we aim to analyze the concept of criminal liability of the legal person from both diachronic and comparative perspective in order to determine the role of this fiction in contemporary legal systems. We shall focus on the legal framework in both European and Anglo-American systems. We also intend to identify the factors that have led to the consecration of criminal liability.

Keywords*: legal personal, criminal liability, European regulations, Anglo-American legal system.*

Introduction

In order to understand the inner mechanisms of the legal person, it is essential to analyze it both from the perspective of public law and of private law, as well.

One of the most controversial aspect regarding the criminal law institution is, undoubtedly, the liability of the entities. We perceive it in the same natural manner as the liability of individuals, neglecting, unfortunately, aspects of great importance that contribute to the configuration of legal entities as we known them today.

Romans were very attached to the idea that the legal person is very similar to the natural person. However, the legal person could not be held criminal responsible, fact enshrined also by the adagio *societas delinquere non potest*. Thus, Ulpian specifies that a *municipium* cannot be responsible for *dolus*, since it is a legal person[1], i.e. a fictive entity. After all, the legal persons were the product of fiction, being actually nothing more than a legal metaphor.

However, some authors, especially Archille Mestre, asserted that the Romans considered legal persons capable of committing offenses and, in consequence, they could be punished. In support of its sentences, the author gives the example of the town Cheronea, against whom a criminal legal action had been formulated. This would lead to the idea that in Roman law, the criminal liability of legal persons was recognized[2]. In fact, some of the residents of the town, without the entire community being involved, killed Roman citizens. After trial, Cheronea had been exonerated.

In the Middle Ages, the liability of legal person remained a controversial matter. The general tendency has been to accept that legal person may also be criminal responsible. In the

[1] F. Streteanu, R. Chiriță, *Răspunderea penală a persoanei juridice*, C. H. Beck Publishing House, Bucharest, 2007, p. 4.
[2] F. Streteanu, R. Chiriță, *op. cit.*, p. 5.

context in which the Church`s role was predominantly, punishing legal person constituted a means of applying sanctions to those entities under public law in particular, which did not comply with the religious regulations. The penalty was excommunication. Pope Inocențiu the 6th is the one of those who argued the criminal liability of the legal person. A supporter and an establisher, after some authors, of the theory of fiction, he rejected the idea that an imaginary creation can be held liable for committing a criminal offense, as it had no free will and no real existence. He argued that an *universitas*, because it was a creation without soul and body, which was not a part of the Church[3], may not be punished by criminal provisions.

In Germanic law, both natural person, as well as legal person were recognized as being real subject of law. In the 7th century, there were established, as territorial units, centuries and curies. They were responsible for any criminal offenses committed on their territory[4]. Considering this, the basis of criminal sanctions was not guilt, but the consequences of the action. The penalty was actually a compensation, a restoration of the prejudice caused, more than a punishment *per se*.

In France, the criminal liability of moral person was consecrated by the Criminal Ordinance of 1670 and it had been applied until the French Revolution. The French code of 1810 has eliminated the criminal liability of legal persons, although it had been consecrated before the 8th century. But the new legislation was based on the realities of that historical times. After the French revolution, legal persons under private law had vanished due to the prohibition of freedom of association.

The criminal liability was vehemently criticized by the *ultra vires* doctrine supporters. The sense of the syntagm *ultra vires* is revealed by the expression *beyond the powers*. According to this theory, the legal person is entitled only to those legal rights which had been specifically conferred, therefore, a legal person`s capacity is limited to the specialization of its object of activity. It may act only in accordance with the purpose for which it was established. Criminal liability would imply that committing offences must be one of the statutory purposes. This is, without doubt, not possible, whereas the object of an association must be in accordance with the law and with the morality. The 9th century, in Great Britain, this concept has been adopted by the court in *Ashbury Railway Carriage and Iron Co. v. Riche.*

Before the Second World War, in Europe, despite the tradition of the Middle ages, the principle *societas delinquere non potest* continued to be applied. After the War, the judges of Nuremberg had not punished Germany, but the Nazi Party, which was also a legal person.

The Netherlands was the first European country to introduce the concept of criminal liability of moral person, in 1976. From the last decade of the 20th century, the majority of the member states of the old continent followed its example. Some countries, such as Sweden and Greece have refused the recognition and the consolidation of criminal liability of the legal person.

Germany has opted for administrative liability of collective entities. This implies that an offense must be related to individual - *verbandsunrecht*[5]. It is mandatory that the action is related to a legal obligation of the moral person and it has to have contributed to its enrichment. The doctrine is also known as the *theory of the report of legal persons.*

In France, criminal liability of moral person has been re-introduced by the Criminal code of 1994 and it is based on the *theory of the identification of bodies and the representatives with the legal person*. In accordance with article 121-2 of the Criminal code "moral persons, except the State, are responsible under criminal law *[…]*of the criminal offenses committed in their name or on their behalf, by their bodies or representatives. "*(Les personnes morales, à l'exclusion de l'Etat, sont responsables pénalement […] des infractions*

[3] M. Lizee, *De la capacite organique et des responsabilites delictulle et penale*, McGill Law Journal, no. 41/1995, p. 5.
[4] *Ibidem*, p. 9.
[5] Sofie Geeroms, *La responsabilité pénale de la personne morale: une étude comparative*, in Revue internationale de droit comparé, no. 3/1999, p. 545.

commises, pour leur compte, par leurs organes ou représentants.). In other words, the governing bodies and the representatives shall be identified with a legal entity in all legal relations. Whenever a crime is committed by a person outside the entity, the criminal liability of the collective person is not possible. Also, an employee, if he is not part of the governing bodies or does not act as a representative of the moral person cannot attract, by his deed, the criminal liability of the entity. The above reasoning is founded on *theory of liability by "rebound"*. According to this doctrine, in order to be criminal liable it is necessary the offense to have been committed by a natural person. The moral person is responsible only in the situation in which the offense has been performed by a body or a representative, in the name and on its behalf. The responsibility is, therefore, of conventional nature.

This doctrine follows the *theory of functional liability*, jurisprudential creation based on a fiction. The representatives of the entity cannot be held responsible for everything that is happening inside the legal person. They may be responsible only for those events regarding which they had a certain power or were their responsibilities. Therefore, committing a criminal offense shall be examined considering the functions carried out under the legal person`s activity. It is not punished the author of physical offense, but the one that was responsible, at the time of the offense, with the inspection or supervision[6] of the activities carried out by the entity.

But, naturally, the legal person may not be subject of all offenses. As such, Article 121 paragraph (2) of the French Criminal Code stipulates that the legal person answers "in the cases provided for by law or regulation". The penalties applicable to the person legal are not the same with those for individual. These are limited provided by the law, for instance, the fine, the dissolution, the prohibition of carrying out particular activities for a certain period.

A special solution was adopted by Malta. In the situation in which a criminal offense is presumed to have been committed by a legal person, all those who, at the time, were directors, managers and secretaries or occupied other similar positions or who have being fulfilling those functions, will be considered responsible for the criminal offense. The criminal liability of natural person is not active whenever he proves that he has no knowledge of the offense or that he has acted with due diligence to prevent the offence[7]. The raison of this solution is justified by the fact that legal person does not have a free will, therefore it is not likely to have criminal intentions. When the individual violates the legal regulations, whenever he is part of any decision-making bodies or of representation, he shall be responsible under criminal law.

In Romania, criminal liability of moral person was introduced by the Law no. 278/2006. The consecration this institution was due to the need for Romania to comply with European Union`s trend, as well as to respect the commitment assumed by ratifying international instruments and the recommendations of European Union in this respect.

In the anglo-american system of law, criminal liability of the legal person is indirect. Regarding the subjective side of the offence, the doctrine has formulated the *identity theory*. Thus, the behavior of the directors or of representatives of the legal person is that of the moral person itself.

The U.S.A. have been pioneers in consecrating the criminal liability of the legal person. This is rather surprising considering that the system of *common law* embraced the theory of fiction. Until the 18th century, this concept had been rejected with uncharacteristic vehemence by the American courts. They considered that by regulating such institutions, ridiculous situations can occur, whereas some penalties may not be applicable only to natural persons. For instance, the legal person cannot be incarcerated.

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[6] Sofie Geeroms, *op. cit.*, p. 542.

[7] Gert Vermeulen, Wendy De Bondt, Charlotte Ryckman, *Liability of Legal Persons for Offences in the E.U.*, Institute for International Research on Criminal Policy, European Commission, Maklu Publishers, Antwerpen, 2012, p. 23.

In the 19th century, corporations began to develop. The industrial revolution phenomenon was amplifying. The new realities have imposed the dismissal of the principle *societas delinquere non potest*. The number of criminal allegations charges by the prosecutors against corporations was growing. Courts were convinced, in more and more causes, of their arguments. *Common law* was changing. The Congress had interpreted the concept of person within the meaning of including also corporations. Therefore, criminal law was applied to all persons. Corporations could be held criminal responsible. For instance, in 1901, *New York Central Railroad* has been accused of aggravated murder. A fire busted in its depot, where a considerable amount of dynamite was held, violating, therefore, the legal rules. The explosion which broke out killed 6 workers[8].

Maintaining the institution of criminal liability of corporation for over two centuries in American law is, in many cases, justified by the particularities of the justice system. The defendant benefits from numerous and important procedural rights. As they are consecrated in the Constitution, the activity of prosecutors regarding hearing witnesses or discovering evidence is difficult. In case of offenses committed by the legal person, the prosecutors' situation is more time consuming. The confidentiality client-lawyer has been interpreted broadly by judges. Lawyers use, in most cases, means to slow down legal procedures, blocking the administration of evidence or to challenge the accusations in all procedural phases. By regulating the criminal liability of legal persons, there has been created an advantage of the prosecutors in the negotiations with corporate representatives. They may decide what evidence to administrate and if they drop off or not the charges. The corporation which collaborates with the accusation in the identification and the punishment of guilty natural persons, such as directors, managers, in most of the times, is no longer subject of sanctions. The institution`s aim is not to punish the legal person, but rather to determined it to cooperate with the prosecutors in catching those who are guilty[9].

In Great Britain, a premise in consecrating the criminal liability of the legal person had been the modification, in 1899, of *Interpretation Act* by including within the concept of person legal entities as well. English courts, had been condemning legal persons from the very beginning of the 19th century for accusations of *nuisance* – the omission or the lack of compliance with legal provisions. In 1840, in the case *The Queen v. Birmingham and Gloucester Railway*, the latter had been convicted for failure to obey a legal order while it had been required to destroy a bridge. In 1844, in *The Queen v. Great North of England Railway Co.*, the company had been sanctioned for that employees who did not repaired the damaged road due to the construction of a railway line[10]. The corporation was liable for someone else's deed as, according to *the respondent theory*, a legal person can be responsible for the offenses committed by an employee or an agent. Therefore, the company has the obligation to comply itself, as well as its employees, with the legal rules.

In Great Britain, two doctrines were fruitfully governing the criminal liability of moral persons: the objective and the subjective theories. The objective liability may be *strict liability*, in which it is relevant the personal offense and *vicarious liability* or liability for someone else's deed. The second form of liability is based on the idea of guilt, being a responsibility of subjective nature.

In the case of the first form, it does not appear to be necessary proving the guilt - *mens rea*, whether it is intention, fault with or without provision, but it is mandatory to demonstrate one or all the elements of the action/inaction - *actum rea*. *Vicarious liability*, on the other hand, attacks the criminal liability for the crime committed by the person itself or by another

[8] W. S. Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability*, University of Chicago Press, 2006, p. 12.
[9] E. B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, Yale Law Journal, no. 126/2008, pp. 128-132.
[10] Leonard Heschel Leigh, *The Criminal Liability of Corporations and Other Groups*, in Ottawa Law review, vol. 9/1977, p. 249.

person who has acted with *mens rea*, for instance, the criminal responsibility of the moral person for a prohibited action committed by an employee[11].

Conclusions

A factual situation does not generate legal effects until it is consecrated by legal provisions. Without being recognized by the law, the legal person does not legally exists. It remains, therefore, a fiction. By juridical recognition, the person gains rights and obligations.

In this context, the criminal liability of legal persons is, as Professor Valeriu M. Ciucă stated "a postmodern implausible fiction"[12]. The principle of personal criminal liability is not susceptible of extensive interpretations. The individual has a real existence, it is not a metaphor of the law. Its actions are determined by its own psychological processes. He is the one who, by fault or intentionally, commits offenses. In this regard, we have to notice that one of the raisons for ending the criminal prosecution is, according to the law, the death, and not the dissolving of the offender.

A legal entity is a collective body. It has rights and obligations, but cannot substitute the individual. Its will is assigned by the persons who compose or manage it, therefore, the legal person has no personal will. In some cases, these persons are different from the one who commits the offence, for instance, as a representative. There are, therefore, two wills which become confluent only in the plan of theory, both regarding "the interest of the legal person".

Furthermore, in the case of Romania, the consecration of criminal liability of entities has been the effect of the ratification of international instruments and the commitment to the European Union. So, the organic premises of this institution are missing.

In Europe, in the 20th century, when the criminal liability was recognized, premises that have determined the regulation of criminal liability of the legal person, did not longer exist. We believe that there is a need at least for the Romanian legislator to take return to its Roman legislative heritage, and dispense of this institution which is rather inconsistent.

Bibliography:

Gert Vermeulen, Wendy De Bondt, Charlotte Ryckman, *Liability of Legal Persons for Offences in the E.U.*, Institute for International Research on Criminal Policy, European Comission, Maklu Publishers, Antwerpen, 2012;

E. B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, Yale Law Journal, no. 126/2008;

F. Streteanu, R. Chiriță, *Răspunderea penală a persoanei juridice*, C. H. Beck Publishing House, Bucharest, 2007;

W. S. Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability*, University of Chicago Press, 2006;

Sofie Geeroms, *La responsabilité pénale de la personne morale: une étude comparative*, in Revue internationale de droit comparé, no. 3/1999;

V. M. Ciucă, *Răspunderea penală a persoanei juridice – o ficțiune postmodernă neverosimilă*, in Anuar, "Petre Andrei" University Iași, 8th Tome /1998;

M. Lizee, *De la capacite organique et des responsabilites delictulle et penale*, McGill Law Journal, no. 41/1995;

Leonard Heschel Leigh, *Strict and vicarious liability*, Sweet and Maxwell Limited, London, 1982;

Leonard Heschel Leigh, *The Criminal Liability of Corporations and Other Groups*, in Otawwa Law review, vol. 9/1977.

[11] Leonard Heschel Leigh, *Strict and vicarious liability*, Sweet and Maxwell Limited, London, 1982, p.1.

[12] Valerius M. Ciucă, *Răspunderea penală a persoanei juridice – o ficțiune postmodernă neverosimilă*, in Anuar, Universitatea Petre Andrei, Tomul al VIII-lea / 1998, pp. 15 and ff.

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SOME REMARKS ON THE NEW AMENDMENTS TO THE PROCEDURE OF THE ADOPTION'S INSTITUTION

L. Cetean-Voiculescu

Laura Cetean-Voiculescu
Legal and Administrative Sciences Department, Faculty of Law and Social Sciences,
"1 Decembrie 1918" University from Alba Iulia, Alba Iulia, Romania
*Correspondence: Laura Cetean-Voiculescu, Lecturer PhD, "1 Decembrie 1918" University from Alba Iulia, 5 Gabriel Bethlen St., Alba Iulia, Romania
E-mail: lauravoiculescu@yahoo.com

Abstract

Adoption is one of the most important measures to protect children in need, namely that category of children who are deprived of parental care, loss due to various reasons. If a child in need cannot be maintained or reinstated in his natural family, state authorities must have an alternative measure of protection: guardianship, special protective measures provided by Law no. 272/2004 on the protection and promotion of children's rights (placement, emergency placement or specialized supervision) or adoption, regulated by Law no. 273/2004.

This paper aims to critically analyze the Adoption of the new rules, with special regard to the adoption's administrative and judicial proceedings.

Keywords*: Adoption procedure, individualized plan of protection, substantive conditions for adoption, celerity, child's best interests, the principle of continuity.*

Introduction

If a child in need cannot be maintained or reinstated in his natural family, state authorities must have an alternative measure of protection: guardianship, special protective measures provided by Act no. 272/2004 on the protection and promotion of children's rights (placement, emergency placement or specialized supervision) or adoption, regulated by Act no. 273/2004.

If the individualized protection plan reveals that the best measure of protection for a child in need is adoption, it carries out an extensive procedure, which runs in parallel on two areas: administrative and judicial.

The Act governing adoption's procedure no. 273/2004 was amended successively by a series of laws, the latter being of recent date, and the purpose of this article is a critical analysis of the latter changes in matter.

Current regulatory

This year, the Law on the legal status of adoption was republished[1] in the Official Gazette of Romania no. 259/19 April 2012, subsequently appearing H.G. 350/2012 approving the Methodological Norms for applying Law no. 273/2004. This is the second reprint of mentioned Act after that on the Official Gazette no. 788/2009, as amended by Law no. 71/2011 for the implementation of the new Civil Code.

[1] Under the provisions of art. X of Law. 233/2011 amending and supplementing Law no. 273/2004, published in Official Gazette of Romania no. 880/7 December 2011 and entered into force on 7 April 2012.

Regarding republication believe that it was imperative given that the new Civil Code governing this child protection measure, as noted on another occasion[2], the regulations contained in two acts were not entirely compatible.

But given that new rules and legal norms are found some critics consider appropriate a succinct analysis of these changes in relation to the regulation of adoption procedures contained in the Civil Code.

Thus, the changes in adoption proceedings are in force, by republication of the Law no. 273/2004, starting with April 7, 2012.

General and special law in adoption procedure

If prior to the abrogation of the Family Code, which represent the general law regarding all legal relationships which form the subject of family law, general law presently role in this regard is played by the new Civil Code, which in Book II entitled "On the Family" includes a set of rules generally applicable legally binding marriage relationship, parentage, adoption and other similar reports of family law.

On Adoption, Civil Code includes in Title III (relationship) a separate chapter (Chapter III) a set of legal rules governing the adoption, rules with a general character. Special character rules are found in Law no. 273/2004 on the legal status of adoption, which is intended to be the law governing the particular aspects of the actual procedure of adoption, both the administrative and the judicial.

On internal adoption procedure, the stage of obtaining the certificate of a person or family able to adopt (administrative procedure)

The first step of this phase is the requirement of the adopter or the adopting family to issue the certificate of a person or family able to adopt, formulated by the General Directorate of Social Assistance and Child Protection at their home.

Following this request, the Department conducted an assessment of parenting skills, the analysis of performance guarantees moral and material conditions, and preparation for assuming the role of parent.

Within 120 days from the date of application for final evaluation shall report on the ability of the applicant to adopt, and this report will contained the proposal to release the certificate or not.

The evaluation result can be favorable, in which case the certificate will be issued per person or family able to adopt, or negative, issued by order of granting the certificate, in which case the person or family have the possibility of submitting an appeal.

There are cases where it is not necessary to obtain the certificate:

- The adoption of the person, who has acquired full legal capacity,
- The adoption of the child by the natural or adoptive parent's spouse.

If the above mentioned change law called this stage, the adopter or the adopting family certificate, the name was changed in step evaluation adopter or adoptive family to obtain the certificate.

Also, if the previous law refers only to assess collateral moral and material conditions, this law is more explicit, defining even as that process evaluation like that process which identifies parenting skills, assess performance guarantees moral and material conditions of adopter or adoptive family and preparing to assume, knowingly, the role of parent.

Another new legislation is the final evaluation report, a document shall be made compulsory up to 120 days (not 60 days as it was earlier) from the date of submission of the evaluation, including evaluation results and the proposal on the issuance or failure to issue the certificate.

[2] Laura Cetean-Voiculescu, Ada Hurbean, *Considerations regarding the amendments to legislation on child protection through the new civil code*, in Challenges of the Knowledge Society, Pro Universitaria Publishing House, Bucharest, 2012.

Also a new legislative adoption procedure is the possibility of withdrawing the certificate on the grounds expressly provided by law, and termination of validity of the certificate.

An appeal against the decision is no longer the revaluation under current regulations, but appeal, which is solved by the Romanian Office for Adoptions, and not by the court. In addition objection was preserved and the provision for appeal against refusal or withdrawal of the certificate.

On internal adoption procedure, initiation stage (Judicial Procedure)

Domestic adoption can be achieved more easily after the change of the law on adoption procedure. Thus, if the previous law provided that the previous requirement adoption making efforts to reintegrate child in the family or extended family placement or foster child, now must pass within 1 year of the establishment of special protection measure natural parents or relatives up to the fourth degree cannot be found or not working in family reintegration or say they do not want to deal with growth or childcare. Do not wait any longer fulfilling this period if the child was registered as born of unknown parents, where adoption can be ordered within 30 days from the issuance date of birth of the child.

On the fit between the child and the person / family able to adopt (administrative procedure)

The phase of the matching between the child and the adopting person or family is introduced into law on internal adoption procedure. As defined by law even in 36th article is a preliminary stage custody for adoption, a stage in which it identifies and selects the most appropriate person/family certified as fit to adopt that child needs and establish compatibility between the child and the person/adoptive family.

Matching will be done with priority between the child and the extended family relatives or between it and other people with whom the child has enjoyed family life for a minimum of 6 months.

Matching can be:

- Theoretical, conducted by the Office for children in its records and to be entrusted for adoption by identifying and selecting from the National Registry for adoption of certified persons.
- Practice, when selecting the most appropriate people conducted by department of adoptions and the post-adoptions structure direction.

At the end of this stage, prepare a document called matching report, which will include conclusions on finding compatibility between the child and the adopting person, together with a proposal for initiating court next step.

With regard to custody for adoption (legal proceedings)

The main change on this stage is the removal of a period of 30 days from the date of the final and irrevocable decision authorizing domestic adoption must identify the most appropriate person to custody of the child or family.

Even if this change is likely to affect the principle of celerity which must govern this procedure, on the other hand the current law formula is a step in this direction, providing that decisions which the custody process applications for adoption are enforceable the date of delivery.

On the approval of adoption (legal proceedings)

A declaration of adoption must be accompanied by a series of acts, from those in the old regulation modifying the law added three, namely:

- Report of the natural parents' advice and information for child adoption by the natural father husband;
- The document recording the expertise results to confirm parentage to the father, accomplished by anthropometric expertise in child adoption by the wife if natural parent when the child has been recognized administratively by his father and if the child' paternity

was established by court noted that its recognition by the father, which confirms the parties' bargain, without having examined the merits of the application;
- Notarized statement on oath.

Also, at this stage has changed, and rightly an article that regulate post-adoption, because the new regulation provides a separate chapter - Chapter IX, which deals exclusively with monitoring and post-adoption activities.

The procedure of international adoption[3]

Fortunately, as I have said on other occasions[4], the regulation on international adoptions has changed as well.

The most important change is related to the category of people who can adopt. Before, if the adopter or the adopting family living abroad should be relative to grade III with the child, according to current rules international adoption can occur in the following situations:
- Adopter or adoptive family one spouse is relative to grade IV including child which was affirmed domestic adoption procedures;
- Adopter or adoptive family one spouse is a Romanian citizen, but only for children who upheld opening internal adoption procedure could not be identified adoptive or adoptive family normally resident in Romania.
- Adopter is the spouse of a natural parent of the child whose adoption is required.

Other novelties are some additional procedural rules for international adoption in the match; this is accomplished by the Office, in compliance with the methodology developed by him and approved by Government Decision. Selected person must actually reside in the country for at least 30 consecutive days in the home will report on the match that will send Office. In turn, shall notify the competent central authorities of the receiving State or approved organizations selecting adopter.

Finally, Final items that sanctions were repealed, for the same reasons of the existence of a separate chapter, introduced by the new amendment, on monitoring and post-adoption activities.

Conclusions and proposals

We cannot express our gratitude that this time, the legislature took into account the amendments to the law on adoption procedure, the recommendations doctrine in this area, although there are aspects for improvement in adoption proceedings.

In light of revealing in this paper and other items that were not identified, the following:

1. Agreement required the implementation of the provisions of the Civil Code and the Act relating to adoption proceedings.

2. It is necessary to establish regulatory domain of each of the two acts. For example, the 453rd article and 454th article from Civil Code contains legal provisions referring to the special law so that it is clear that international adoption and adoption proceedings are governed solely by the Act no. 273/2004 as a special law on Adoption.

3. Correcting grammatical errors and inconsistencies in the wording of the two acts, as the grammatical interpretation of legal norms is very important and with many implications for legal practice.

[3] For more details see Laura Cetean-Voiculescu, *Dreptul familiei*, Hamangiu Publishing House, Bucharest, 2012, pp. 303-306.
[4] A. Drăgoi, Laura Cetean-Voiculescu, *Curs teoretic şi aplicativ de dreptul familiei*, Agora University Press, Oradea, 2007, pp. 196-197.

Bibliography

Laura Cetean-Voiculescu, Ada Hurbean, *Considerations regarding the Amendments to Legislation on child protection through the new civil code*, in Challenges of the Knowledge Society, Pro Universitaria Publishing House, Bucharest, 2012;

Laura Cetean-Voiculescu, *Dreptul familiei,* "Hamangiu" Publishing House, Bucharest, 2012;

F. Emese, *Dreptul familiei*, "CH Beck" Publishng Huse, Bucharest, 2011;

The new Civil Code, Law no. 287/2009;

Laura Cetean-Voiculescu, *Drept în asistență socială*, "Risoprint" Publishing House, Cluj-Napoca, 2008;

A. Drăgoi, Laura Cetean-Voiculescu, *Curs teoretic şi aplicativ de dreptul familiei,* Agora University Press, Oradea, 2007;

Law no. 273/2004 regarding the adoption procedure.

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THE PLACE OF LIABILITY IN RESPECT TO THE FREEDOM OF EXPRESSION

V. Chiper (Mihalcea)*

Valentina Chiper (Mihalcea)
Faculty of Law and Administrative Sciences
University of Craiova, Craiova, Romania
*Correspondence: Valentina Chiper (Mihalcea), University of Craiova,
13 Al. I. Cuza Street, Craiova, 200585, Dolj, Romania
E-mail: av_mihalcea@yahoo.com

Abstract

The terms 'freedom' and 'liability' are polysemantic and bear multi-valent meanings according to the field.

Civil or criminal liability, through the interdictions it brings, sets the border between the legal or illegal discourse. The guilt defined by criminal and civil crimes transfers a set of obligations to the communicator[1]. Terms like 'excess' or 'abuse' of the freedom of expression is another way to define it.

We shall try hereinafter to answer the question whether it is better to regulate and engage the civil liability or criminal liability in relation to the freedom of expression.

Keywords: *freedom of expression, civil liability, criminal liability*

Introduction

Freedom of expression has been considered from the ancient times as a powerful weapon and sometimes as a menace to power, whether religious or political, social or economic. The most powerful legal vehicle in ensuring the control over works is censure, gradually replaced by liability.

The freedom of expression, one of the oldest liberties of the citizen and known either under this title or as the freedom of the word or press essentially include two freedoms: the freedom of expression supposes the liberty to search for, to receive and to disseminate information and ideas of any kind, in verbal, written, printed or artistic format and irrespectively of the frontiers or any other means at its discretion[2], without any interference of public bodies and across any border[3].

The terms 'freedom' and 'liability' are polysemantic and bear multi-valent meanings according to the field – political, legal or symbolic. The concept of 'freedom' known two major approached in the reference literature. The first is a natural approach according to each every person is presumed to have innate wisdom to "rule, to be born with the equal and imprescriptible right to live independently of his/her neighbours and to behave according to his/her understanding of destiny"[4] so that the judiciary freedom is characterized by an area

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[1] P. Jourdain, *Les principes de la responsabilité civile*, Dalloz, Paris, 2000, 5th édition, p. 48.

[2] Art. 19 of the International Pact on civil and political rights, adopted by UN General Assembly on December 16, 1966.

[3] Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

[4] Tocquevile, *État social et politique de la France avant et depuis 1799*, 1838, renewed edition by Garnier-Flammarion, 1988, p. 80.

of self-determination granted to a person in a space of opportunities beyond which law no longer authorizes. The second approach of freedom consists in understanding freedom in terms of the protection granted to him/her by right by the existence of a judiciary guarantee of individual independence.

The link between the freedom of expression and democracy relies on the "the ideological ratio of legitimacy"[5]. The rule of law supposes knowing the constitutional right to freedom of expression. Moreover, the constitutionalization of the freedom of expression in democracy raises the question of its link to other freedoms, especially to the conciliation of the freedom of expression with someone else's right.

Judicial liability has been appreciated as "the intromission in the exercise of the freedom of expression to the extent that expressing or not expressing something binds the author to be held liable by exposure to punishment"[6]. Judiciary liability may be classified as a response whereby the responsible person must turn to account before a third party for a fact, behaviour or situation before the courts and assume consequences[7].

Therefore, in the private law, liability is of two types: criminal or civil. In respect to the freedom of expression, criminal liability consists in being liable for the prejudice caused to society, subject to a punishment of criminal nature. Civil liability is the obligation to respond for an individual damage which entails the obligation to compensate prejudicing consequences.

Civil or criminal liability, through the interdictions it brings, sets the border between the legal or illegal discourse. The guilt defined by criminal and civil crimes transfers a set of obligations to the communicator[8]. Terms like 'excess' or 'abuse' of the freedom of expression is another way to define it.

We shall try hereinafter to answer the question whether it is better to regulate and engage the civil liability or criminal liability in relation to the freedom of expression.

1. The place of criminal liability in respect to the freedom of expression

Article 30, paragraph 8 of the Romanian Constitution, the final thesis, states that "indictable offences of the press shall be established by law". Erroneously, the Constitutional Court, by Decision no. 62 of January 18, 2007, reviewing the unconstitutionality of the text cancelling contempt and outrage specified in Articles 206 and of the Criminal Code, grounds its settlement on the lack of the press law and on the need to include offences of the press in the law.

The disposition under article 30, paragraph 8 is a repressive and shall therefore be construed senso strictum, in the sense that "potential offences of the press can only be established by law and not by an administrative fiscal regulation specifically in order to better protect the freedom of expression against the authoritarian tendencies of the executive or judiciary power and not to restrict it. This does not mean that the law must necessarily stipulate the offences of the press"[9].

The cancelled dispositions can no longer be re-enacted upon the unconstitutional declaration of the regulation cancelling such dispositions without the Parliament or, as appropriate, the Government adopting a new regulation addressing the concerned area. The same was recently stated by the High Court of Cassation and Justice by Decision no. 8 of October 18, 2010 upon the admission of the appeal in the interest of the law lodged by the Romania's Attorney General in respect to the impact of Decision no. 62/2007.

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[5] Louriane Josende, *Liberté d´expression et démocratie. Réflexion sur un paradoxe*, Bruylant, Brussels, 2010, p. 247.

[6] Guillaume Lécuyer, *Liberté d´expression et responsabilité. Étude de droit privé*. Thèse, Dalloz, Paris, 2006, p. 17.

[7] Geneviève Viney, *La responsabilité*, APD, 1977, p. 278.

[8] V. Jourdain, *Les principes de la responsabilité civile*, Dalloz, Paris, 2000, 5th edition, p. 48.

[9] D. C. Dănişor, S. Răduleţu, *Competenţa Curţii Constituţionale. Insulta. Calomnia. Controlul normelor de abrogare*, in "Curierul Judiciar" Journal, no. 3/2007, Bucharest, C.H. Beck Publishing House, 2007.

Offences of the press aim at punishing the excesses of expression in the media. However, article 205-206 of the Criminal Code not only considers the specific nature of offences of the press, but also their review-widened framework in terms of securing the freedom of expression, constantly supported by the ECHR case law since it deals with mass information, due to their specific operating conditions and their function in the democratic society and to the fact that it affects the principle of the presumption of innocence through the reversal of the burden of proof and the impossibility of the proof of veracity, sometimes a true probation diabolica, which finally represents a powerful restriction of the press freedom and a violation of article 10 of the Convention, subject to the risk of such freedom transforming from principle to exception.

As the European Court assessed and guided in many occasions, a careful distinction must be made between facts and judgments of value. If the materiality of the facts can be proven, the accuracy of the latter is not feasible for demonstration.

The relationship between the criminal law and the human rights is subject to a paradox since the criminal law embodies both the protection and the menace to fundamental rights and freedoms[10], or, as Ch. Van den Wijngaert said it in metaphorical words in 1995 in a speech on the issue of the European citizen face to the criminal justice in the EU, human rights are both the "shield" and the "sword" in criminal law.

In a first approach, the criminal law is a law of strictest necessity. It "must not intervene unless all other judiciary approaches prove to be insufficient"[11]. In another approach, from the victim's standpoint, the intention to harm in the criminal trial seems to be more powerful than in the civil trial of impersonal, abstract nature[12].

The UN's Council for Human Rights and the Council of Europe are against the use of the criminal law in the media. In addition, most European states appeal to civil liability only. France is the country beating the record of criminal offences of the press, also due to the preservation of the Press Law of July 29, 1881[13].

The Resolution no. 1577 of October 4, 2007, passed by the Parliamentary Assembly of the Council of Europe, recalls the hostility of the ECHR case law to criminal sanctions. It must be understood however that in principle, the European Court does not sanction the use of the criminal law in respect to the press since it considers that the dominant position of governments asking it to state its reserves to the use of criminal punishment, especially when there are other means to hold someone liable for unreasonable attacks and criticism[14]. Nevertheless[15], the same reserve shall not apply in situations when criminal pursuit is initiated by an individual.

The punishment in terms of proportionality is justified when there is no other way to protect the right secured by the Convention. The European Court appeals to the subsidiarity of the use of criminal law resulting in the use of other mechanisms to protect the rights of persons, other than the criminal provisions[16].

There is a constant disappearance of coercive laws in relation to the press at the level of the European Court. Mass information means are not the forth state power since this would turn the media in a "mediocracy" ("powers or counter-powers"). Although it does not

[10] Mireille Delmas-Marty, *Le paradoxe pénal*, in Libertés et droit fundamentaux, coordinated by M. Delmas-Marty and Lucas de Leyssac, Paris, Seuil, 1996, p. 368.
[11]Renée Koering-Joulin, Jean- François Seuvic, *Droits fondamentaux et droit criminel*, AJDA spécial, 1998, p. 106.
[12] Bouloc Bernard, *Vers un déclin de la sanction pénal des atteintes a la dignite?,* Recueil Dalloz Sirey, 21/05/2009, n° 20, p. 1373.
[13] Gérard Spitéri, *Le journaliste et ses pouvoirs*, PUF, coll. "Essais", 2004, p. 202.
[14] ECHR, March 4, 2003, Yasar Kemel versus Turkey, § 33, (http://www.echr.coe.int/).
[15] ECHR, October 22, 2007, Lindon Otchakovsky-Laurrens et al versus France, §59; ECHR, January 24, 2008, Coutant versus France, in *Revue de science criminelle et de droit comparé*, 2008, p. 706, obs. Marguénaud.
[16] ECHR, October 3, 2000, Du Roy and Malaurie versus France, §36.

represent the public opinion, it "has not the specialized knowledge of institutions" and is not subject to the democratic control[17].

"The punishment by imprisonment for an offence perpetrated in the press may only be consistent with the freedom of expression in extraordinary circumstances, especially when other fundamental rights have been severely prejudiced, for instance if a hatred or violence-stirring discourse is made available to the public"[18].

The European Court broadened the concept of criminal matter by including sanctions classified as disciplinary or administrative in the domestic laws of the states according to the seriousness[19] of the acts, because they have both a repressive and dissuasive nature in the same time. The Court in Strasbourg shows that "three criteria determine the existence of a 'charge in criminal matter': the judiciary qualification as offence in the domestic law, the very nature of such office and the nature and gravity of the punishment"[20]**.** "In our law, the criminal matter is regulated separately from the delinquency matter. The two types of sanctions are nevertheless conceived in terms of continuity of purposefulness, the delinquency law defending the social values not protected by the criminal law"[21].

Although the authority of inflicting punishments belongs in principle to national jurisdictions, the Court judiciously considers that the conviction to prison for an offence of the press is not compatible with the freedom of expression of journalists as guaranteed in Article 10 of the Convention unless other fundamental rights are severely affected in respect to the intended purpose, e.g. the public dissemination of a hatred or violence-stirring discourse.

In relation to the discouragement of the punishment, the Court invoked several times the preventive and repressive nature of a number of sanctions classified as administrative or disciplinary under the domestic law, for the purpose of including it in the concept of 'criminal matter'. However, the Court points out to the specific characteristic of discouraging the criminal law in its narrowest sense, to the exclusion of other types of charges, in respect to ensuring the protection of the society's essential values[22].

In assessing whether the intromission of the criminal law is justified or not in relation to the exercise of some of the rights and freedoms protected by the European Convention, the Court in Strasbourg takes into account in its argumentation not only its objective for the purpose of foreseeing unwanted consequences, but also its function. As far as the freedom of expression is concerned, the Court finds that the criminal punishment of some offences perpetrated in the field of the press are likely to threat the journalist's freedom of expression.

The risk of criminal convictions resides in preventing the press from participating to open debates on questions of public interest[23]. Discouraging such charges is beneficial for the exercise of the journalistic freedom of expression[24].

However, on the other side, charges inflicted have been extremely severe. The Court recalls that states have the positive obligation to protect the freedom of the press. A punishment system so harsh for investigation journalists may results in their reticence to play

[17] Points 19-20 in the Resolution no. 1003/1993 of the Parliamentary Assembly of the Council of Europe published in Romania's Official Journal no. 265 of September 20, 1994.

[18] ECHR, December 17, 2004, Cumpănă and Mazăre versus Romania, §115; and also ECHR, September 23, 2004, Feridun Yazar versus Turkey, § 27, 23; ECHR, July 8, 1999, Surek and Ozdemir versus Turkey, §l 63.

[19] ECHR, September 24, 1997, Garyfalou Aebe versus Greece.

[20] ECHR, Pierre-Bloch versus France, October 21, 1997, Recueil 1997-VI, p. 2224, § 53; Malige versus France, 23.09.1998 (*http://www.echr.coe.int/*, § 35).

[21] Dan Claudiu Dănişor, *Principiul retroactivităţii legii penale sau contravenţionale mai favorabile,* in Caiete de drept penal no. 4/2009, C.H. Beck, Bucharest, 2009.

[22] Michel Van de Kerchove, *Les caracteres et les fonctions de la pein, noeud gordien des relations entre droit pénal et droits de l´homme*, in *Les droits de l´homme, bouclier ou épée du droit penal*?, coordinated by Zves Cartuyvels, Hugues Dumont, Francois Ost, Michel Van de Kerchove, Sébastian Van Drooghenbroeck, Brussels, Facultés Universitaires Saint-Louis, 2007, p. 358.

[23] ECHR, July 8, 1999, Sürek versus Turky.

[24] ECHR, December 17, 2004, Cumpănă and Mazăre versus Romania.

their part, i.e. that of watch dogs for the democracy and proper operation of the democratic rule. In the given context, the Court recorded that claimants have been convicted to prison, irrespectively of whether a reprieve occurred, and adjacently to the automatic interdiction of professional practice as journalist during the execution of the conviction. The Court seems to be highly concerned of the automatic nature of such punishment in relation to the government's obligation to set a legislative framework protecting the freedom of the press. In addition, the same was inflicted upon claimants as complementary unpardoned punishment, which the Court considers to be an excessive charge that can only justify under absolute extraordinary circumstances. The Court thinks such punishment exceeds the government's assessment margin and that Article 10 has been breached.

2. Place of civil liability in respect to the freedom of expression

If the repressive regime was for many years considered to ensure the maximum protection of public freedoms, the increased tendency to choose civil liability in respect to freedoms has been noticed of late, a trend also presumed for the European case law in the previous chapter.

In sustaining the absoluteness of the civil liability, the compensations granted have been appreciated as much more important that the relatively modest fines inflicted by judges. This risk was also emphasized by the European Court which recalled the significance of the principle of proportionality[25].

The French law and practice was never unitary in the way the abuse of the freedom of expression may entitle to compensation considering the existence in the same time of the dispositions of the press law and the article 128 of the Civil Code on the civil liability. First, the specialized practice bet on the fact that the only liability-generating facts are the publication acts specified and punished by the press law of 1881.

Later on, the French Court of Cassation changed its practice and gradually removed the entire article 1382 of the Civil Code from the area of freedom of expression. From 2005 on, claiming the civil liability is no longer excluded, but it cannot be invoked in order to avoid the relevant disposition of the press law. The Court of Cassation, in a case of 2010, sees the completive function of the civil liability: "the abuse of the freedom of expression and the non-public insults upon the regime of the law of July 29, 1881, suppressed by article R621-2 of the Criminal Code, cannot be compensated on the grounds of article 1382 of the Civil Code"[26].

The French President's suggestion in 2009 of disincriminating obloquy and of transferring the treatment of obloquy to the civil jurisdiction was well received by OSCE and the Council of Europe, although it did not materialize by now as the disincrimination of obloquy is addressed in the Council of Europe's recommendations to Member States in 2010[27].

The increasing number of ECHR convictions also point out to the lack of legislation in certain aspects. It is crucial to recognize what is permitted to say and what the legal consequences are and not necessarily the civil or criminal nature of responsibilities[28]. It has been proved that the civil punishment is most of the times much more efficient than the criminal one and the reduction of the prejudicing person's property is much more painful and better sensed. On the other side, on the opposite part of the victim, "the simple expression of a moral conviction would hardly justify human suffering"[29].

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[25] ECHR, June 2008, Avgi Publishing versus Greece, §35; ECHR, February 15, 2005, Steel & Morris versus UK, § 96.

[26] Cass., 2e civ., February 18, 2010: Communication Commerce electronique, 2010, comm. 38, obs. A. Lepage.

[27] Commission nationale consultative des droits de l´homme, *Les droits de l´homme en France. Regards portés par les instances internationales. Rapport 2009-2011*, Ed. La documentation Française, Paris, 2011, p. 388.

[28] Loïc Cadiet, foreword for Guillaume Lécuyer, *Liberté d´expression et responsabilité. Étude de droit privé.* Thèse, Dalloz, Paris, 2006, p. XI.

[29] Herbert Lionel Adolphus Hart, *Low, Liberty and Morality*, Oxford, Oxford University Press, 1963, pp. 65-66.

Any person, including the journalist, exercising freedom of expression, takes over both obligations and duties. As the Court in Strasbourg states in Stoll versus Switzerland on May 10, 2007, in a universe where the individual faces an increasing flow of information disseminated on both traditional and electronic media ad involving an increasing number of authors, controlling the compliance with the journalistic code of conduct seems more and more important[30].

The difficulty in qualifying the situations which may entail one's liability is true, whether due to the wrong definition of rules or to their wrong interpretation in the case law, and their materialization into facts is hard despite their precise definition. The higher interest disappears most of the times or gets blurred before the intimidating power of the punishment, which may result in the enforcement of a prudential policy concerning the forms of freedom of expression, leading on its turn to a denial of treating various risky or taboo subjects.

This risk of affecting the supreme interest of the freedom of expression by inflicting disproportionate sanctions is constantly envisaged by the European Court for Human Rights. Accordingly, the Court expresses its concerns about the inhibitory power of disproportionate sanctions on public debate and implicitly on the life of the democratic society through discouragement of open discussions on matters of general interest[31], of the expression by citizens of their opinions on such issues, for fear of criminal punishment[32].

Moreover, the Court in Strasbourg appreciates that the seizure of the issues of a journal and the publication of the sanctioning decision in case of publication of articles criticizing the government in widely-spread newspapers may be classified as censure and that such conviction, in case of public debates, is likely to refrain journalist contribution to public debates and to matters concerning community life[33].

Therefore, the solution given by the Court against such negative consequences is the control of the proportionality of the punishment or of the sanction inflicted for the illicit exercise of the freedom of expression regulated under Article 10, paragraph 2 of the Convention. A first element of such proportionality control is the principle of necessity. Government's involvement must be required to protect the legitimate interest corresponding to an imperative social need. Proportionality is required if the freedom of expression conveys a public interest.

Consequently, governments dispose in principle of an appreciation margin when taking measures limiting the freedom of expression, when enforcing seizure or attachment of a movie[34] and seizing obscene paintings along with a fine inflicted for the illicit and dangerous nature of the act for the general interest[35], and a conviction to payment of compensation[36].

In exercising its power of control, the Court shall under no circumstances have the burden to substitute the domestic jurisdiction, but that of checking the decisions passed by virtue of their power of appreciation in the light of article 10 (Fressoz and Roire versus France [GC], Request no. 29.183/95, paragraph 45, ECHR 1999-1).

In particular, the Court must determine whether the arguments called down by national bodies to justify the intromission are "pertinent and sufficient" and the incriminated measure is "proportionate to intended legitimate purposes" (Chauvy et all versus France, Request no. 64.915/01, paragraph 70, ECHR 2004-VI). The Article 10 in the Convention must convince itself that the national bodies, based on the reasonable appreciation of relevant facts, applied rules consisting to the principles enshrined in Article 10 (see inter lia the

[30] ECHR, December 10, 2007, Stoll versus Switzerland, §104.
[31] ECHR, June 25, 1992, Thorgeir Thorgeirson versus Iceland, §68.
[32] ECHR, February 22, 1989, Barford versus Denmark, §29.
[33] ECHR, July 8, 1986, Lingens versus Austria, §44.
[34] ECHR, October 20, 1994, Otto Preminger versus Austria, §55-57.
[35] ECHR, May 24, 1988, Muller versus Switzerland, §68.35-43.
[36] ECHR, July 13, 1995, Tolstoy miloslavsky versus UK, §48.

Decision of November 25, 1997 in Zana versus Turkey, Collection of Resolutions and Decisions 1997-VII, page 2.547-2.546, paragraph 51).

In Goodwin against the UK, Resolution of March 27, 1996, the claimant, copy editor at the London newspaper The Engineer received by phone some confidential information on the Tetra company. The copy editor contacts the company by phone to check the facts and to invite the company to make comments in its financial issues and afterwards writes a draft article for editing. Tetra addressed to the court and obtained the obligation of the editorial office not to publish the information received and to reveal the whistle blower for initiation of criminal proceedings. Moreover, the petitioner was convicted to a fine of 5,000 pounds for refusing to obey to the order of submitting personal notes. The European Court considered that the interest of Tetra cannot prevail over the primary interest it has for the freedom of the press, the protection of the newspaper's source had no justification in limiting the right to free expression and Article 10 of the Convention was breached in that case.

The Court must see whether the domestic bodies preserved the balance between the protection of the freedom of expression enshrined in Article 10, on one side, and the right to reputation of the persons in question which is also protected by Article 8 of the Convention as an attribute of private life, on the other side. This last condition may require the adoption of proper positive measures to secure the actual respect for the private life between individuals.

Too broad an interpretation of the freedom of expression would discourage the breach of other rights. Too draconian a protection of a right would not only be dangerous, but also counter-productive since it would discourage the exercise of media's freedom[37]*. The Court must clearly and systematically establish the general rules of the balance between the freedom of expression and the legitimate limitations for governments and individuals as well, in a uniform and protective manner for all*[38].

3. The freedom of expression is not an intangible right admitting no restriction. In most cases, it must be reconciled with other imperatives of the sale regulatory value. The case law of the European Court for Human Rights gives us some stable principles however.

In the *analysis of the intromission* of the public bodies in the exercise of the petitioner's freedom of expression in the light of Article 10 of the Convention, the European Court for Human Rights checks first of all whether such intromission is 'stipulated by law', pursuits a legitimate interest to protection by the state of at least one value (national security, territorial integrity, public safety, defence of public order and prevention of offences, health, ethics, reputation or rights of others, prevention of confidential information disclosure, guarantee of the authority and impartiality of the judiciary power), whether it is 'needed' in a democratic society"[39] and means used to limit the right or the freedom in question are proportionate to the legitimate purpose sought.

First of all, the intromission must be established by law. The concept of 'law' is taken materially and not formally. It is enough for a law to be already endorsed by an accessible and predictable case law.

One of the requirements in relation to the expression 'stipulates by law', to which the European Court agrees,[40] is the predictability of the concerned measure which allows the citizen to adjust his/her behaviour. He/she must have the reasonable capacity to foresee and the experience shows that no absolute certainty can be reached in relation to the consequences that may arise from a determined act.

37 Irina Moroianu Zlătescu, *Un echilibru instabil: Libertatea de exprimare şi interdicţia discriminării rasiale*, in Revista de drept public, no.1/2001, p. 50.

38 Gérard Cohen-Jonathan, *Discrimination raciale et liberté d´expression. A propos de l´arrêt de la Cour EDH dun 23 septembre 1994 "Jersild c. Danemarca"*, in Revue universelle des droits de l´homme", March 15, 1995, vol. 7, no. 1-3, p. 8.

39 ECHR, Lingeans versus Austria, judgment of July 8, 1996.

40 ECHR, Tammer versus Estonia, judgment of February 6, 2001.

Secondly, the intromission must be justified by one of the purposes listed under the second paragraph of Article 10 in the Convention, namely: " The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

In respect to the proportionality between the sanction and the intended purpose, as ECHR case law also embraces while acknowledging in principle the jurisdiction of the national courts in establishing the sanctions, the conviction to prison for an offence of the press is not consistent with the principle of journalist' freedom of expression guaranteed by Article 10 of the European Convention but in exceptional circumstances. The regular cases of outrage or affront are not likely to justify the conviction to prison[41].

The nature and the duration of punishments are also factors to consider in analyzing the proportionality of the intromission[42]. In the opinion of the European Court, the press is protected from too severe a punishment according to the contribution in democratic debates. As far as personal sanctions are concerned, with emphasis on the nature and the duration of punishments, the European Court invites governments according to their dominant position to spare such type of sanctions, although not compatible with Article 10 of the Convention[43].

The final, highly important principle reviewed by the Court in Strasbourg is whether the intromission is required in a democratic society, i.e. whether it satisfies an imperative social need. We may see prejudice to a right or freedom in all criminal convictions, resulting in their restriction. What makes the difference is that the intromission must be justified by a very strict principle, namely by the principle of 'necessity'.

If the legitimate purpose is to protection the reputation, someone else's rights or other limitations specified in Article 10 of the Convention, according to Court's constant case law, it must be determined whether the challenged intromission corresponds to an imperative social need, is proportionate to the legitimate interest sought and the reasons expressed by national bodies to justify such intromission are relevant and sufficient[44].

The Court often acknowledged in respect to the seizure of the publication and the interdiction to distribute it that the dispositions of Article 10 of the Convention have been breached and do not classify as measure required in a democratic society[45].

Conclusions

In the last period has noted increasingly strong option of choosing civil liability in terms of freedoms, as we have shown that relies and the European jurisprudence.

Any person, including the journalist, exercising freedom of expression, takes over both obligations and duties. Civil or criminal liability, through prohibitions which puts them, marks the border between lawful or unlawful speech. Essential is to know not necessarily the nature of civil or criminal liability, but that which is authorized to say and what are the legal consequences.

It has proved that the civil sanction, most of the time, it is much more effective than criminal sanction, reduction of the heritage in the fault being much more painful and felt better.

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[41] *idem*;

[42] ECHR, March 9, 2004, Abdullah Aydin versus Turkey, §34; July 8, 1999, Okcuoglu versus Turkey, §49; May 27, 2003, Skalka versus Poland, §42.

[43] ECHR, March 30, 2004, Radio-France versus France, §40, April 23, 1992 Castell versus Spain, §46.

[44] ECHR, Constantinescu versus Romania, judgment of June 27, 2000.

[45] ECHR, Çetin et al versus Turkey, Resolution of February 13, 2003; C.S.Y. versus Turkey, ECHR Decision of March 4, 2003; Incal versus Turkey, ECHR judgment of June 9, 1998.

Bibliography

Cass., 2e civ., 18 februarie 2010: *Communication Commerce Electronique,* 2010, comm. 38, obs. A. Lepage;

Louriane Josende, *Liberté d´expression et démocratie. Réflexion sur un paradoxe*, Bruylant, Bruxelles, 2010;

Bouloc Bernard, *Vers un déclin de la sanction pénal des atteintes a la dignite?,* Recueil Dalloz Sirey, 21/05/2009, n° 20 , p. 1373;

D. C. Dănişor, *Principiul retroactivităţii legii penale sau contravenţionale mai favorabile,* in "Caiete de drept penal" Review, no. 4/2009, C.H. Beck Publishing House, Bucharest, 2009;

Commission nationale consultative des droits de l´homme, *Les droits de l´homme en France. Regards portés par les instances interationales. Rapport 2009-2011*, La documentation Française, Paris;

ECHR, January 24, 2008, Coutant versus France, in Revue de science criminelle et de droit comparé, 2008, p. 706, obs. Marguénaud;

ECHR, June 2008, Avgi Publishing versus Greece, §35; ECHR, February 15, 2005, Steel & Morris versus UK, § 96;

Michel Van de Kerchove, *Les caracteres et les fonctions de la pein, noeud gordien des relations entre droit pénal et droits de l´homme*, in *Les droits de l´homme, bouclier ou épée du droit penal*?, coordinated by Zves Cartuyvels, Hugues Dumont, Francois Ost, Michel Van de Kerchove, Sébastian Van Drooghenbroeck, Brussels, Facultés Universitaires Saint-Louis, 2007;

D. C. Dănişor, S. Rădulețu, *Competența Curții Constituționale. Insulta. Calomnia. Controlul normelor de abrogare*, in "Curierul Judiciar" Journal, no. 3/2007, C.H. Beck Publishing House, Bucharest, 2007;

ECHR, December 10, 2007, Stoll versus Switzerland, §104;

Guillaume Lécuyer, *Liberté d´expression et responsabilité. Étude de droit privé*. Thèse, Dalloz, Paris, 2006;

Loïc Cadiet, *Liberté d´expression et responsabilité. Étude de droit privé*. Thèse, Dalloz, Paris, 2006,

Gérard Spitéri, *Le journaliste et ses pouvoirs*, PUF, coll. "Essais", 2004;

ECHR, December 17, 2004, Cumpănă and Mazăre versus Romania, §115; and also ECHR, September 23, 2004, Feridun Yazar versus Turkey, § 27, 23; ECHR, July 8, 1999, Surek and Ozdemir versus Turkey, §l 63;

ECHR, March 30, 2004, Radio-France versus France, §40, April 23, 1992 Castell versus Spain, §46;

ECHR, March 9, 2004, Abdullah Aydin versus Turkey, §34; July 8, 1999, Okcuoglu versus Turkey, §49; May 27, 2003, Skalka versus Poland, §42;

ECHR, Çetin et al versus Turkey, Resolution of February 13, 2003; C.S.Y. versus Turkey, ECHR Decision of March 4, 2003; Incal versus Turkey, ECHR judgment of June 9, 1998;

ECHR, March 4, 2003, Yasar Kemel versus Turkey, § 33, (http://www.echr.coe.int/); ECHR, October 22, 2007, Lindon Otchakovsky-Laurrens et al versus France, §59;

Irina Moroianu Zlătescu, *Un echilibru instabil: Libertatea de exprimare şi interdicţia discriminării rasiale*, in "Revista de drept public" Review, no.1/2001;

ECHR, Constantinescu versus Romania, judgment of June 27, 2000; ECHR, October 3, 2000, Du Roy and Malaurie versus France, §36;

Patrice Jourdain, *Les principes de la responsabilité civile*, Dalloz, Paris, 2000;

ECHR, July 8, 1999, Sürek versus Turky;

Renée Koering-Joulin, Jean- François Seuvic, *Droits fondamentaux et droit criminel*, AJDA spécial, 1998;

ECHR, Pierre-Bloch versus France, October 21, 1997, Recueil 1997-VI, p. 2224, § 53; Malige versus France, 23.09.1998 (http://www.echr.coe.int/, § 35);

ECHR, September 24, 1997, Garyfalou Aebe versus Greece;

Mireille Delmas-Marty, *Le paradoxe pénal*, în Libertés et droitd fundamentaux, sub direcţia M. Delmas-Marty şi Lucas de Leyssac, Paris, Seuil, 1996;

ECHR, July 13, 1995, Tolstoy miloslavsky versus UK, §48;

ECHR, October 20, 1994, Otto Preminger versus Austria, §55-57;

Points 19-20 in the Resolution no. 1003/1993 of the Parliamentary Assembly of the Council of Europem pblished in Romania's Official Journal no. 265 of September 20, 1994;

ECHR, June 25, 1992, Thorgeir Thorgeirson versus Iceland, §68;

ECHR, February 22, 1989, Barford versus Denmark, §29;

ECHR, May 24, 1988, Muller versus Switzerland, §68.35-43;

Tocquevile, *État social et politique de la France avant et depuis 1799*, 1838, reedit. Garnier-Flammarion, 1988;

ECHR, July 8, 1986, Lingens versus Austria, §44;

Geneviève Viney, *La responsabilité*, APD, 1977;

Herbert Lionel Adolphus Hart, *Low, Liberty and Morality*, Oxford, Oxford University Press, 1963;

Convention for the Protection of Human Rights and Fundamental Freedoms.

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THE SPECIAL SEIZURE

Gh. Diaconu

Gheorghe Diaconu
Law Department, Faculty of Juridical and Administrative Sciences,
University of Piteşti, Piteşti, Romania
*Correspondence: Gheorghe Diaconu, Court of Appeal Piteşti, 22 Victoriei St., Piteşti, Romania
E-mail: gheorghe.diaconu@just.ro

Abstract

The special seizure is a safety measure privative of goods and it consists in the fact that the goods or the values that belong to the person that commited a criminal deed, they are unnaturally passed in the state's patrimony. The possession of these goods or values, because of their nature or because they are related to the committed deed, it presents the danger of perpetration other deeds provided by the penal law.

Keywords: *seizure, state of danger, goods submitted to the seizure*.

Introduction

The special seizure is a penal sanction which belongs to the category of safety measures that are meant to eliminate a state of danger and to prevent the perpetration of the deeds provided by the penal law.

As it's a measure privative of goods, it consists in the fact that the goods or the values that belong to the person that commited a criminal deed, they are unnaturally passed in the state's patrimony. The possession of these goods or values, because of their nature or because they are related to the committed deed, it presents the danger of perpetration other deeds provided by the penal law; at the same time, if the goods were let in the doer's possession, then they would represent a danger for the rule of law.

1. Notion

The safety measure of special seizure is a measure privative of goods and it consists in the fact that the goods or the values that belong to the person that commited a criminal deed, they are unnaturally passed in the state's patrimony. The possession of these goods or values, because of their nature or because they are related to the committed deed, it presents the danger of perpetration other deeds provided by the penal law.

The relevant provisions are found in article 118 of the Penal Code.

The safety measure of special seizure distinguishes from all the other safety measures by the specific of its material incidence. Thus, while all the other safety measures regard the persons, respectively the person who committed a deed established by the penal law, on the contrary, the special seizure concerns certain goods and taking this measure is conditioned by the state of danger that these goods may represent (objective dangerousness).

In the juridical doctrine it has been stated the opinion according to which the state of danger has to be considered not only in relation to the goods submitted to special seizure, but also in relation to the doer's person, in the sense that it prevents not only the perpetration of new criminal deeds by their owner but also any person's guilty conduct that is willing to break the penal law[1].

[1] C. Dărîngă, *Privire generală asupra măsurilor de siguranță*, "Revista Română de Drept (R.R.D.)" Review number 1/1967, p. 48.

The justification of the special seizure lies in the social jeopardy, in the state of danger that these goods would present if they were let at the free disposal of the persons and thus they could be utilized in order to commit criminal deeds.

Consequently, some of these goods are dangerous by their nature (for instance: arms, explosive substances, narcotic substances), other goods become dangerous by the destination or by the use they were given (for instance: breaking tools, proper keys, devices for the coinage offence). There are also certain goods which are dangerous because of their illicit provenance and because they would represent a permanent incitement to commiting offences if they were let in the possession of the persons that own them (for instance: the posession of the false coin, the possession of counterfeit goods and of artisanal arms). Even more, the jeopardy or the state of danger exists in the case of the goods which are received as a payment for the perpetration of offences (for instance: the money given by the instigator to the author of the murder or the money given as bribe and any other benefits that are received as a reward for commiting an offence).

If these things were let to free circulation among the persons, then it will exist the possibility that they may be utilized for the perpetration of other criminal deeds. For this reason, the measure of special seizure has to be taken in order to eliminate this danger[2].

This danger appears as a serious fear that the things considered as dangerous to be kept, if they were let in the doer's possession they could serve for the perpetration of other deeds provided by the penal law or they could represent an easy mean utilized in order to get illicit benefits.

2. Conditions

The safety measure of special seizure can be enforced only when the following conditions are fulfilled:

a. *The doer has committed a deed provided by the penal law*

Usually, the special seizure can be enforced no matter if the committed deed is only stipulated in the penal law or if it represents an offence.

However, in the case of the second category of goods (the goods utilized to commit an offence; the goods made with the purpose to be utilized at the perpetration of an offence, according to article 118 letter b. and c. of the Penal Code), the special seizure can be taken only if these goods are the result of the committed offence. Even in these cases, the enforcement of a punishment is not necessary in order to take the measure of special seizure[3].

The intervention of some causes of non-punishing doesn't affect the special seizure's enforcement. Consequently, if an offence was committed, the seizure of the good can be disposed even if the offence was amnestied[4] or it intervened the prescription of the criminal liability[5] or the defendant's death[6] or if it exist a cause of non-punishing[7] or any other cause that may involve the cessation of the penal law suit[8].

But, the special seizure cannot be enforced if the offence was disincriminated and if the disincriminated deed represents a contravention and the seizure is established for it, then the court will inform the competent legal bodies in order to ascertain the contravention and to take the legal measure of seizure[9].

b. *The existence of a state of danger*

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[2] R. Chiriță, *Câteva considerații in legătură cu temeiul juridic al aplicării măsurilor de siguranță*, "Dreptul" Review, number 1/1999, p. 51.
[3] V. Papadopol, *Confiscarea specială in practica judiciară*, R.R.D. number 5/1983, p. 32.
[4] The Supreme Tribunal, Penal Decision number 1647/1971, "Culegere de decizii", 1971, p. 362.
[5] The Supreme Tribunal, Penal Decision number 614/1984, R.R.D. number 2/1985, p. 74.
[6] The Tribunal of Timis, Penal Decision number 696/1980, R.R.D. number 7/1981, p. 47, annotated by V. Dobrinoiu and N. Cornea.
[7] The Supreme Tribunal, Penal Decision number 841/1980, in "Culegere de decizii", 1980, p. 310.
[8] The Supreme Tribunal, Penal Decision number 945/1980, in "*Repertoriu*" number 2, p. 73.
[9] The Supreme Tribunal, Penal Decision number 3622/1972, *Repertoriu number 1*, p. 228.

The existence of a danger state represents not only the condition but also the reason of taking this safety measure. It consists, as we said before, in the danger revealed by the committed deed and in the fear that to let free the seizable good in the doer's possession it may serve to the perpetration of other deeds stipulated in the penal law.

In the juridical doctrine, there have been stated many opinions related to the estimation of the state of danger which is necessary in order to enforce the special seizure.

According to the first opinion, the state of danger is always presumed if the good belongs to those categories enumerated by article 118 of the Penal Code[10].

Another opinion states that if the possession of the good, even if the good is enumerated by article 118 of the Penal Code, if it doesn't present any social danger, then it won't be seized and the danger's estimation belongs to the court[11].

We consider that the latter opinion is correct and also this opinion was accepted by the case-law[12]. Thus it was established that are not submitted to the special seizure the sums of money that the doer obtained by a useful social work as a consequence of the revaluation of some objects made by the illegal exercise of a profession.

c. *The court's estimation that by taking the measure of special seizure, the state of danger is eliminated*

This condition derives from the goals of the safety measures stated by article 111 of the Penal Code, respectively the elimination of the state of danger.

Consequently, the measure of special seizure is taken whenever the court establishes that is imposed in order to remove the dangerous state for the society by keeping the possession of the confiscable good.

In the other situations, even if the good served or it was meant to serve for the perpetration of an offence, it may not be seized if the doer combats the existence of a dangerous state. For instance, we consider that the special seizure is excluded in the situation when the seized goods got into a bona fide interested person's property, in an onerous mode, because in the first place, he benefits by the property presumption established by article 1909 of the Civil Code of 1864 and in the second place, he doesn't belong to that category of passive individuals to whom the safety measures are enforced, because only the persons that committed deeds provided by the criminal law belong to this category, according to article 118 of the Penal Code. Similarly, the court can state that it's not necessary to seize the sums of money that the doer obtained by the exercise of a profession in other conditions than those legally established, if the goods are the result of a social useful work (for instance, the money obtained by the one who exercised the bootmaker's trade, without a legal authorization)[13].

3. Content

As a measure privative of goods, the special seizure consists in the fact that the seizable good is taken out from the patrimony of the person who owns it and it is passed in the state's property.

But, the special seizure generates effects *in rem* because is taken by considering certain goods, respectively it generates effects for any person that has the seized goods and that is obliged to hand over them to the judicial bodies. In the latter case, the third party that has confiscable goods is introduced in the criminal trial, under the *sui generis* quality of third holder[14].

If the goods submitted to seizure are not found, then money and goods are confiscated up to their amount (article 118 paragraph 4 of the Penal Code).

The special seizure has the character of a penal sanction and not of a civil compensation. Consequently, the one who gave a sum of money to the offender (sum which

[10] S. Aragea, *Confiscarea specială in practica judiciară*, Pro lege number 1/1991, p. 104.
[11] V. Papadopol, *Confiscarea specială in practica judiciară*, op. cit., p. 36.
[12] The Supreme Tribunal, Penal Decision number 464/1978, R.R.D. number 3/1969, p. 41.
[13] The Supreme Tribunal, Penal Decision number 473/1978, R.R.D. number 8/1978, p. 67.
[14] The Supreme Tribunal, Guidance Decision number 3/1973, R.R.D. number 6/1973, p. 97.

was seized) in order to determine him to commit an offence, then he cannot claim a compensation instead of the sum that he had given[15].

The special seizure's character of penal sanction excludes the possibility of a solidary obligation which is specific to many offenders' liability for the prejudice caused by the offence. Therefore, the minor's parents couldn't be obliged to pay solidary with the minor the pecuniary equivalent of the goods submitted to the special seizure[16]; in the same way, if an offence was committed in penal participation and the offence's benefit was divided among the participants, they cannot be obliged to pay solidary the sums that represent the totality of the seized sums, but each of them will pay depending on the part that he got[17]; also, it cannot exist a solidary obligation for the payment of the values which are susceptible of special seizure[18].

4. Categories of goods that are submitted to the special seizure

Article 118 of the Penal Code generically enumerates the categories of goods submitted to the safety measure of special seizure. Although they are enumerated in a limited mode, the categories of goods mentioned in the text are wide enough in order to ensure the special seizure's efficiency. These goods are as it follows:

a. *The goods made by the perpetration of a deed provided by the penal law*

The goods produced by the perpetration of a penal deed are those goods which are the result of the action that forms the material element of the committed deed, as: false banknotes; counterfeit credit titles; the arms made in an artisanal mode; adulterated food, beverages or medicines; explosive matters[19] and others.

There are considered as goods made by the committed offence those that illicitly had got a certain quality, a certain position in fact which they could get only by illegal means as it would be, for instance, the goods inserted by contraband in the state, beverages, cigarettes, medicines that contain an important dose of narcotics prepared on the base of an abusive medical prescription and others[20].

Also, there are considered as goods produced by the penal deed, the sums of money that were obtained from the goods traffic as it would be, for instance, the sums of money obtained by the sale of the false banknotes and others.

According to article 118 of the Penal Code, "the good" is defined as any object that has both an external physical existence and a value which can be economically valuated and that is susceptible of appropriation.

Depending on the safety measures' goals (the elimination of the state of danger and the prevention of the perpetration of new offences), there cannot be considered goods produced by the perpetration of a deed provided by the penal law, those goods obtained by the offender from other offenders by the perpetration of such deeds (as it would be, for instance: delapidated sums of money, documents which were purloined by a spy, sums of money obtained by threatening or by blackmail and others) because these goods are returned to the one who incurred a damage.

By the mode in which article 118 letter a. of the Penal Code is drawn up (which represents the relevant provisions for the special seizure of the goods produced by the deed provided by the penal law) it results that in order to dispose their seizure it's not necessary that the deed should be an offence but it's enough the deed's penal character (for instance, adulterated foods that were sold by an irresponsible person).

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[15] The Supreme Tribunal, Penal Decision number 2559/1972, R.R.D. number 2/1973, p. 169.
[16] Tribunal of Bucharest, Penal Decision number 2279/1984, R.R.D. number 3/1986, p. 78.
[17] The Supreme Tribunal, Penal Decision number 276/1981, R.R.D. number 11/1981, p. 57.
[18] The Supreme Tribunal, Penal Decision number 448/1977, R.R.D. number 12/1977, p. 44.
[19] The Tribunal of Bucharest, Penal Decision number 298/1983, Repertoriu number 3, p. 158.
[20] M. Vasile, *Aspecte particulare in materia confiscării speciale in ceea ce priveşte cazurile de aplicare*, "Dreptul" Review, number 3/2002, p. 134.

b. *The goods that were utilized in any mode for the perpetration of an offence*

The relevant provisions can be found in article 118 letter b. of the Penal Code and from the content of the legal text it results that the following conditions have to be fulfilled in order to take the measure of special seizure:

- the good *had to be utilized for the perpetration of an offence* (for instance, the knife or the arm with which the murder was committed, the key utilized for breaking into a place, the axe with which a good was destroyed, the sporting gun utilized at poaching and others). Consequently, if the deed at which perpetration the good was utilized it doesn't represent an offence and it's only a deed provided by the penal law, then the good couldn't be seized[21];

- the good that was utilized at the perpetration of an offence it has to be *the offender's property*. If the good doesn't belong to the offender but it's other person's property, it would be confiscated only if the proprietor knew the goal of its illicit use; on the contrary, only the pecuaniary equivalent would be seized (article 118 paragraph 3 of the Penal Code). Thus, as we exemplify, the following goods are not seized: the knife taken by the offender from the table in the local where the murder was committed; the torch utilized by the doer and which was purloined or borrowed from a friend; the camera utilized by the spy and which it was borrowed from another shop. Even if the utilized good belongs to other person, it will be seized if the good by itself it presents social danger as, for instance, the case in which the offender borrows a fishing net and he poaches with it.

If the good utilized for the perpetration of an offence is the offender's and other persons' joint property, the seizure is wholly enforced and the joint owners have to revaluate their rights by a separate civil action[22].

In the case-law it was stated that the seizure of the vehicle it cannot be disposed if it was accidentally utilized for the theft of woods from the forest, in value of 4000 lei and the remaining in the doer's possession doesn't present any social danger[23]; in the same mode, if the vehicle wasn't utilized at the perpetration of the offence, but it was utilized to transport cereals that came from repeated purloinings in small quantities, from the doer's home to other place in order that the goods shouldn't be discovered[24]; or the bicycle with which the offender transported a reduced quantity of corn cobs purloined from the enterprise, because the corn cobs' transport could be made without bicycle and the bicycle wasn't especially utilized for the corn's transport but for the offender's movement from his home to the enterprise from which he purloined the corn[25]; the apartment even if it was ocasionally utilized for the practice of the prostitution because it wasn't meant to serve for the perpetration of offences and it hadn't such destination, in an objective sense[26].

If the good utilized at the perpetration of an offence was alienated by the offender to a *bona fide interested person*, then the equivalent of the sum it would be seized, respectively the received price, but only if this is not inferior to the goods' real value because, on the contrary, the offender will be obliged to pay a sum that represents its real value.

When the good submitted to seizure has a value which is obviously disproportionate in comparison with the nature and the gravity of the offence, taking into account the offence's consequences and his contribution to it, then a partial seizure is disposed, by pecuniary equivalent (article 118 paragraph 2 of the Penal Code)[27].

From the rule concerning the seizure of the good that served for the perpetration of an offence, it exists an exception (provided by article 118 paragraph 1, second thesis of the Penal Code). According to this exception, the measure cannot be disposed in the cases of the

[21] The Supreme Tribunal, Penal Decision number 1822/1979, Culegere de decizii, 1979, p. 464.
[22] The Supreme Tribunal, Penal Decision number 54/1985, R.R.D. number 7/1986, p. 78.
[23] The Tribunal of Maramureş, Penal Decision number 91/1984, R.R.D. number 11/1984.
[24] The Supreme Tribunal, Penal Decision number 798/1985, R.R.D. number 2/1986, p. 78.
[25] The Tribunal of Bucharest, Penal Decision number 2489/1984, *Repertoriu number 3*, p. 62.
[26] The Supreme Tribunal, Penal Decision, number 2973/1985, R.R.D. number 12/1986, p. 73.
[27] M. Basarab, *Aspecte teoretice şi practice privind confiscarea specială in lumina art. 118, lit. b, Cod penal, Studia Universitatea*, Babeş Bolyai, Jurisprudentia XXXII, number 2/1987, p. 73.

offences committed by press. As a consequence, the goods utilized by the journalists that committed offences of insult and slander and others; thus there cannot be seized: the computers, the video equipments, the cameras and other such goods[28].

c. *The goods that were produced, modified or adapted with the purpose of committing an offence*

The relevant provisions can be found in article 118 letter c. of the Penal Code, according to which all the goods that were produced, modified or adapted for the purpose of committing offences they are submitted to the measure of special seizure. Consequently, these goods have to be the "fruits" of an offence; when the committed deed hasn't a penal character (it exists one of the causes that remove the deed's penal character and that are provided by articles 44-51 of the Penal Code), the goods cannot be confiscated.

The goods produced by the perpetration of an offence are those goods that hadn't exist before the committed offence, they exist only owing to the action which forms the material element of the committed deed, as it would be, for instance: false coins, adulterated beverages or foods, the artisanal arms, the manufacture of the pirate compact discs and others[29].

In the same mode, there are considered as "goods produced" by the offence those goods that got a certain quality, a factual position by the offensive activity as it would be, for instance: the goods obtained by contraband.

In comparison with the "produced goods" that hadn't had an existence before the committed offence, the goods that were modified or adapted and that existed before the perpetration of an offence, but by the offensive activity, an intervention is made over them in order to be utilized at the committed offence, as it would be, for instance: a medicine of which content is modified by the mixture with a dose of morphine in order to become valuable or to be utilized as a drug; or the doubling of a cistern's walls that transported combustible so that the quantity of combustible that existed between its walls it couldn't be noticed or the case when the poacher manufactures various devices (dragnets, fishing net) for catching fishes.

Such goods are submitted to seizure only if they were utilized at the committed offence and only if they belong to the offender.

If the respective goods belong to another person that the offender, the seizure will be disposed only if the goods were produced, modified or adapted by the proprietor himself or by the offender, but with the proprietor's knowledge.

If the goods don't belong to the offender and the person to whom they belong didn't know the goal of their use, then the goods' pecuniary equivalent would be seized (article 118 paragraph 3 of the Penal Code).

Also, if the goods that were "produced, modified, or adapted" cannot be found, then money and goods would be confiscated, up to their value.

Sometimes, although certain goods are the result of a perpetrated offence, they cannot be considered as "produced goods" when they were fraudulently obtained by the offender from other persons as it would be, for instance: stolen or delapidated sums, sums obtained by blackmail, documents purloined by a spy and others; these goods are not seized, but they are returned to the injured person.

d. *The goods that were given in order to determine the perpetration of an offence or in order to reward the doer*

There are considered as "goods given" to determine the perpetration of a deed provided by the penal law, those goods which have a patrimonial value (money or other

[28] J.F. Popa, *Măsura de siguranță a confiscării speciale prevăzută de art. 118 lit. b., Cod penal cu referire specială la confiscarea vehiculelor*, "Dreptul" Review number 6/2000, p. 108.
[29] The Tribunal of Bucharest, Penal Decision number 298/1983, *Repertoriu number 3*, p. 158.

things) that had been offered before to the doer, in order to determine him to commit the respective deed.

The goods given in order "to reward" the doer are those goods with an economic value that are offered *as a payment for him, after he had committed the deed*.

In both situations, it's not necessary that the deed should represent an offence, but it's enough if it has only a penal character.

The goods given in order to determine the perpetration of a deed provided by the penal law appear as means which indirectly serve for the offence's perpetration because they stimulate the doer's activity.

But only the goods that were actually given to the doer in order to determine him to commit the deed provided by the penal law, they are submitted to the special seizure. Consequently, there cannot be seized the goods promised in order to determine or to reward the perpetration of the deed and the promise was accepted or it wasn't rejected or it wasn't respected afterwards[30].

If the good was actually given to the doer, then it would be seized even if he hadn't proceeded to commit the deed or if he had denounced to the authorities the offer which it had been made for him, as it would be, for instance the situation when the officer to whom it was given bribe, he denounces this fact and thus the briber is caught[31].

Also, there are submitted to the special seizure, the goods (money) given in order "to determine" or "to reward" the doer even if the deed remained in the stage of attempt or if the doer committed another deed than the one which was prepared and he cheated the person who gave him the money[32].

It has no relevance if the goods were given on the initiative of the person who offered them or at the doer's request.

There aren't submitted to the special seizure the goods that were given under the pressure of a constraint, for instance, we mention the situation when the person is constrained to bribe.

e. *The goods that were obtained by the perpetration of the deed provided by the penal law*

In the sense of article 118 letter e. of the Penal Code, the goods obtained by the perpetration of a deed provided by the penal law, are those goods that came under the doer's hands as a consequence of the totally development of the offensive activity and of the produced result (stolen goods, delapidated money and goods, goods obtained by fraud and others[33]); in other words, these goods are "the fruits" of the committed deed.

There are also assimilated to the obtained goods, those goods that took the place of some goods that were initially obtained by the deed provided by the penal law, as it would be the money gained from the sale of the stolen goods or the car which was bought with delapidated money and others[34], because the substituted goods have the same illicit character regarding their obtaining.

If by the deed provided by the penal law there were obtained sums of money, these are always seized in kind because they have a fungible character.

If the goods obtained by the penal deed (others than the sums of money) are not found in the doer's possession and the person who has them is not known, then the seizure of the equivalent will be disposed.

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[30] The Supreme Tribunal, Penal Decision number 3074/1985, R.R.D. number 9/1986, p. 74.
[31] The Supreme Tribunal, Penal Decision number 1578/1984, R.R.D. number 10/1985, p. 74.
[32] C. Turianu, I. Mihai, *Examen teoretic al practicii judiciare cu privire la aplicarea măsurii de siguranță a confiscării*, R.R.D. number 5/1987, p. 126.
[33] C. Niculeanu, *Confiscarea specială. Sume de bani obținute prin valorificarea bunurilor dobândite prin infracțiune*, "Dreptul" Review, number 4/1999, p. 138.
[34] The Supreme Tribunal, Guidance Decision number 3/1973, R.R.D. number 6/1973, p. 97.

If the person who got them is known, the situation is different depending on the fact if there were asked compensations or not, or depending on the interested person's bona or mala fide, in the moment of the obtaining. Thus, in all cases when the injured person requested the restitution of the good, the good would be taken from the interested person and it would be returned to the injured person; the bona fide interested person from whom the good was taken, he has the right to ask for the restitution of the sum he had paid as a price to the doer; in the same situation, the mala fide interested person has no right to ask the price's restitution and consequently the respective sum will be seized from the doer[35].

The matter of the seizure of the goods obtained by the deed provided in the penal law it's raised only when the injured person doesn't request their restitution or compensations (the goods' equivalent); this legal provision is contained by the final part of article 118 letter e. of the Penal Code and also it was accepted by the case-law[36].

The justification of the seizure of the goods obtained by the deed provided by the penal law it consists in the necessity to eliminate the state of danger which is represented by the doers that possess such goods because they can utilize them or they can put back them in circulation or they can keep the offence's benefit, fact which is not only illegal, but also immoral[37].

To dispose the seizure of the "produced goods" it's not necessary that the deed should be an offence, but it's enough that the deed should be provided by the penal law. Consequently, the seizure of the good which was stolen by an irresponsible it could be disposed, if the injured person didn't ask for its restitution or for civil compensations.

f. *The goods of which possession is prohibited by law*

According to article 118 letter f. of the Penal Code, all the goods of which possession is prohibited by law there are submitted to the special seizure; this means that the state of danger represented by their possession doesn't have to be proved because it's presumed by the legislator.

Sometimes, by certain dispositions or by special laws it's provided that the illegal possession of certain goods it's incriminated as an offence on its own, as it would be for instance: the possession of the fire arms and of ammunitions, without authorization; explosive or radio-active materials; abortion instruments; poaching tools and others.

In most cases, the goods possessed against the law dispositions "are produced" by the deed stipulated in the penal law (for instance, the possession of goods introduced by contraband in the country, the possession of arms or of explosive materials made illegally, the possession of false coins and others) or these goods "served" for the perpetration of some deeds provided by the penal law (for instance, fire arms, explosive materials, devices for the coins' falsification, narcotics and others[38]).

When a good which is presumed to be dangerous, for instance, a fire arm for which the doer has an authorization of possession, it was utilized for the perpetration of an offence, its seizure would have as a legal ground the provisions of article 118 letter f. of the Penal Code.

The seizure of the goods of which possession is prohibited by law is disposed no matter if the respective good belongs to the doer or to other person, even if this person has no contribution to the perpetration of the deed provided by the penal law. If the good (an arm) was legally owned by the proprietor and the doer obviously purloined the good from him, it

[35] The Supreme Tribunal, Penal Decision number 816/1985, R.R.D. number 4/1984, p. 72. The Supreme Tribunal, Penal Decision number 64/1986, R.R.D. number 6/1987, p. 76.
[36] The Supreme Tribunal, Penal Decision number 376/1981, R.R.D. number 11/1981, p. 60.
[37] M. Vasile, *Aspecte particulare in materia confiscării speciale în ceea ce priveşte cazurile de aplicare*, "Dreptul" Review, number 3/2003, p. 135.
[38] V. Papadopol, *Confiscarea specială în practică judiciară*, R.R.D. number 5/1983, p. 47.

will be disposed the restitution and not the seizure; the restitution is made to the person from whom the good was purloined, at her request[39].

Conclusions

The penal law can act more efficiently against the criminality by using not only the system of punishments (retributive and repressive sanctions) but also complementary means, with a preventive character, respectively, the safety measures that can be enforced by the judiciary bodies when the perpetration of a deed provided by the penal law it's established.

The social jeopardy, the state of danger which such goods would present if they were let at the doer's free disposal and he would be tempted to utilize them in order to commit new deeds provided by the penal law, thus these goods have to be eliminated by the special seizure's enforcement.

As the other safety measures, the special seizure is a penal law sanction because it intervenes only for the persons that committed a deed provided by the penal law; at the same time, it's a legal measure and it represents the appliance of the principle "nulla poena sine lege".

But, in comparison with other safety measures, the special seizure has to be accompanied by a punishment and in its enforcement, the general criteria of individualisation provided by article 72 of the Penal Code are not taken into consideration, but there are taken into account the nature and the gravity of the state of danger and the possibilities to eliminate it.

Bibliography

M. Vasile, *Aspecte particulare în materia confiscării speciale în ceea ce priveşte cazurile de aplicare*, "Dreptul" Review, number 3/2003;

M. Vasile, *Aspecte particulare în materia confiscării speciale în ceea ce priveşte cazurile de aplicare*, "Dreptul" Review, number 3/2002;

J.F. Popa, *Măsura de siguranță a confiscării speciale prevăzută de art. 118 lit. b., Cod penal cu referire specială la confiscarea vehiculelor*, "Dreptul" Review, number 6/2000;

C. Niculeanu, *Confiscarea specială. Sume de bani obținute prin valorificarea bunurilor dobândite prin infracțiune*, "Dreptul" Review, number 4/1999;

R. Chiriță, *Câteva considerații în legătură cu temeiul juridic al aplicării măsurilor de siguranță*, "Dreptul" Review, number 1/1999;

V. Pasca, *Măsurile de siguranță*, "Lumina Lex" Publishing House, Bucharest, 1998;

S. Aragea, *Confiscarea specială în practica judiciară*, Pro lege number 1/1991;

C. Turianu, I. Mihai, *Examen teoretic al practicii judiciare cu privire la aplicarea măsurii de siguranță a confiscării*, R.R.D. number 5/1987;

M. Basarab, *Aspecte teoretice şi practice privind confiscarea specială în lumina art. 118, lit. b, Cod penal*, Studia Universitatea, Babeş Bolyai, Jurisprudentia XXXII, number 2/1987;

V. Papadopol, *Confiscarea specială în practica judiciară*, R.R.D. number 5/1983;

C. Dărîngă, *Privire generală asupra măsurilor de siguranță*, R.R.D. number 1/1967.

Case-law

The Supreme Tribunal, Penal Decision number 64/1986, "Revista Romana de Drept (R.R.D.)" Review, number 6/1987;

The Supreme Tribunal, Penal Decision, number 2973/1985, R.R.D. number 12/1986;

The Supreme Tribunal, Penal Decision number 3074/1985, R.R.D. number 9/1986;

The Supreme Tribunal, Penal Decision number 54/1985, R.R.D. number 7/1986;

Tribunal of Bucharest, Penal Decision number 2279/1984, R.R.D. number 3/1986;

[39] V. Pasca, *Măsurile de siguranță*, Lumina Lex Publishing House, Bucharest, 1998, p. 244.

The Supreme Tribunal, Penal Decision number 798/1985, R.R.D. number 2/1986;
The Supreme Tribunal, Penal Decision number 1578/1984, R.R.D. number 10/1985;
The Supreme Tribunal, Penal Decision number 614/1984, R.R.D. number 2/1985;
The Tribunal of Maramures, Penal Decision number 91/1984, R.R.D. number 11/1984;
The Supreme Tribunal, Penal Decision number 816/1985, R.R.D. number 4/1984;
The Tribunal of Bucharest, Penal Decision number 2489/1984, Repertoriu number 3;
The Tribunal of Bucharest, Penal Decision number 298/1983, Repertoriu number 3;
The Supreme Tribunal, Penal Decision number 376/1981, R.R.D. number 11/1981;
The Supreme Tribunal, Penal Decision number 276/1981, R.R.D. number 11/1981;
The Tribunal of Timis, Penal Decision number 696/1980, R.R.D. number 7/1981;
The Supreme Tribunal, Penal Decision number 841/1980, "Culegere de decizii", 1980;
The Supreme Tribunal, Penal Decision number 945/1980, "Repertoriu" number 2;
The Supreme Tribunal, Penal Decision number 1822/1979, "Culegere de decizii", 1979;
The Supreme Tribunal, Penal Decision number 473/1978, R.R.D. number 8/1978;
The Supreme Tribunal, Penal Decision number 448/1977, R.R.D. number 12/1977;
The Supreme Tribunal, Guidance Decision number 3/1973, R.R.D. number 6/1973;
The Supreme Tribunal, Penal Decision number 2559/1972, R.R.D. number 2/1973;
The Supreme Tribunal, Penal Decision number 3622/1972, "Repertoriu", number 1;
The Supreme Tribunal, Penal Decision number 1647/1971, "Culegere de decizii", 1971;
The Supreme Tribunal, Penal Decision number 464/1978, R.R.D. number 3/1969.

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ENVIRONMENT CRIMINAL LAW IN TODAY EUROPEAN UNION

I. Flămînzeanu

Ion Flămînzeanu
Faculty of Law, "Spiru Haret" University, Romania
Institute for Legal Research "Andrei Rădulescu", Romanian Academy, Bucharest, Romania
*Correspondence: Ion Flămînzeanu, 12 Emil Rahoviță Blvd., bl. R3, ap. 25, sector 4, Bucharest, Romania
E-mail: ionflaminzeanu@yahoo.com

Abstract

Environment crime is among the European Union's central concerns. The Tampere European Council of 15 and 16 October 1999 at which a first work program for the European Union action in the field of Justice and Home Affairs was adopted asked that efforts be made to adopt common definitions of offences and penalties focusing on a number of especially important sectors, amongst them environment crime. But despite this agreement about the importance of joint the European Union action, environmental criminal law has become the centre of a serious institutional fight between the European Commission, supported by the European Parliament on the one hand and the Council, supported by the great majority of the European Union member states on the other hand. At stake is nothing less than the distribution of powers between the first and the third pillars, and therefore also between the Commission and the European Union's member states. The effect of this fight is currently a legal vacuum on general environmental criminal law that was closed with the Directive 2008/99/CE, taking into consideration the cross-border dimension of environmental crime and the existing significant differences in the national legislation of the European Union member states.

Key word : *Tampere European Council, common definition of offences, third pillars, enviromental crime.*

Introduction

In February 2000, Denmark presented an initiative for a Framework Decision on Environmental Crime. Same country has made a proposal for a Directive on the Protection of the Environment through Criminal Law. Both proposals, defined offences as infringements of secondary environmental legislation or implementing national legislation of and participation in such activities were also considered an offence[1].

On sanction, the proposals obliged European Union states to provide for natural persons for criminal penalties, involving in serious cases deprivation of liberty.[2] *The Directive proposal went through the first reading of the European Parliament, after which an amended proposal was adopted. But Council never took up the proposal for discussion, only adopting the Danish Framework Decision proposal in 2003*[3].

1.The Framework Decision 2003/80/JHA, so adopting, on the protection of the environment through criminal law was build substantively on the structure of the Council of Europe Convention on the Protection of the Environment through Criminal Law.[4] In the Decision, the offences are defined including the requirement of unlawful behaviour, i.e.

[1] The Tampere European Council of 15 and 16 October 1999;
[2] The Directive 2008/99/CE;
[3] The Framework, Decision 2003/80/JHA;
[4] Jean Pradel, *Droit pénal général*, Paris 1990.

"infringing a law, an administrative regulation or a provision of Community law aiming at the protection of the environment, with an exception of one autonomus offence in Article 2(a).

The European Union states had to ensure that penalties include at least in serious cases, deprivation of liberty which can give rise to extradition, which means generally more than one year of imprisonment, such in Article 5. Article 6 of the Framework Decision defined the grounds on which legal persons must be held responsible for conduct committed for their benefit by persons having a leading position within their structure or when such a person is liable for lack of supervision or control. Sanctions for legal persons should include criminal or non-criminal fines and may include other sanctions such as exclusion from entitlement to public benefits, a judicial winding-up order etc.

The Framework Decision 2003/80/JHA obliged European Union states to establish jurisdiction when the offence was entirely or partly committed in their territory or on board of a ship or on aircraft registered in it or flying its flag and provided for optional jurisdiction grounds, such in Article 8. Additional rules[5] on extradition and prosecution in particular on offences committed by own nationals outside the territory of a European Union state, had lost their relevance with the introduction of the European Arrest Warrant.[6]

2. When the Framework Decision was adopted in the Council, the Commission always upheld the view that this was not the appropriate legal instrument for provisions on environmental crime. In this situation, environmental criminal law has become the centre of a serious institutional fight between the European Commission and the Council about the possibility to include criminal law related provisions in first pillar instruments. So, briefly after the adoption, in april 2003 the Commission sought annulment of the Framework Decision before the European Court of Justice for wrong legal bases. The Commission was supported by the European Parliament, the Council by eleven European Union states. The Court annulled the Framework Decision and held that its Articles 1-7 could have been properly adopted on the bases of Article 175 TEC so that its adoption under the third pillar provisions infringed upon Article 47 of Treaty on the European Union.[7]

The essential statement was paragraph 48 of the judgment, where the Court said: "However, the last-mentioned finding (according to which generally criminal law is a matter of the European Union Treaty) does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the European Union states [8]which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective…"

3. This statement involved significant changes for legislation.[9] Once the Commission presented the proposal for a new directive on environmental criminal law, to replace the annulled Framework Decision, this directive was adopted by the European Parliament and the Council of the European Union, having regard to the Treaty establishing the European Community and in particular Article 175(1) thereof to the proposal from the Commission, to the opinion of the European Economic and Social Committee, after consulting the Committee of the Regions and in accordance with the procedure laid down in Article 251 of the Treaty.

This Directive (2008/99/CE) on the protection Issue Based of the environment through criminal law was adopted according to Article 174(2) of the Treaty. So, Community policy on the environment must aim at a high level of protection, the Community been concerned at the rise in environmental offences and at their affects, which are increasingly extending beyond

[5] P. Salnoge, *Droit pénal général*, Press Universitaire, 1994.
[6] C. Soyer, *Droit pénal et Procedure pénale*, Librarie Générale de droit et de jurisprudence, Paris, 1994.
[7] International Review of Penal Law, 2007, Preparatory Colloquium, La Coruna (Spain), 2007, National reports – CD Rom annexes.
[8] Codice penale e leggi complementari, "Giuridiche Simone" Publishing House, 2000.
[9] Le nouveau Code pénal introduit et commenté par Henri Leclerc, Edition du Seuil, 1994.

the borders of the states in which the offences are committed. Such offences pose a threat to the environment and therefore call for an appropriate response.

Experience has shown that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of criminal penalties which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law.

Common rules on criminal offences make it possible to use effective methods of investigation and assistance within and between European Union states[10].

In order to achieve effective protection of the environment, there is particular need for more dissuasive penalties for environmentally harmful activities, typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species.

Failure to comply with a legal duty to act can have the same effect as active behaviour and should therefore also be subject to corresponding penalties[11].

Therefore, such conduct may be considered a criminal offence throughout the Community of the European Union when committed intentionally or with serious negligence.

In the Article 3 of the Directive 2008/99/CE, the European Union states must ensure that a series of fact constitutes a criminal offence when unlawful and committed intentionally or with at least serious negligence, such as the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or water, or to animals or plants.

Another conduct constitutes a criminal offence in the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including actions taken as a dealer or a broker-waste management – which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water, or to animals or plants.[12]

The fight against maritime pollution through criminal law in the background of the disaster of the tanker "Prestige" off the coast of Galicia in November 2002 highlighted the urgent need for joint European Union action against ship-source pollution. The above-mentioned Framework Decision on environmental criminal law that was to be adopted approximately at the same time did not address specifically this issue. Political statements of the European Council were unanimous in calling for the rapid adoption of an European Union legislative framework. In addition to proposals for technical regulations, the Commission presented therefore in spring 2003 two proposals on offences and sanctions, one for a Directive based on Article 80 TEC, the rules on the common transport policy and one for a Framework Decision based on Articles 31 and 34 TEU, which form a unity. The discussions for both instruments were difficult. The Framework Decision 2005/667/JHA "to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution" was finally adopted in July 2005, the Directive 2005/35/EC "on ship-source pollution and on the introduction of penalties for infringements" in September 2005. Two instruments were considered necessary due to the above-mentioned institutional conflict whether criminal law provisions were acceptable in a first pillar instrument. The Commission had initially included most of the criminal law related provisions in its proposal for a directive, however, the Council decided to transfer the majority into the Framework Decision.

The Directive 2008/99/CE on the protection of the environment through criminal law, of the European Parliament and of the Council, having regard to the proposal from the Commission stipulate that is an offence, the shipment of waste, where this activity falls within

[10] Strafgesctzbüch, 33 Aufflage, 1999, Beck Texte in Deutscher Taschenbuch Verlag.
[11] Model Penal Code and Commentaires, Part I, Philadelphia, P.A. 1985, The American Law Institute.
[12] Mihaela Agheniței, *Constancies of Penal Law General Part*, "Universul Juridic" Publishing House, 2010.

the scope of Article 2(35) of Regulation (EC) No.1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (6) and is undertaken in a non-negligible quantity, whether executed in a simple shipment or in several shipments which appear to be linked.

Another criminal offences such are in the Article 3 of the Directive 2008/99/CE refer to the operations of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water or to animals or plants. With the same result are charging the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances, the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species, and trading in specimens of protected wild fauna or flora species or parts or derivatives thereof with the same exceptions.

Conclusions

Offences are also any conduct which causes the significant deterioration of a habitat within a protected site and the production, importation, exportation, placing on the market or use of ozone depleting substances.

All the European Union states shall ensure (Article 4) that inciting, aiding and abetting the intentional conduct referred to the offences above-mentioned are punishable as a criminal offence, by effective and proportionate, dissuasive penalties for any legal person who don't respect the stipulations of this Directive.

Bibliography

Mihaela Agheniței, *Constancies of Penal Law General Part*, "Universul Juridic" Publishing House , 2010.

The Directive 2008/99/CE;

International Review of Penal Law, 2007, Preparatory Colloquium, La Coruña (Spain), 2007, National reports – CD Rom annexes;

The Framework Decision 2003/80/JHA;

Codice penale e leggi complementari, "Giuridiche Simone" Publishing House, 2000;

The Tampere European Council of 15 and 16 October 1999;

Strafgesctzbűch, 33 Aufflage 1999, Beck Texte in Deutscher Taschenbuch Verlag;

P. Salnoge, *Droit pénal général*, Press Universitaire, 1994;

C. Soyer, *Droit pénal et Procedure pénale*, Librarie Générale de droit et de jurisprudence, Paris, 1994;

Jean Pradel, *Droit pénal général*, Paris, 1990;

Le nouveau Code pénal introduit et commenté par Henri Leclerc, Editions du Seuil, 1994;

Model Penal Code and Commentaires, Part I, Philadelphia, P.A. 1985, The American Law Institute.

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THE ISSUE OF LIABILITY FOR NON-PATRIMONIAL PREJUDICE WITHIN THE LEGAL LABOR RELATIONS

R. Gh. Florian

Radu-Gheorghe Florian
Law and Economics Faculty, Social Sciences Department
Agora University of Oradea, Oradea, Romania
*Correspondence: Radu Gheorghe Florian, Agora University of Oradea,
8 Piața Tineretului St., Oradea, Romania
E-mail: raduflorian@rdslink.ro

Abstract

This study aims to examine the extent to which legal liability for non-material prejudices and moral prejudices is allowable in the field of legal labour relations, in the context of contest for regulations governing non-patrimonial prejudices in Romanian legislation.

Keywords: *material prejudice, non-patrimonial and moral prejudice, patrimonial liability, civil liability, delictual liability, contractual liability.*

Introduction

Prejudice means damaging results of patrimonial or non-patrimonial nature, effects of violations the subjective rights and interests of a person. [1]

Economic prejudices are those that have economic content, which may be assessed pecuniary, such as the destruction or degradation of property, theft of property, killing an animal, injuring a person's health followed by reduction or loss of labour capacity and regular earnings: loss, in whole or in part, of a property right, such as, for example, the right to maintenance, etc.[2]

Non-patrimonial prejudices or material damages are harmful consequences that can not be monetised and result from violations of personal rights, with no economic content. Extra-patrimonial rights define the individual human personality. Such harmful consequences are death, physical and mental pain, injuries that affect physical harmony and a person's appearance, injuries to reputation, honor, dignity, prestige or reputation of a person, restricting the possibilities of the human being to enjoy the satisfactions and pleasures of life etc.[3]

1. Term of moral prejudice

Unlike the old Civil Code that contained no provision for moral prejudice, the new Civil Code that came into force on October 1, 2011, regulates the repairing of non-patrimonial prejudice in several articles grouped in the field of civil liability (delictual and contractual) and in the field of protection of non-patrimonial rights (art. 253-256).

It is noted the terminology adopted by the legislature, of "non-patrimonial prejudice" towards other regulations that refer to "moral prejudices", such as administrative contentious law, the law of combating unfair competition.

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[1] I. Albu, V. Ursa. *Răspunderea civilă pentru daunele morale*, Dacia Publishing House, Cluj-Napoca, 1979, p.29.
[2] L. Pop, *Drept civil. Teoria generală a obligațiilor*, "Lumina Lex" Publishing House, 2000.
[3] C. Stătescu, C. Bârsan, *Drept civil. Teoria generală a obligațiilor*, "Hamangiu" Publishing House, 9th Edition, 2008, p. 148.

Without going into details, we mention that in the doctrine was proposed, as the most accurate and meaningful notion, the one of moral prejudice, that comes from the Latin Dominum, which means loss, damage, because it evokes the reality to which it refers, namely affecting moral values that make up human personality.[4]

Other authors, arguing that the notion of moral prejudices only evokes moral effects, unchallenged not object of a probation, understand that the concept that would cover physical effects is the "moral damage" which means injury, an effect that can be found both physical (like body injuries), and felt, and therefore presumed, such as pain or illness.[5]

The solution adopted by the Civil Code appears as the most suitable, being meant to emphasize the distinction between patrimonial prejudice and prejudice that can not be measured in money, and the distinction between patrimonial and non-patrimonial rights, expressly stipulated in the text of art. 253-256 of Civil Code, although this solution has been criticized in terms of logical existance, claiming that a notion should be defined by what it is and not by what it is not.[6]

2. The issue of employee's liability for prejudices caused to the employer.

A. Employee's liability for repairing the prejudice in accordance to Labour Code

Material nature of employees' patrimonial liability arises from the content of art. 254 paragraph 1 of the Labour Code, which (unlike the art. 253 paragraph 1) expressly provides that employees respond patrimonially for "material damages produced to the epmloyer because and in connection with their work." Obviously, according to the rules and principles of civil liability, the damage will be fully covered, i.e. not only the actual damage produced (*damnum emergens*) but also loss of profit (*lucrum cessans*)

Judiciously, it was noted that the rule from common law does not operate, accordin to which compensation must be made, whenever possible, in nature, and only when it is no longer possible, the equivalent (by calculation and payment of compensation money). This is because there are regulations contained in article. 273 paragraphs 1 and 2 of the Labor Code, relating to deductions from wages, establishing thus, compared to the common law, a measure of protection for employees. According to this legal text, "the fixed amount for claims" is deducted "in monthly rates from the salaries that are due to" guilty employee.[7]

From the formulation of the mentioned text, results unequivocally that expressly, legislature intended, in principle, to limit the employees' civil-contractual financial liability, for the prejudices caused to employers in connection with their employment, except for material prejudices and not to the moral ones.

In fact, by this code was regulated a patrimonial liability that "also includes some exceptions to the common law of classic contractual liability (set by the Civil Code), exceptions that constitute particularities in relation to the latter, appointed in considering the multilateral social protection of employees, based on art. 41 paragraph 2 of the Romanian Constitution".[8]

It was correctly appreciated that the patrimonial responsibility was taken the rule from the legal status of contractual liability according to which moral prejudices are due only exceptionally, or if there is a statutory provision or an express contractual stipulation, or even in limited areas of the contract of transport of persons, relating to copyright, or the ones including implicite obligations for the protection of individuals.[9]

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[4] I. Adam, *Drept civil. Obligațiile. Faptul juridic*, "C.H. Beck" Publishing House, 2013, p. 224.
[5] M. Eliescu, *Răspunderea civilă delictuală*, "Editura Academiei" Publishing House, 1972, pp. 105-110.
[6] I. Adam, *op. cit*., p. 225.
[7] I. T. Ştefănescu, *Tratat teoretic şi practic de drept al muncii*, 2nd Edition, "Universul Juridic" Publishing House, 2012, p. 782.
[8] I. T. Ştefănescu, Ş. Beligrădeanu, Prezentare de ansamblu şi observaţii critice asupra noului Cod al muncii, in "Dreptul" Review, no. 4/2003, p. 78.
[9] I. Albu, V. Ursa, *op. cit*., p. 29.

It was rightly appreciated in the doctrine[10] that it is inadmissible to insert a stipulation in the collective labour agreement or in the job description, since according to Art. 132 of Law no. 62/2011 on social dialogue, the collective labour agreement can not include clauses that to create a more unfavorable situation for the employee in relation to the law.

Also, neither in the individual employment contract (including the "job description", which is an annex to the contract) would not be legally permissible a clause whereby the employee to assume responsibility for moral prejudices – even if in only strictly limited certain assumptions - as such stipulations are null and void, according to art. 38 of the Labour Code. According to art. 38 of Labor Code employees can not waive their rights that are recognized by law. Any transaction that seeks waiver of rights recognized by law or limit those rights is void.

B. Statements contained in other legislation where the employee is responsible for non-patrimonial prejudices

From the provision stated in art. 254 paragraph 1 of the Labour Code there are established, by special legal rules, and some exceptions, judiciously reported in the doctrine.[11]
1) As shown in the civil liability field, it is inadmissible the cumulation of contractual liability and delictual liability. Thus, in case of prejudices - of any kind - caused by failure or improper performance of a contract (civil, commercial, etc.), the injured party has a choice between request for damages either according to contractual liability or according to delictual civil liability of its contractual partner, but injured creditor can only act based on the rules and principles of contractual liability.

On the other hand, the incidence of civil liability for moral prejudices, though more commonly invoked in delictual liability cases, now it is permitted, firm and within contractual civil liability, but only to the extent that there were no express provisions to the contrary, as contained in the regulation of the content of art. 270 paragraph 1 of the Labour Code.

We are reffering to the situation in which the prejudice caused by the employee to the employer, from his fault and in connection with his work, is the result of a crime, when we are in the presence of exceptions to the rule of art. 270 paragraph 1 of the Labour Code, and also to the principle of inadmissibility choice between contractual liability and delictual liability, since if the employer became a civil party, he has the right, where appropriate, to require the defendant-employee compensation and "compensation for moral prejudices, according to civil law" as expressly provided art. 14 paragraph 5 from Criminal Procedure Code, amended by Law no. 281/2003).

2) Law no. 11/1991 regarding unfair competition, by art. 4 and art. 5, as amended by Law no. 298/2001, regulates a number of contraventions and crimes, some of these contraventions being able to be committed only by an employee, causing damage to his employer (for example, "providing services by an employee of a merchant to a competitor or accepting such an offer).

Therefore, the employee not only violates his obligation of loyalty to his employer, but at the same time, committing the offense in question, is the provisions of art. 9 paragraph 1 of Law no. 11/1991, acoording to which "If any of the acts referred to in art. 4 or art. 5 cause patrimonial or moral prejudice, the injured is entitled to apply to the competent court with appropriate civil liability action".

We mention that the provisions of art. 9 paragraph 1 of Law no. 11/1991, on the one hand, are applicable even if in the employment contract of the employee-offender is inserted a non-competition clause under Art. 21-24 of the Labour Code, clause that works maximum 1 year only after termination of mentioned contract (art. 22 of the Labour Code).

In conclusion, art. 9 paragraph. 1 of Law no. 11/1991 constitutes a derogation from art. 270 paragraph 1 of the Labour Code, by the fact that, in the situation mentioned in the

[10] I.T. Ștefănescu, *op. cit.*., p. 490; Ș. Beligrădeanu, *Studii de drept al muncii*, "C.H. Beck" Publishing House, 2007, p. 315.
[11] A. Țiclea, *Tratat de dreptul muncii*, "Universul Juridic" Publishing House, 2007, p. 803.

text, even the employee who is not a criminal, but only offender – is responsible, during the performance of his individual employment contract, restorative (patrimonial), under the rules and principles of civil liability, not just for material prejudices as stipulated in art. 270 paragraph 1 of the Labour Code, but also for moral prejudices produced to his employer.[12]

3) In accordance with art. 148, paragraph 1, in conjunction with Art. 72 of Law no. 31/1990 on commercial companies, managers of such companies "are responsible for fulfilling all obligations according to Art. 72 and art. 73 ", art. 72 stipulating that 'duties and liabilities of administrators are governed by the provisions on the mandate and specifically provided in this Law"

As reproduced texts do not distinguish, results that they are applicable to both administraors -employees of the companies, and administrators who do not have this quality, and on the other hand, both rules aim, firstly, the responsibility restorative (patrimonial).

Similarly, Article 152 paragraph 3 of Law no. 31/1990 stipulates that executives of companies "shall be liable to the company and third parties for non-fulfilment of their duties, in accordance with art. 148, even if there is an agreement to the contrary ".

Thus, the restorative responsibility (patrimonial) in the assumptions given, being governed by the legal provisions regarding the mandate contract, obviously the trade (and not those of the individual employment contract), the consequence is that we are in the presence of specific rules (art. 148. 1, Art. 152 par. 3 in conjunction with art. 72 of Law no. 31/1990, republished on 17 November 2004), which derogate from the general law in the field(art. 270 par. 1 of the Labour Code).

Therefore, this latter text does not apply and, on the other hand, liability for moral prejudices, de plano, is not incompatible with the contractual civil liability (or commercial, art. 1 Commercial code), is inferred, without possibility of doubt, that the managers-employees of companies (including the chairman of the board if an employee) may be materially liable for damages (even if they were not caused by a criminal offense), of course if the conditions for granting of such damages.

But of course, remain the provisions of art. 270 par. 1 of the Labour Code, where commercial "company's clerks" (other than directors, employees and executives) as art. 144 par. 1 of Law no. 31/1990 does not address their patrimonial liability.

On the other hand, if individuals - in the company - having double standards (of administrators as part of the Board) and the employee in another position (economist, engineer etc.), in case of injuring the company, their patrimonial liability is governed, as appropriate, of art. 72 of Law no. 31/1990 (republished) or art. 270 par. 1 of the Labor Code, as prejudice was caused in the exercise director, respectively, in the performance of the other function (economists, engineers, etc.).[13]

According to another author, it is considered that the liability of directors also for moral prejudice is not an exception to the rule established by art. 270 par. 1 of Labour code because their liability is governed by the rules of commercial mandate, even when the state has a majority share of those companies.

It was said that we are in the presence of other responsibilities, contractual common law, which has no connection to the patrimonial liability regulated by the Labour Code[14]

4) In the strike declared illegal or continued, shall be liable strike organizers, under civil-delictual liability (art. 998 et seq. Civil Code.) , ss between them (unions or, if applicable, employee representatives) and employer there is not a legally binding contract with the employer, and employee representatives hold strike under the law mentioned, not exercising their rights and their duties according to their individual employment contract.

Thus, being in the presence of civil and delictual liability, it is clear that those involved (organizers of the strike, where appropriate, unions or employee representatives),

[12] A. Țiclea, *op. cit.*, p. 491; Ș. Beligrădeanu, *op. cit.*, p. 321.
[13] Ș. Beligrădeanu, *op. cit.*, p. 323; A. Țiclea, *op. cit.*, p. 803.
[14] I. T. Ștefănescu, *op. cit.*, p. 491.

particularly their delictual liability for material prejudices caused to employer by a strike (ilegally declared or continued, against the law, a strike which, from a certain point, it became illegal) can answer - when appropriate – also for moral prejudices (damages) due to non-patrimonial damages as stated to the employer concerned.

As for employees who participate in a spontaneous strike (unorganized), by definition illegal, they respond patrimonially, according to common law shaped by art. 270 et seq. From the Labour Code, but only to the extent that it is not a crime.

Therefore, in case of a a spontaneous strike, employees respond patrimonially exclusive for material injuries caused to employers, and not for moral damages, except when their deed is offense.[15]

5) it was correctly appreciated that public officials respond for moral damages even if art. 72 letter a) of Law no. 188/1999 (republished) not expressly state that the liability of public servants also concerns moral damages. But such a conclusion is drawn, no doubt, for a double reason, because of its formulation.

Thus, on the one hand, the text does not contain limitations or exceptions for moral prejudices; thus, since the text does not distinguish, neither the interpreter can not perform as such.

On the other hand, this provision establishes that the liability of public officials undertakes "for damages produced... to patrimony (sn - Ş.B.) of the authority or institution in which he works.

6) The literature has identified a particular case from among the civil servants whose liability includes liability for damages.

It is the regulation included in art. 25 par. 2 of Customs Staff Statute that stipulates that "the damage caused in the control as a result of failure or poor performance of the duties of control, to the extent that conditions for attracting criminal liability are not fulfilled, customs staff with management or executive jobs respond according to art. 998 from Civil Code.[16]

Therefore, customs personnel in the event of an exception provided by art. 25 par. 2 of the Statute of the customs staff, their civil and delictual liability, under art. 998 of Civil Code, may include their responsibility for moral prejudice caused to the National Customs Authority, and not just for material prejudice produced.

3. The issue of employer liability for prejudices caused to employee

A. Employer's liability to employees for non-patrimonial prejudices governed by the Labour Code

A1. Employer's liability prior to Law no. 237/2007.

In the stipulations prior to law no. 237/2007, the provisions of former Art. 269 (now 253 par. 1) from The Labour Code provides that "the employer is required, under the rules and principles of contractual liability, to indemnify the employee in case he has suffered prejudice due to the fault of the employer during service obligations or in connection with the service.

Accordingly, and in connection with the partimonial liability of the employer, shall require the same conclusion: the inadmissibility - usually - to compel the employer to pay compensation for the moral prejudice produced to employees in the process of working (individual employment contract execution).

Therefore, are flagrantly illegal all judgments by which, canceling the measure ordered by the employer to terminate the individual employment contract as illegal and / or unfounded and, according to art. 78 par. 1 and 2 of the Labor Code, compelling therefore the employer to pay money damages and, at the request of the employee, its reintegration into service, the employer, in addition, the employer is compelled to pay for the patrimonial

[15] Ş. Beligrădeanu, *op. cit.*, page 326-327.
[16] Ş. Beligrădeanu, *op. cit.*, page 102.

damage (moral damages) suffered by the employee as a result of unfair and abussive dismissal.[17]

This conclusion can be drawn without any possibility of doubt not only from the text of former art 269 par. 1 of the Labour Code (now Art. 253 par. 1 from Labour Code republished in 2011) that refers only to "material damage" suffered by the employee from the employer's fault, but also from art. 78 par. 1 of the same Code according to which "if the dismissal was effected on a groundless base or illegal, the court will cancel it and requires the employer to pay compensation equal to the wages indexed increased and updated and other rights that the employee would have received."

In connection with this legal text, there were properly observed limits on who can receive compensation when the employee obtain in Court the dissolution of decision to dismiss:[18]

- employee will receive only those wages and other rights to which he would have benefited from the entry into force of the decision to dismiss until the judgment of the court is final or until the occurrence of any cause for legal termination of the individual labor contract law;
- to calculation of damages will be also considered Christmas, Easter or "thirteenth month" bonuses, if provided for in the applicable collective agreement or individual employment contract;
- in the amount of damages, although it is not prohibited, may not be covered moral damage caused to employee by solid or illegal dismissal, because the employer's liability is governed by the rules of contractual liability, which in principle excludes liability for moral damages except where there is a clause of aggravation of liability as a result of the parties' undoubtedly agreement. Therefore, compensation for moral damages may be awarded only if in the applicable collective agreement or individual employment contract there is a provision to this effect.

In conclusion if in the case of partimonial liability of the employee to the employer is inadmissible (by the individual or by the collective contract), assuming an obligation for paying the employer for the moral damages suffered, as would clearly violate Art. 38 of the Labour Code, respectively (when the collective labor contract), the provisions of Law 132. 62/2011 regarding the dialogue, in theory, by mentioned employment contracts, the employer could assume the obligation to compensate the employee cash also for non-material prejudices suffered beccccause of his fault (the employer's), or in general, only in certain circumstances (for instance, where ordered ilegally or groundless the termination, modification or suspension of the employee's individual employment contract), whereas the rules of art. 38 of the Labour Code and the provisions of art. 132 of Law no. 62/2011 exclusively protect employees and never the employers.[19]

The correct orientation of the doctrine was confirmed by decision no. XL (40) on 07 May 2007 in the appeal in interest of the law issued by the High Court of Cassation and Justice.[20]

The supreme court stated compulsory for the future that the provisions of former Art. 269 from Labour Code (now 253 of Labour Code republished) is to be interpreted as meaning that the employer may be ordered to pay damages only if there is an express clause to this effect in the applicable collective agreement or even in the individual employment contract.

The court took into account the following considerations:

[17] A. Athanasiu, Luminița Dima, *Dreptul muncii*, All Beck Publishing House, Bucharest, 2005, p. 161.
[18] *Ibidem*
[19] Ș. Beligrădeanu, *op. cit.*, p. 325; I.T. Ștefănescu,, *op. cit.*, p. 490.
[20] Published in the Official Gazette of Romania, no. 763 from November 12th 2007.

"Throughout chapter III of Title XI of the Labour Code is regulated patrimonial liability of the employer and employees, establishing both principles that generate it and the concrete ways for recovering the prejudices.

This regulatory framework through art. 269 par. (1) of the Labour Code provided that "the employer is obliged under the rules and principles of contractual liability to indemnify the employee in a situation where it has suffered material prejudice during the performance of his work by employer's fault, or related to his job obligations".

Correspondingly, by art. 270 par. (1) of the Code, in which is ruled the patrimonial liability of the employees, it was provided that "employees are patrimonially liable under the rules and principles of contractual liability, for material damages caused to employer by their fault and in connection with their work."

Therefore, the provisions of the two pieces of legislation set clear the unequivocal legislature's will, as patrimonial liability of the employer and employees should not be established solely for the material prejudices and not for moral prejudices.

It is true that art. 295 par. (1) of the Labour Code provides that "the provisions of this Code shall be complete with the other provisions of the labor law and, to the extent they are not inconsistent with the type of labour relations provided by this Code, with the provisions of civil law."

But, in order to be complemented the specific provisions of the Labor Code with the Civil Code, is required, as shown in the mentioned text, that the particular situation not to be covered by a provision of the Labour Code and not to be an incompatibility determined by the nature of the work relations, as long as they are based on collective or individual employment contract.

However, these two conditions can not be considered to be met in order to justify the application of Art. 269 par. (1) of the Labour Code in conjunction with art. 998 and 999 of the Civil Code, as a legal basis for reparation of the moral prejudice within the legal labour relations, as long as mutual patrimonial liability of the parties of such a report may arise only from the employment contract, based on the principles of contractual liability.

As long as the juridical nature of patrimonial liability, regulated by the Labour Code, it is a variety of contractual liability, with certain features imprinted by the character of labour relations, including the one derogatory established by art. 269 par. (1) and Art. 270 par. (1), that covers only the reparation of the material damage, it is obvious that under such liability can not be granted moral damages, and these may be claimed under art. 998 and 999 of the Civil Code, only in delictual liability.

Or, in report with its own rule of the common law in the field of contractual liability, according to which moral damages for patrimonial prejudice can not be established, except for the case where such a liability is an exception, it means that their grant is only possible if the there is a legal provision that requires them or was expressly stipulated in the contract.

Thus, it must be considered that the patrimonial liability of the employer, as regulated in Art. 269 par. (1) of the Labour Code, employees may be granted damages only if the law requires it or have been integrated into the collective agreement or individual employment contract clauses relating to the employer's liability for such damages. "

To be noted that the entire argument of the Supreme Court to justify the applicability rules of reparation of non patrimonial prejudice is based on patrimonial liability as a variety of contractual liability, which admits only exceptionally the reparation of non- patrimonial prejudices.

In these circumstances arises the question to what extent this argument is valid under the new provisions of the Civil Code which admit as a principle the possibility that a creditor can obtain compensation for non patrimonial damages suffered, according to art. 1531 par. 3 Civil Code.

A2. The situation created by the emergence of law no. 237/200

By law no. 237/2007[21] art. 269 par. 1 was stipulated: "The employer is obliged under the rules and principles of contractual liability, to compensate the employee in situation that he suffered a material or moral prejudice by employer's fault while performing his duty obligations or related with his duties. "

Therefore, common law in the field of patrimonial liability presumes that the employer takes responsibility also for the moral damages incurred and proved by his employee.

In this context, the provisions of the Act regulating the common law liability of employers involve their responsibility and therefore moral prejudices suffered by employees, leaving pointless the distinction that exists between the patrimonial liability for discrimination having the criteria sex and other forms of discrimination.

However, the new regulation itself is discriminatory, since it leaves unchanged art. 270 par. 1 of Labour Code regarding the limits of employees' patrimonial liability, who will remain responsible only for the material prejudice caused directly by their deed. Thus, it is created a break of the balance between the contracting parties based on the principle of the protection of employees' labor law rules.

Therefore it was judiciously proposed in the law doctrine, either removing law amendments of art. 269 paragraph 1 of Law no. 237/2007, or to be amended accordingly also art. 270 of Labour Code.[22]

B. Employer's liability for non-material prejudices caused to its employees regulated by other legislation

According to art. 43 par. 6 of Law no. 202/2002 on equality between women and men, text under which "employees" who consider themselves discriminated based on sex could request (including at the court competent to resolve labor disputes of rights) "compensation for material and / or moral and / or to eliminate the consequences of discriminatory acts the person has committed. "Today this article was repealed by Law no. 340/2006, which amended accordingly the article 46 par. 2, in the sense that damages will be awarded by the court according to law.

Therefore, between the entry into force of Law no. 340/2006 and the entry into force of Law no. 237/2007, persons who notified the court for discrimination based on sex could not get any compensation for moral damages, since the common law, meaning "the law" applicable to the employment, forbade it, in accordance to art. 269 from Labor code.[23]

We also appreciate this conclusion as being the correct one, by analyzing the legal text that refers to "fixing the compensation in accordance to law" as opposed to the previous regulation which referred to "common law". So in the period between the entry into force of Law no. 340/2006 and the advent of Law no. 237/2007, the employer was not liable for moral prejudices caused by acts based on discriminatory criterion of sex, because in labor relations "law", especially Labor Code, only allowed under the former art. 269 the liability for material prejudice.

However, to note that the law no. 340/2006 amended by art. 44 of law no. 202/2002 in the sense that a person considered to be the victim of discrimination on grounds of sex, in areas other than labor, has the right to apply to the competent institution or to the request by the court, according to common law, and to seek materials and/or moral compensation and/or to be eliminated the consequences of discriminatory acts from the person that committed them.

This is possible because in other legal relationships outside the scope of labor law, the law governing the liability for prejudices is common law, meaning the Civil Code, namely

[21] Published in the Official Gazette of Romania, no. 497 from July 25th, 2007.
[22] Ş. Beligrădeanu, *op. cit.*, p. 331.
[23] I. T. Ştefănescu, *op. cit.*, p. 530.

delictual liability that allows the liability of the author of illegal deed for non-patrimonial prejudices.

To be noted that similar legislation is contained in art. 27 par. 1 of G.O. No. 137/2000 on preventing and sanctioning all forms of discrimination, republished on 1st of March 2007, which provides: "A person who feels discriminated may formulate, in the court of law, a claim for damages and restoring the situation previous of discrimination, or cancellation of current situation created by discrimination, according to common law. The application is exempt from judicial taxes and is not subject to referral to the Council"[24].

Since in this legal text refers to common law, in doctrine[25] was wisely concluded that it is possible to solicit moral damages since the text does not distinguish. In this way it becomes inexplicable how, for all other forms of discrimination, victim can claim moral compensation and the reparation of moral damages and for discrimination on grounds of sex which has a special regulation moral damage repair is not possible.

Notably, the object of this regulation concerns any form of discrimination consisting of: "distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social status, belief, sex, sexual orientation, age, disability, contagious chronic disease, HIV infection, belonging to a disadvantaged category, and any other criteria that has the purpose or effect the restriction, prevention recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms of legal rights in the political, economic, social, cultural or any other field of public life".

The term "common law" referred to in the text of art. 21 (the numbering previous to republication, currently 27 paragraph 1.) is represented by the provisions of art. 998-999 Civil Code and the matters of legal labor relations.

Thus, faced with the exception of unconstitutionality of art. 21 par. 1 in conjunction with the former art. 269 from Labor Code, Constitutional Court concluded as follows:[26]

According to art. 269 of the Labour Code, employees who have suffered material prejudice due to the fault of the employer in the performance of duty obligations or in connection with the duties have the opportunity to address the court, pursuant to the rules and principles of contractual liability for patrimonial prejudices suffered.

Or, the Court noted that criticized legislation applies to all persons in the situation stipulated b the hypothesis of the norm, without any distinction or considering other criteria, namely that to all individuals with the status of employee and that suffered material prejudice by employer's fault.

On the other hand, the Court finds that art. 269 of the Labor Code is not an impediment for the employees who consider themselves discriminated against in the workplace to address the court, by the mean of common law, to seek compensation for moral or non-patrimonial prejudices, incurred in connection with the duty, as stipulated by art. 21 par. (1) of Government Ordinance no. 137/2000. Thus, art. 1 paragraph. (2). letter e), point (i) of the Ordinance provides that "the principle of equality between citizens, exclusion of privileges and discrimination are guaranteed especially in exercise of the following rights: [...] e) economic, social and cultural rights, in particular: (i) right to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration". "In applying these provisions, the court is asked to determine whether issues probated by an employee are connected to discrimination and, if so, to pay compensation to the person discriminated against and to restore the situation previous to discrimination or cancellation of the situation created by discrimination.

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[24] For details see Lavinia Onica Chipea, *The legal regime of individual labour conflicts*, "Universul Juridic" Publishing House, Bucharest, 2011, p.190.

[25] Ș. Beligrădeanu, *op. cit.*, page 329.

[26] Decision no. 721/2006 published in the Official Gazette of Romania, no. 962/30.11.2006.

To interpret the criticized legal texts in the sense of limiting the damages owed to a discriminated person who is an employee, the amount of material prejudice caused by the employer, equals to a restriction of the right to full compensation for the prejudice suffered. Or, it is precisely this circumstance that could trigger the application of a different treatment, thus discriminatory, to persons in the same legal situation generally regulated by Government Ordinance no. 137/2000, which by the very title proposes preventing and sanctioning all forms of discrimination. That is, since that order makes no distinction on the issues addressed by or forms of discrimination and the principle of "ubi lex non distiguit, nec nos distinguere debemus", the quality of employee does not put the discriminated person in a situation to justify the application of a different legal treatment. Therefore, the employee is entitled to compensation for moral prejudices, according to art. 21 par. (1) of Government Ordinance no. 137/2000, under the rules and principles of delictual liability contained in art. 998 and 999 of the Civil Code".

Accordingly, according to the concept of the Constitutional Court, patrimonial liability does not apply to all prejudicial acts caused to employees. Thus, in case of discrimination criteria, except sex, according to GO No. 137/2000 on the theme, employer will be responsible for delictual liability involving both material and moral prejudices.

An exception regulation regarding the possibility of repairing the moral prejudices is contained in Civil Servants Statute under which, in case of cancellation of illegal termination of service, public authority or institution may be required to payment of moral damages, provision also supported by provisions of art. 18 par. 3 of the Law no. 554/2004.

In this respect is also Decision. 2037/29.03.2005 of High Court of Cassation and Justice, which found the following:[27]

According to art 998 (of old - Ed) Civil Code: "Every deed of man that causes prejudice to another, obliges the one by whose fault it was produced to repair it". The basic rules governing liability are: the principle of full compensation for the damage and the repair of the damages principle. Full compensation prejudice involves removing all the harmful consequences of an illegal and culpable act, whether patrimonial or non-patrimonial, in order to restore the previous situation of the victim, according to the principle of law *restitutio in integrum*.

According to the provisions of Article 11 paragraph 2 of Law nr.29/1990 (now art. 18 par. 3 of Law no. 554/2004 - Ed) in case of the acceptance of the the request for annulment of the administrative act or acknowledgment of violated law the court will decide on the damages.

In the literature, moral damages are assessed as being a breach of a person's physical existence, limb and health, honor, dignity and honor, professional reputation, etc.

According to provisions of art.1169 (of the old - Ed) Civil Code, the burden of proof in the application for granting the moral damages lie to the claimant, according to the principle of law *actors incumbit onus probandi*. According to the rules of the common law, the claimant must prove the existence of attempted non-patrimonial prejudice and the illegal nature of the offense, ans the casual report between the prejudice and defendant's act.

In this case, by the abusive and illegal behavior, respondent-defendant seriously injured appellant-claimant's fundamental right - the right to work, causing harm and moral prejudices, by affecting the honor, prestige and dignity protected by law.

The attitude of the defendant has seriously affected appellant-claimant's health, fact that that led to the suspension of the service's report, worsening cardiovascular diseases he is suffering.

Regarding the determination of the amount of moral damages, the court will consider it to have countervailing effects, not being allowed to decide neither excessive fines for damage nor undue revenue for their victims.

[27]Decision published on www.scj.ro (site visited on 11.12.2012).

Unlike other civil damages that require a sample holder in respect of moral damages, can not call the material evidence, the judge being the one who, in relation to the consequences suffered by the injured party, will appreciate a certain lump sum to compensate for non-patrimonial prejudice caused, reason for which the court allowed the claim for moral damages granting. "

There is another situation where the employer, under special laws, is also responding for moral damages. It is the provisions of art. 44 of law no. 319/2006.

Thus, according to art. 44 of law no. 319/2006 "Employers are patrimonial liable, according to civil law, for prejudices caused to victims of accidents or occupational diseases, to the extent that damages are not fully covered by social security benefits."

Since the legislature uses the notion of "civil law", we think it refers to delictual law, that is common law in the field of delictual liability, which, as we know, includes liability for moral prejudices. In this respect, it was concluded that the person concerned has the opportunity to apply under this text, as compensation for patrimonial prejudices, and compensation for non-material prejudices, because, according to the rules of the common law in the field of delictual liability, the author of illegal act is liable for all prejudices he has caused. It is about the actual damage and the loss of earning, by non-patrimonial prejudices, all to the extent that they are not the direct and indirect consequences of the illicit fact.[28]

Therefore we can not agree with the authors[29] who state that the provisions of art. 44 of Law no. 319/2006 form a whole with art. 269 paragraph 1 of the Labour Code, which is why it appears that the employer will be liable only under patrimonial liability, excluding moral damages.

Conclusions

From the analysis presented it has been observed that under current law, the employer is responsible also for moral damages, while the employee is liable only for material damages.

We appreciate that the lex ferenda requires the statements of employees' liability also for non-patrimonial prejudices produced to employers by an illegal act connected to his work. employees cover liability for non-material damage caused to the employer by an unlawful act that has to do with work.

An argument is the new vision of moral prejudices resulting from the economy of the provisions of the Civil Code that came into force on October 1st, 2011. Thus it not only regulates the legal person's calling for the repair of the non-material prejudices, but elevates to rule the compensation by the debtor also for non-patrimonial prejudices suffered by the creditor on the occasion of non-executing *lato sensu* the contract (Art. 1531 par. 3 of Civil Code).

Or, as patrimonial liability of the employee is a variety of contractual liability, and on the other hand the employer responds already, under art. 253 par. 1 of Labour Code, also for moral prejudices, we consider that an intervention of the legislature is needed in order to establish vocation employer's to repairing the non-patrimonial prejudices caused by an employee by his or her illicit act, in relation with his work.

Bibliography

I. Adam, *Drept civil. Obligaţiile. Faptul juridic*, "C.H. Beck" Publishing House, 2013;

I. T. Ştefănescu, *Tratat teoretic şi practic de drept al muncii*, 2nd Edition, "Universul Juridic" Publishing House, 2012;

Lavinia Onica Chipea, *The legal regime of individual labour conflicts*, "Universul Juridic" Publishing House, Bucharest, 2011;

[28] O.P. Musta, *Consideraţii privitoare la particularităţile răspunderii civile consacrate de art. 4 alin. 2 din Legea nr. 346/2002*, in "Revista de dreptul muncii" Review, no. 3/2007, p. 52.

[29] I. T. Ştefănescu, *op. cit.*, p. 652.

C. Stătescu, C. Bârsan, *Drept civil. Teoria generală a obligațiilor*, "Hamangiu" Publishing House, 9th Edition, 2008;

Ș. Beligrădeanu, *Studii de drept al muncii*, "C.H. Beck" Publishing House, 2007;

O. P. Musta, *Considerații privitoare la particularitățile răspunderii civile consacrate de art. 4, alin. 2 din Legea nr. 346/2002*, in "Revista de dreptul muncii" Review, no. 3/2007;

A. Țiclea, *Tratat de dreptul muncii*, "Universul Juridic" Publishing House, 2007;

A. Athanasiu, Luminița Dima, *Dreptul muncii*, All Beck Publishing House, Bucharest, 2005;

I. T. Ştefănescu, Ş. Beligrădeanu, *Prezentare de ansamblu şi observaţii critice asupra noului Cod al muncii*, in "Dreptul" Review, no. 4/2003;

L. Pop, *Drept civil. Teoria generală a obligațiilor*, "Lumina Lex" Publishing House, 2000;

I. Albu, V. Ursa, *Răspunderea civilă pentru daunele morale*, "Dacia" Publishing House, Cluj-Napoca, 1979;

M. Eliescu, *Răspunderea civilă delictuală*, "Editura Academiei" Publishing House, 1972.

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THE ROLE OF THE JOURNALIST AND MASS-MEDIA IN THE DEVELOPMENT OF THE SOCIETY

E. V. Frâncu

Emilian-Valentin Frâncu
Râmnicu Vâlcea Municipality
* Correspondence: Râmnicu Vâlcea, 14 G-ral Praporgescu St., Vâlcea, Romania
E-mail: emilian.francu@senat.ro

Abstract

Referring to the role of the press, some researchers in the domain, who have mentally represented the existence of the modern society in the absence of the mass-media, concluded that, in spite of all the shortcomings of the journalist activities, one could not entirely imagine the human existence without being accompanied and influenced by the media.

Keywords: *journalist, mass-media, information, press, development*

Introduction

The establishment of the modern democracy has led to the growth of the press' importance, which took action in three main directions as to consolidate the democratic process in his totality; the relation between the persons led and the leaders in terms of public control on the political powers by means of the journalists; the relation between the persons led and the leader, referring to the mobilisation of the citizens and their consciousness regarding political decisions; the relation between the citizens, referring to the free competition of ideas. Thus, the journalists must represent a strong binding agent between power and public, between society and politics or between particular persons, as the mass-media is envisaged as an absolute communication environment, the only environment capable of mediating the bonds between the masses in modern societie.[1].

Information – indispensable factor for the evolution of the inter-human relations

The need for information constitutes a characteristic trait of the human being from the oldest times, which is emphasized permanently, along with the evolution of society, the evolution of the complexity of social relation at the local or international level, with the progress of science and technique, in all domains of activity, along with the multiplication of the events which are important for the community, etc.

Information– as a primordial ontological factor which stands, along with mater and energy, at the origins of the universe- represents one of the main components of the human existence, without which the progress of the society, under all its aspects and the life itself of every human would be inconceivable in its absence. It is mainly revealed by means of the journalists by different means of communication such as: journals, papers, broadcasting, television, internet, etc.

The word "information", which was taken from Latin, (*informatio*) by means of the French language (*information*), has a polysemantic character, due to the numerous senses which are imposed by the various domains and contexts in which they are used. Thus, except for the meanings used currently, it also embodies other sense, attributed either by defining itself as a term (scientific or technical), either as a concept within certain branches of philosophy or other sciences and technologies whose object of study it represents[2].

[1] D. Pop, *Mass-media şi democraţia*, Polirom Publishing House, Iaşi, 2001, p. 217.
[2]The notion of information refers to an informational process (informing activities), at the result of this process (the volume, variety of information obtained), as well as certain specific phenomenon (the informational

The original sense of this notion – which mainly targets the communicative aspect[3] and in the same time, the qualitative aspect refers to the knowledge obtained from others, by own investigations or personal research accumulated from reading, reports on recent events or which have not been priory acquired or known, materials from journals, newspapers or news bulletins; obtained by means of study or education – deducted from direct observations and own experience[4].

Due to the appearance, together with the written press of other means (radio, internet), as well as the improvement of traditional transmission methods of information (the appearance of the book or electronic press), not only has the quantity of information increased, but also the transmission speed, thus creating, more useful possibilities of receiving information, as the recipients must select the sources and news they wish to access, depending on the interests and goals pursued[5], being careful to avoid the "trap" of occupying their time with these steps at the expense of developing other useful activities in the personal, family and social plan.

Moreover, the journalist also has the task to filter important issues from an increasing volume of information which originate from busy and specialised domains, having the role of passing from the supplying facts to supplying senses[6], the main objective being that the mass-media also achieves a cultural and educational function for the benefit of the society members.

Depending on the professionalism of the journalists, the press may embody an important educational, formative and instructive role, as the information transmitted by means of it may contribute to a more realistic knowledge of reality, which permits the guidance of human actions as to achieve the goals pursued.

Journalism and the progress of the society

In conformity with the doctrine[7], the news media fails to "tell" people HOW to think, but frequently achieves to tell the reader WHAT to think about, depending on the representations of the news modulated by the editors and publishers of the paper they are frequently reading. .

The mass means of communication may offer identities and aspirations, supplying new behavioural models[8]. Thus, the journalist plays an important role in the society of the individuals[9], and depending of the credibility and objectivity of the materials supplied, they create opinions, direct the values, faiths, attitudes and public behaviour[10].

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phenomenon, informational boom, etc). As to correctly understand the notion of information, other concepts must be taken into consideration: meaning, knowledge, truth, representation, mental stimulus, scholarship, culture, communication, redundancy, feedback, entropy, negative entropy, etc.., and the rules associated (See C. F. Popescu, *Practica jurnalismului de informare. Principii, reguli, provocări*, "Lucian Blaga" University Printing House, Sibiu, 1999, p. 51; Mielu Zlate, *Psihologia mecanismelor cognitive*, Polirom Printing House, Iaşi, 1999, p. 65).

[3]The communication function or the "associated" function specific to the mass-media is also known by the term of social integration function as it is considered that the process of communication also implies integration (Dorin Popa, *Mass-media, astăzi*, European Institute Printing House, Iaşi, 2002, p. 85).

[4]A. Toffler, *Puterea in mişcare*, Antet Printing House, Iaşi, 1995, p. 344; Melvin L. DeFleur, Sanda Ball-Rokeach, *Teorii ale comunicării de masă*, Polirom Printing House, Iaşi, 1999, p. 54.

[5]V. Traciuc, *Modalităţi de transmitere a ştirilor in radio*, in "Manual de journalism", vol. I, coordinated by M. Coman, Polirom Printing House, Iaşi, 1997, p. 149.

[6]Jo Bardoel, *BeyondJournalism: A Profession between Information Society and Civil Society*, in European Journal of Communication, 11(3), 1996, p. 297.

[7]B. Cohen, *The Press and the Foreign Policy*, Princeton University Press, Princeton, NJ, 1963, p. 13.

[8]W. Mills, *The Power Elite*, Oxford University Press, New York, 1956, p. 314, which also shows that "The information means tell the individual from the crown who he is, confers an identity and tell him what he wishes to be, thus, creating aspirations".

[9]Socialization also embodies the existence of important possibilities to communicate, which have become habits, between the individual and the society. It is, "in the same time, a cultural learning and conditioning, but also a cultural adaptation, prioritization and incorporation. This term finds its place in very divers theoretical currents

The relation between journalists and the receiving public may result in three effects: strengthening the existent opinions, creating new opinions- based on the information supplied by the mass-media- and changing the opinions depending on the argumentation and veracity of the information offered by the press[11].

In this manner, the mass-media has a major importance both for the evolution of the society as a whole, as well as for the documented attitude of the individuals which form it, as "people may evaluate certain tendencies and may optimise, knowingly, their decision" based on information[12].

People are searching the contact with the media in certain situation and in order to find remedies against loneliness, as to create "positive" feelings or in order to define human relations"[13].

The journalist finds himself in a key position of the society, as he fulfils an extremely complex role, due to his involvement in the information sources and the public, having the task of presenting information in conformity with the principles, rules and legal regulations specific to the journalistic activity[14]. In this sense, Randall shows that the role of a journalist is to acquire fresh information on things which are of public interest and to "transmit it to the readers as quick and as accurately of possible, in an honest and balanced manner"[15].

As a result of his objective activity, the journalist may contribute to the understanding and rectification of the negative aspects in the social life, thus creating a perfect balance between the private interest and the public interest. As a result, by revealing extremely serious facts, the journalists brought important contributions in taking certain normalisation measures of the activities envisaged, in numerous situations, some of them proving to be of considerable importance for the smooth running of the social, economic, politic life etc.[16]

The advanced technologies used by the journalists in the mass-media activity substantially influences the globalisation aspects, as the people are becoming "contingently, aware of the multitude of events occurring worldwide" and which had been normally ignored. Global expansion of the modern institutions would have been impossible without the involvement of knowledge which is represented by the news"[17].

Mass-media and democracy

The multitude of reactions towards the relation media-democracy can be reduced to two main positions: an essential one is the critique brought, which accuses the limitations

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such as: cultural anthropology, genetic or inter-human psychology" (See Gilles Ferreol, *Dicționar de sociologie,* Polirom Printing House, Iași, 1998, p. 206)

[10] D. Șandru, S. Bocancea, *Mass-media și democrația in România postcomunistă,* "Institutul European" Printing House, Iași, 2011, p. 91.

[11]See S. Chelcea, *Personalitate și societate in tranziție*, "Editura Știință și Tehnică" Printing House, Bucharest, 1994, pp. 204 and following, which shows that the first step towards a change in attitude is the "drawing of attention concerning the message" and that then, it is necessary "for the message to be understood", and the last phase consists in "accepting the content of the respective message".

[12]M. Coman, *Din culisele celei de-a patra puteri*, Carro Printing House, 1996, p. 104.

[13]J.U. Rogge, K. Jensen, *Everyday Life and Television in West Germany: An Empathetic-Interpretive Perspective on the Family System*, Sage printing House, 1988, quoted by Roger Silverstone, *Televiziunea in viața cotidiană*, Polirom Printing House, Iași, 1999, p. 53.

[14]See H. J. Gans, *Deciding What's News*, Pantheon, New York, 1979, p. 282, which states that the news must contain a multiple orientation, reflecting on the plurality of opinions and perspectives.

[15]D. Randall, *Jurnalistul universal*, Polirom Printing House, Iași, 1998, p. 37.

[16]For example, the journalists Bob Woodward and Carl Bernstein published, in the year 1972, in the daily "*Washington Post*" documented information (obtained from confidential source) from which it resulted that, under the patronage of the president of the SUA, Richard Nixon and with the involvement of the Central Investigation Agency (CIA), the illegal interception of the conversations of the "democrats" was initiated, by means of a system installed at the headquarters of the Democratic Party, in the Watergate building in Washington. As a result of the disclosure made by the two journalists, the president had to resign.

[17]A. Giddiness, *The Consequences of Modernity,* Polity Press, Cambridge, 1990, pp. 75-76.

imposed by the media logics of the classic forms of interaction, and the second one, which insists on the "co-substantial" relation between the media and the democratic opening[18].

The premise of manifesting a solid opposition which represents an indispensable element of democracy is represented by the chance to freely and publicly express one's conviction by means of the media.

On the other hand, the parties that came to power are compelled, as to keep their position, to contribute to the formation of the public opinion, with the help of the mass-media, thus bringing at their disposal their own perspectives and beliefs.

Who wishes to exercise the right to free manifestation of opinions must present the possibility of being informed regarding the thinks he is interested in[19]. One can not form his own judgements, if he does not know the facts. All works which are of public interest and with which the citizens must be familiar with in order to form justified political judgements must be discussed publicly, as an important role in this sense is defined by the journalistic.

Only those regimes which are submitted to the attention of the public opinion, by means of the mass-media, take the political maturity of the citizens seriously, as it can not be consolidated by means of the publicity[20].

The culture of the époque in which we live is related to the media and the culture of the image which developed in modernity presupposes the inter-reaction of image, sound and word in forms which create significant structures, sometimes which influences the population significantly[21].

The media culture is distinguished by its variety which is continuously enriched by new technological improvements, its penetration in the most intimate spaces of the anthropology of the daily[22], of the collective and individual experiences. The relation between the media culture and the industrial type culture is evident by the replication of production and reproduction models which are traced back to the mass-media[23].

Conclusions

In conformity with the traditional liberal conceptions, the essential role of the journalists and the mass media is that of acting in its capacity of a watch dog (*Watchdog*)[24], by criticizing the wrongful measures and actions of the state[25], as it considers that by revealing certain abuses to the public authorities, to the powerful institutions, in general, an

[18]M. Petcu, *Sociologia mass-media,* Dacia printing House, Cluj-Napoca, 2002, p. 147.

[19]D. Ş. Paraschiv, *Sistemul sancţiunilor in dreptul internaţional public*, CH Beck printing House, Bucharest, 2012, pp. 155-156.

[20]Waldemar Besson, Gotthard Jasper, *Das Leitbild der modernen Demokratie. Bauelemente einer freiheitlichen Staatsordnung*, Bundeszentrale für politische Bildung, Bonn, 1990, pp. 30-45.

[21]For example, in the electoral campaign from the years 1960, Kennedy, following the Roosevelt model, who successfully used the radio – by developing a true art of the presidential communication" – realized the importance of television for an efficient communication with the electorate, thus obtaining the function of president of the USA although 84% of the papers controlled by the republicans were against him (See V. Duculescu, Constanța Călinoiu, Georgeta Duculescu, *Drept constituțional comparat*, Lumina Lex printing House, Bucharest, 1996, pp. 74 and foll.).

[22]J. Alexander, S. Seideman, *Cultură şi societate. Dezbateri contemporane*, "Institutul European" Printing House, 2001, pp. 223-297.

[23]In the USA, the internet sites had a considerable importance in the electoral campaign developed by Barack Obama by means of his supports that used means made available by the staff candidate. the key element being denominated "*social networking*". After president Obama raised the internet to a level of political communication, the phenomenon spread with the speed of light over the Globe (Daniel Șandru, Sorin Bocancea, [10], p. 141).

[24]The term of *Watchdog* derives from the necessities of the free market of ideas and public manifestations of the individuals. Being defenseless in the confrontation with Power, the citizen delegates part f that power to the politicians, and the other part to the media in order to control the first. Thus, journalists have two main functions, namely function the activity of the politicians and to correctly inform the citizens (Doru Pop, [1], pp. 13-14).

[25]J. Curran, *Mass-media and Society*, Michael Gurevitch Printing House, Rutledge, 1991, pp. 82ff in Doru Pop, *op. cit.*, p. 223.

equilibrium may be achieved in the society which is to maintain it within the parameters of an authentic democracy.

In this sense, Jefferson declared that, if he should decide between having a government without newspapers and having newspaper without a government, he would not hesitate in choosing the second option[26]. Managing to impose itself with difficulty before the powers who are attempting to prohibit, control or corrupt it, the media communication is thus, in its founding inspiration, the fruit and manifestation of a fundamental liberty: the liberty of thinking and free expression[27].

All powers present counter-powers, however there is only one exception which does not abide this rule: the media power. Democracies are at risk when one of the powers does not have a counter-power[28].

Bibliography

D. Ş. Paraschiv, *Sistemul sancţiunilor în dreptul internaţional public*, CH Beck Printing House, Bucharest, 2012;

D. Şandru, S. Bocancea, *Mass-media şi democraţia în România postcomunistă*, European Institute, Iaşi, 2011;

L. W. Bennet, News: *The Politics of Illusion*, 6th edition, Longman, New York, 2004;

M. Petcu, *Sociologia mass-media*, "Dacia" Printing House, Cluj-Napoca, 2002;

D. Popa, *Mass-media, astăzi*, "Institutul European" Printing House, Iaşi, 2002;

D. Pop, *Mass-media şi democraţia*, Polirom Printing House, Iaşi, 2001;

J.Alexander, S. Seideman, *Cultură şi societate. Dezbateri contemporane*, European Institute Printing House, 2001;

C. F. Popescu, *Practica jurnalismului de informare. Principii, reguli, provocări*, "Lucian Blaga" University Printing House, Sibiu, 1999;

M. Zlate, *Psihologia mecanismelor cognitive*, Polirom Printing House, Iaşi, 1999;

R. Silverstone, *Televiziunea în viaţa cotidiană*, Polirom Printing House, Iaşi, 1999;

Melvin L. DeFleur, Sanda Ball-Rokeach, *Teorii ale comunicării de masă*, Polirom Printing House, Iaşi, 1999;

D. Randall, *Jurnalistul universal*, Polirom Printing House, Iaşi, 1998;

Gilles Ferreol, *Dicţionar de sociologie*, Polirom Printing House, Iaşi, 1998;

G. Lochard, H. Boyer, *Comunicarea mediatică*, "Institutul European" Printing House, Iaşi, 1998;

J. N.Jeanneney, *O istorie a mijloacelor de comunicare*, "Institutul European" Printing House Iaşi, 1997;

V. Traciuc, *Modalităţi de transmitere a ştirilor în radio*, in M. Coman (coord.), "Manual de jurnalism", vol. I, Polirom Printing House, Iaşi, 1997;

M. Coman, *Din culisele celei de-a patra puteri*, Carro Printing House, 1996;

J. Bardoel, *Beyond Journalism: A Profession between Information Society and Civil Society*, in European Journal of Communication, 11(3), 1996;

V. Duculescu, Constanţa Călinoiu, Georgeta Duculescu, *Drept constituţional comparat*, Lumina Lex Printing House, Bucharest, 1996;

A. Toffler, *Puterea în mişcare*, Antet Printing House, Iaşi, 1995;

S. Chelcea, *Personalitate şi societate în tranziţie*, "Editura Ştiinţă şi Tehnică" Printing House, Bucharest, 1994;

[26]L. W. Bennet, *News: The Politics of Illusion*, 6th edition, Longman, New York, 2004, p. 141, which also stated: "People are the only censors of those they lead and must be in possession of complete information regarding their actions by means of newspapers".

[27]G. Lochard, H. Boyer, *Comunicarea mediatică*, "Institutul European" Printing House, Iaşi, 1998, p. 6.

[28]J. N. Jeanneney, *O istorie a mijloacelor de comunicare*, "Institutul European" Printing House, Iaşi, 1997, p. VII.

J. Curran, *Mass-media and Society*, Michael Gurevitch Printing House, Routledge, 1991;

A. Giddens, *The Consequences of Modernity*, Polity Press, Cambridge, 1990;

W. Besson, G. Jasper, *Das Leitbilddermodernen Demokratie. Bauelementeeinerfreiheitlichen Staatsordnung, BundeszentralefürpolitischeBildung*, Bonn, 1990;

H. J. Gans, *Deciding What's News*, Pantheon, New York, 1979;

B. Cohen, *The Press and the Foreign Policy*, Princeton University Press, Princeton, NJ, 1963;

W. Mills, *The Power Elite*, Oxford University Press, New York, 1956.

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KOSOVO – HISTORY AND ACTUALITY

C. Jura

Cristian Jura
"Dimitrie Cantemir" Christian University, Bucharest, Romania
Correspondence: Cristian Jura, 110 Icoanei Str, 2nd district, Bucharest, Romania
E-mail: cristianjura@yahoo.com

Abstract

The Kosovo region was always the "cause of fight" between Serbians and Albanians, Kosovo becoming a long source of hate between the two populations. The Serbians considered Kosovo the "Saint Land", some kind of Jerusalem. They provided historical arguments as well: they were saying that the territory of Kosovo province was situated in the centre of their medieval empire; on this territory were the main religious "flags", which helped the Serbians to achieve their own cultural identity, in this region being situated their main monasteries built during the medieval period.

The Serbian writer Dobrico Ćosić stated in 1999 that Kosovo province "is not only a piece of land, it represents the Serbian identity itself. With the loss of Kosovo... the Serbian people was mutilated".

In this study, a range of observations are provided on etymology, a brief history, as well as the causes which determined the beginning of conflict.

Keywords: *Kosovo, Yugoslavia, Kosovo-Metohia, Army of Liberation of Kosovo, NATO.*

Introduction

In 1871, at Prizren, was organised a reunion of Serbians, where was discussed the possibility of reconquering and reintegrate the province of Kosovo in the "old Serbia", whereas the Serbia Principality was already doing plans for the expansion of Ottoman territory. In 1878, was signed a Peace Agreement which stipulated the transfer of the control of Priştina and Kosovska Mitrovica towns to Serbians and the waiving to ottoman jurisdiction, whereas the rest of Kosovo province remained under ottoman control. In the same year, the Albanian ethnics formed the League from Prizren, which aspirated to the unification of all Albanians, following to acquire autonomy in the Ottoman Empire. The League from Prizren governed Kosovo until 1881, when it was abolished by Ottoman troupes.

I. Observations on the name of Kosovo province

A theory about the name of Kosovo states that it comes from the Serbian neuter possessive adjective *kos*, which means "merle"[1]. *Kosovo Polje* means "merle field", the place were took place the famous Battle from Kosovo Polje[2].

The region currently known as "Kosovo" became administrative region since 1946, as Autonomous Province of Kosovo and Metohia[3]. In 1974, the composition "Kosovo and Metohia" was changed in "Kosovo", on Autonomous Province of Kosovo and Kosovo[4], but

[1] http://opinionleaders.htmlplanet.com/koskosova.html.
[2] It took place on the day of Saint Vitus (June 15th, currently celebrated on 28th) 1389 between a coalition of Serbian boyars and the Ottoman Empire.
[3] It was an autonomous province of Serbia within the great Yugoslavian federation which existed from 1946 until 1974.
[4] It was one of the two autonomous socialist regions of the Socialist Republic of Serbia and was a part of Federative Socialist Republic of Yugoslavia since 1974 until 1990.

in 1990, was renamed after the previous name as Autonomous Province of Kosovo and Metohia[5].

The entire region is known as *Kosovo* in Romanian, and in Albanian as *Kosova*. In Serbian, it is made a distinction between the East and West part; the term of *Kosovo* is used for the East part, whereas the West part is called *Metohia*.

The formation of Kosovo Republic is the result of decomposition of Yugoslavia, mainly of the War from Kosovo between 1996 to 1999, the nationalist renaissance from Balkans under the domination of Ottoman Empire in the XIX century, and mainly of the conflict between the Albanian and Serbian nationalities.

II. Brief history

2.1. Prehistoric and medieval epoch

During the Neolithic epoch, the region of Kosovo was within the extension of Vinča Culture[6], which was populated by Dardens between IV – I before Christ. Later on, the region was conquered by Romans in 196 before Christ and integrated in the Roman province Illyricum in 59 before Christ.

In 87 before Christ, the region of Kosovo became part of Superior Moesia[7]. In 850s, Kosovo was attached to Bulgaria, later on, in 1018, it was conquered again by Byzantines. As the Slav resistance managed to prevent the coming of Byzantine empire in the region, most of the times, the Kosovo region passed on the one hand, or in the suzerainty of Serbians or Bulgarians, and, on the other part, in the suzerainty of Byzantines, until the Serbian Principality Rascia conquered it in the XI century.

Under the full suzerainty of Serbia Kingdom until the end of XII century, the Kosovo region became a laic and secular medieval Serbian centre in Nemanjić dynasty in the XIII century, with the Patriarchy of Orthodox Church installed at Peć. The peak was reached upon the formation of a Serbian empire in 1346, which, after 1371, turned from a medieval monarchy into a feudal kingdom. Kosovo became the land of inheritance of the House Branković and Vučitrn[8].

In 1389 takes place the Battle from Kosovo Polje, won by the ottoman forces, which defeated the coalition of Serbians, Albanians and Bosnians governed by prince Lazăr Hrebeljanovici[9].

2.2. History of Kosovo pachalic

Kosovo was part of Ottoman Empire since 1455 until 1912, first as part of Rumelia pachalic and starting with 1864 as a separate province.

On the initiative of Roman-German king Leopold I[10] in 1690, the Patriarch of Serbia from Péc, Arsenie III, would have governed the relocation of a contingent of around 37,000 families, most of them Serbians, from Kosovo and other regions to Austria. However, several migrations of Christian Orthodox from Kosovo followed as well during the XVIII century during the great Serbian migration. In 1766, the Turks abolished the Patriarchy from Péc and created *jizya*, a tax system belonging to non-Musulmans, affecting much more the position of Christians in the region. In contrast, many Albanian chiefs converted to Islam, winning

[5] It was incorporated during the anti-bureaucratic revolution by the government of Slobodan Miloşevici (the first president of Serbia, occupying the position on May 8th 1989, until July 23rd 1997) since 1990 until 1999.

[6] The Vinča culture / Turdaş culture was an European culture (between the millenniums 5 and 3 before Christ) extended around the Danube in Romania, Serbia, Bulgaria and Macedonia. The name of the culture comes from Vinča, a suburb of Belgrade where in 1908 were discovered the first archaeological rests.

[7] Moesia, sometimes written Moësia, was the antic roman province situated today on the territory of the states of Serbia, Bulgaria and Romania. Geographically, it is situated between the Black Sea on east, the Balkan Mountains and the Sar Mountains in south, the river Drina on west and the Danube river on north.

[8] http://ro.wikipedia.org/wiki/Kosovo.

[9] https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html.

[10] Leopold I (born on June 9th 1640, Vienna and dead on May 5th 1705, Vienna) from the House of Habsburg was emperor of the Saint Roman Empire between 1658-1705. He was also king of Hungary, Bohemia, and Croatia. The Saint Roman Empire was an empire extended in Central Europe since the Middle Ages, since 962 and until 1806, when it was abolished on the initiative of Napoleon.

prominent positions during the Turkish region. On the whole, "the Albanians had less causes of concern", and sometimes they were persecuting hardly the Christians on behalf of their Turkish leaders. The final result of the four centuries and a half of Islamic domination was marked by a decline in the demographic structure of the Slav Christian from Kosovo.

With the "renaissance of nations" in the whole South-East Europe, began the Albanian nationalist movement, focused in Kosovo, and which caused ethnic tensions and a long fight between Christian Serbians and Musulman Albanians[11].

In 1871, at Prizren, was organised a reunion of Serbians, where was discussed the possibility of reconquering and reintegrate the province of Kosovo in the "old Serbia", whereas the Serbia Principality was already doing plans for the expansion of Ottoman territory. In 1878, was signed a Peace Agreement which stipulated the transfer of the control of Priştina and Kosovska Mitrovica towns to Serbians and the waiving to ottoman jurisdiction, whereas the rest of Kosovo province remained under ottoman control. In the same year, the Albanian ethnics formed the League from Prizren, which aspirated to the unification of all Albanians, following to acquire autonomy in the Ottoman Empire. The League from Prizren governed Kosovo until 1881, when it was abolished by Ottoman troupes.

2.3 Kosovo in the XX century

The movement of young Turks supported the centralized government and opposed to any kind of autonomy wanted by Kosovarians, mainly Albanians. In 1910, an Albanian revolt extended from Priştina and lasted until the visit of the ottoman sultan in Kosovo, in June 1911. In 1912, during the Balkan wars[12], most part of Kosovo was captured by the Kingdom of Serbia, whereas the region Metohia was conquered by the Kingdom of Montenegro. Later on, an exodus of Albanian population took place, the Serbian authorities promoting the creation of the new Serbian establishments from Kosovo, as well as the assimilation of Albanians by the Serbian society. The state of Kosovo province was completed the next year, by the Treaty from Lodon from 1913.

During the winter between 1915-1916, during the First World War, the Serbian army was withdrawn from Kosovo, thus the province was occupied by Bulgaria and Austro-Hungary, further on, in 1918, the Serbian army chased away the Central Powers. After the First World War, on December 1st 1918, the monarchy was turned into the Kingdom of Serbians, Croatians and Slovenians, and Kosovo was shared in four counties, three belonging to Serbia (Zvečan, Kosovo and south of Metohia) and one from Montenegro (north of Metohia). Nevertheless, the new system of administration from April 26th 1922 divided Kosovo in three regions of the kingdom: Kosovo, Rascia and Zeta. In 1929, the kingdom was turned into the Kingdom of Yugoslavia and the territory from Kosovo was reorganised.

In 1935 and 1938, two agreements between the Kingdom of Yugoslavia and Turkey were signed for the expatriation of 240,000 Albanians from Turkey, but which were not completed due to the Second World War[13].

In 1941, Kosovo and Yugoslavia got involved in the Second World War after the Axis Powers invaded Yugoslavia in 1941 and a great part of Kosovo became part of Albania controlled by Italians, and other parts were assigned to Bulgaria and Serbia, being under the military administration of Nazis Germany. The Italian fascist regime of Benito Mussolini[14] was exploited by the nationalist feelings of Albanians, to encourage it to create the Great Albania[15], including as well the province of Kosovo, which was obtained during the Second World War, period when dozens of thousands of Serbians were chased away from Kosovo.

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[11] http://ro.wikipedia.org/wiki/Kosovo.

[12] The Balkan wars were two wars in south-east Europe in 1912-1913, during which the states of Balkan League (Bulgaria, Montenegro, Greece and Serbia) first conquered the ottoman territories Macedonia, Albania and the majority of Thrace, and then agreed on sharing the territories conquered.

[13] http://ro.wikipedia.org/wiki/Kosovo.

[14] Fascist leader of Italy between 1922 and 1943.

[15] The term of Great Albania refers to an irredentist concept of lands beyond the borders of Albania Republic, which are considered part of a larger national land by some Albanians, in terms of a current or historical

After many revolts of partisans, led by Fadil Hoxha, Kosovo was liberated in 1944 and became province of Serbia within the Democratic Federation of Yugoslavia[16].

2.4. Kosovo in the communist Yugoslavia

After the Second World War, in Yugoslavia is instituted the communist government of Josef Broz Tito. In 1945, in Kosovo it is instituted the militarised administration, and the secret police of Tito arrests all nationalist Albanians who wanted the union of Kosovo region with Albania or the formation of a Kosovarian state.

During the years 1955-1956, thousands of Albanians were deported in Turkey. A demographic analysis of Kosovo province during the years '70s shows that the report between the Serbians and Albanians was of one Serbian to nine Albanians.

2.5. Kosovo after the fall of communism

After the fall of communist block and of Soviet Union, the world, recently escaped from the Cold War, witnessed the disintegration of Yugoslavia and the appearance of secessionist movements in the former Soviet republics.

In case of Yugoslavia, certain regions asked for much autonomy, wanting to go further than the frame offered by the internal constitutional organisation. Kosovo is another kind of region. In 1945, the Kosovo-Metohia region was assigned the status of autonomy in Serbia, status consolidated in 1963, then in 1974, on the occasion of amendment of federal constitution and abolished in 1989 by Slobodan Miloşevici, the former president of Yugoslavia. After the Albanian ethnics in the province reacted violently with respect to the withdrawal of the status of autonomy, Miloşevici sent in 1990 the Yugoslavian army in Kosovo and dissolved the parliament of the province. In September 1990, the Albanian ethnics from Kosovo organised a referendum deciding the secession from Serbia and Yugoslavia. It is obvious that the results of such referendum couldn't be acknowledged.

Before the firm attitude of Yugoslavian authorities (formed, starting with 1992, from Serbia and Montenegro), the Albanian ethnics organised a guerrilla movement, attacking mainly the Serbian police forces. The tension increased very much, the Serbian authorities reacted again very tough, forcing the Albanian inhabitants of province to abandon their dwellings. Albania contributed as well to this situation, supporting with weapons the movement of Albanian ethnics in the province. At the end of 1998's summer, the problem of Albanian ethnics from Kosovo, called by them Kosovarians, became already a humanitarian problem which drew the attention of the international community, as well as the application of the disposals of United Nations Charta and international law.

At the end of the year 1998, the Serbian authorities launched an offensive against the Army of liberation of Kosovo (paramilitary formation of ethnics), which determined the involvement of international community by the discussion from Rambouillet from 1999, discussions which didn't bring any real results[17]. In March 1999, NATO launched a range of air bombardments against Serbia, bombardments which had the expected effect, as the Serbian military forces withdrew in June 1999 from the province.

On October 14th 2003, the Serbian and Albanian Kosovarian leaders gathered in Vienna for the first discussions after the end of the conflict from 1998-1999.

In December, ONU determines a range of standards which Kosovo has to accomplish in order to launch the negotiations with respect to the determination of the final status in 2005.

In October 2005, the ambassador Kai Eide recommended in his report that the discussions related to the future region of Kosovo should continue.

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presence of Albanian population in such regions. The term refers to the inclusion of Kosovo province, as well as of some territories from the neighboring countries, Montenegro, Greece and Macedonia Republic. The Albanians are using the most the term of Ethnic Albania.

[16] http://ro.wikipedia.org/wiki/Kosovo.

[17] Alan Day, *Political and Economic Dictionary of Eastern Europe*, GBR: Europe Publications Limited, London, 2002, p. 301.

Subsequently, the ONY General Secretary, Kofi Annan, appointed Martti Ahtisaari on the position of special representative for the coordination of the political process concerning the future of Kosovo province. In February 2006 begin the discussions concerning the status of Kosovo province under the auspices of the special representative of ONU, Martti Ahtisaari.

III. Causes of conflict

There were several causes which determined the conflict from Kosovo in 1999, but an immediate cause of this conflict was Slobodan Miloşevici and his manner of persecution of Kosovarian Albanians during his mandate as president of the Federal Republic of Yugoslavia[18]. His persecutions determined eventually the creation of a violent opposition of Kosovarian Albanians against Serbians, first by creating an *Army of Liberation of Kosovo* (Ushtria Çlirimtare e Kosovës - UCK) and then by the successive acts of violence between 1998 and 1999. However, the antecedents of conflict are back in the history[19].

The Serbian writer Dobrico Ćosić stated in 1999 that Kosovo province "is not only a piece of land, it represents the Serbian identity. With the loss of Kosovo... the Serbian people was mutilated"[20].

Some commentators state that Serbia has lost Kosovo for centuries, since the population of province began to become more and more Albanian. The province populated today to an overwhelming extent by Albanians (90%) doesn't see any reason to remain in the structure of Serbia[21]. It may be said that practically speaking Kosovo has no longer been a part of Serbia since 1999. This *de facto* independence began immediately after 1989, when Ibrahim Rugova became the president of the parallel state in Kosovo. When the participation of Albanians to public institutions was discouraged by Serbian authorities, they withdrew, creating parallel administrative structures. The existence of a parallel state in Kosovo (with schools, hospitals etc…) reflects the self-confidence of the Albanians from the province. This wouldn't have been possible if the province hadn't benefited of a wide autonomy since the beginning of '80s and if a range of officials, experts and contractors hadn't been educated at the University of Priştina (founded in 1970) which became the centre of Albanian nationalism[22]. In 1991, the province declared its independence for the first time, but it wasn't acknowledged by the international community. However, beside the parallel administrative structures, Kosovo did not accomplish the conditions stipulated for statehood in the Convention from Montevideo[23]. Currently, Kosovo has a somehow dual status: it is not an independent and internationally acknowledged state, but at the same time it is independent *de facto* from Serbia by an international protectorate[24].

The problem of Kosovo province appears, in many respects, as a model of classical crisis of a minority nationalism (but majority in a part of the territory). For too many analysts, the crisis of the province was rushed (and created) by the awkwardness and irresponsibility of central authorities who were not able to anticipate the result of their actions.

In the case of Kosovo we encounter traditional elements of the movements of national emancipation:

- fast demographic increase of a minority;
- economic under-development which determined national dissatisfactions and claims;

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[18] Anca Păiuşescu, Nicoleta-Elena Buzatu, *State's Recognition and Succession Act as Contemporary Issues in International Relationships. Case Kosovo***,** The 18th International Scientific Conference "The Knowledge-based Organization", Sibiu, România, 14-16 June 2012, KBO Conference Proceedings 2 – Economic, Social and Administrative Approaches to the Knowledge-based Organization, "Nicolae Bălcescu" Land Forces Academy Publishing House, pp. 748-753

[19] http://invataistorie.blogspot.com/2011/06/conflictul-din-kosovo-1998-1999.html.

[20] Tom Gallagher, *Balkans in the new millennium: in the shadow of war and peace*, Humanitas Publishing house, Bucharest, 2006, p. 46.

[21] http://www.ecmi.de/information-services/enriched-links/67/kosovo-crisis-links/?no_cache=1.

[22] http://www.ceri-sciencespo.com/archive/decjan/articb.pdf.

[23] http://www.ejil.org/pdfs/14/5/455.pdf.

[24] http://www.ceri-sciencespo.com/archive/mars06/independence_kosovo.pdf.

- creation of a national consciousness consolidated by literacy and access to education;
- repression by the central government.

Conclusions

The question asked now is: should the separation *de facto* of Kosovo opposite to Serbia to evolve to the constitution of a new suzerain and independent state? On point 6 of the Declaration of the Group of Contact for Kosovo dated 31.01.2006 are reminded the directory lines set forth in 2005 by the group of contact constituted by the United States of America, United Kingdom, France, Germany, Italy and Russia: it is impossible to return to the situation previous to the year 1999, Kosovo cannot be divided (between Albanians and Serbians who are concentrated in the north part of province - Metohia) and it is impossible the union of Kosovo with any part of a country or with another country**.** The same declaration reasserts the need of a government relying on multi-ethnic bases, considering the conditions to provide a safe environment, duty which is incumbent upon KFOR[25]. The plan of Ahtisaari presented in January 2007 goes further than the conclusions of the Group of Contact, anticipating a supervised independence for Kosovo.

If this province of Serbia becomes an independent state, may Kosovo become a model to follow for other regions which coquette with the idea of becoming independent states? May Kosovo become a dangerous precedent? If we considered the conclusions of the group, the answer would be rather negative, since the situation from Kosovo is the result of ethnic conflicts, of ethnic purification and of the events from 1999. The Group of Contact reasserts the fact that the state of Kosovo cannot be regulated but by considering the Resolution no. 1244 of the Security Council, resolution which confirms the suzerainty of Serbia over the province (the exact formula referred to Yugoslavia – formed of Serbia and Montenegro) and granting a wide autonomy to the province. If these are the principles agreed by the Group of Contact, why it is accepted so easily that the independence *de facto* of Kosovo has to be acknowledged as well as a juridical reality? It is true that such solution would possibly solve the existent situation, but it would generate other more serious which could involve Eurasia in a devastating war. The rules of international law do not stipulate a secession right, and the appearance of some new states is possible only by the acknowledgement of the other independent states. Do these states afford to waive the rules of international law and to see one day their own territories amputated? Even when in Kosovo took place a genocide attempt, this cannot mean granting a secession right. Thus, it would mean that the principle of state suzerainty and state integrity would be left without content. The international society may apply means of pressure against some states that do not observe the rights of some minorities (using even military means, but in compliance with the disposals of the United Nation Charta), but this does not mean the territorial amputation of some states. The intervention of NATO, authorised by the Security Council, was a humanitarian intervention in order to protect the Albanian population risking to be exterminated by a dictatorial regime. Currently, things changed, in Serbia there is a government democratically elected (in January 2007 were organised legislative elections), and the country is aspiring to enter in the European Union, hoping to obtain the capacity of candidate state for the European Union.

Bibliography

I. Diaconu, *Tratat de drept internațional public*, vol. I - III, "Lumina Lex" Publishing House, Bucharest, 2005;

C. Jura, *Rolul organizatiilor nonguvernamentale pe plan international*, All Beck Publishing House, Bucharest, 2003;

[25] http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/declarations/88236.pdf.

A. Năstase, B. Aurescu, C. Jura, *Drept Internațional Public. Sinteze pentru examen*, All Publishing House, Bucharest, 2000;

A. Cassese, *International Law*, Oxford University Press, 2001;

J. Rehman, *The weakness in the international protection of human rights*, Kluwer Law International, 2000;

T. Salmon, *Issues in International Relations*, Routledge, 2000;

P. Alston, *The EU and Human Rights*, Oxford University Press, 1999;

B. Buzan, O. Weaver and J. de Wilde, *Security: a new framework for analysis*, Lynne Rienner Publishers, London, 1998.

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THE ROMANIAN CRIMINAL LAW ENFORCEMENT IN TIME IN THE LIGHT OF THE CHANGES INTRODUCED BY THE NEW ROMANIAN CRIMINAL CODE

L. A. Lascu

Liviu-Alexandru Lascu
Law and Economics Faculty, Social Sciences Department
Agora University of Oradea, Oradea, Romania
*Correspondence: **Liviu-Alexandru Lascu,** 5 M. Eminescu St., Oradea, Bihor, Romania
E-mail: liviulascu@yahoo.com

Abstract

The article aims to analyze the changes introduced by the new Criminal Code in relation to the criminal law enforcement in time, mainly in order to harmonize the criminal provisions with some constitutional principles and also, for the reason of their easily application in practice.

From this perspective we can observe that the new Criminal Code has taken over the greatest part of the provisions nowadays into force and also, has eliminated those provisions in contradiction with the constitutional principles. Among the latter we can mention those provisions which provide the retroactivity of the additional punishment, education and safety measures for reasons of public interest or the provisions relating to the optional application of the most favorable criminal law in the closed cases. We may see, also, the introduction of the laws declared unconstitutional and the Ordinances of the Government among the laws which are subjects for the application of the principle of the most favorable criminal law.

Keywords: *the law activity, ultra activity, non-retroactivity, the principle of legality of the punishment, the most favorable criminal law.*

Introduction

1. *Introductory remarks.*

The adoption of a new Romanian Criminal Code in accord with the new social and political realities of Romania, a Member State of the European Union and of the Council of Europe, requiring the rule of law in a democratic state governed by constitutional principles and laws adopted in the spirit of the Constitution, has been advertised since many years ago.

After the implementation's failure of the Criminal Code adopted in 2004, the Romanian Parliament succeeded to adopt a new Romanian Criminal Code (embedded into the Law no. 286/2009), the content of which does not indicate a specific date for implementation but provides in the article 446 paragraph (3), a requirement for the Government that within 12 months of its adoption, to submit to the Parliament a draft law relating to its application. Long after this deadline, on November 12, 2012, in the Official Monitor of Romania no. 757/2012, has been published the Law no. 187/2012 surnamed the Law of applying the new Romanian Criminal Code. This latest law foresees the date when the new Criminal Code is going to enter into force, namely February 1, 2014.

It is not our purpose in this article to analyze the feasibility of this process which requires some huge transformations of Romanian judicial system within a relatively short period of time. In the other hand, without reference to how this new Criminal Code was adopted (by using the special proceeding of Romanian Government assuming its responsibility in Parliament which entailed some criticism, especially in terms of overlapping

the powers of the executive branch over the power of legislative branch) we propose ourselves to analyze the main changes introduced by the new Criminal Code regarding the criminal law enforcement in time by taking in account the text content of the newly adopted provisions, by comparing them with those of the current Criminal Code and also, in some particular aspects, with similar provisions of the foreign legislations. We try to emphasize our opinions regarding the drafting committee's arguments for making some changes to the current provisions, whether they are more or are less motivated.

2. *Some general comments on the layout of the chapter dedicated to the criminal law enforcement in time.*

The first change that introduces the matter under our discussion is the reverse of the sections' order of the Chapter II, "The criminal law enforcement". It has been arranged by firstly placing the section on "The criminal law enforcement in time" and following the section on "The territorial enforcement of the criminal law". Even though only a symbolic one and not influencing the enforcement of the criminal law in its core content, this reverse of the sections' order is not totally irrelevant. It is caused by the deep changes of the geopolitical environment of the Romanian society nowadays, far away from that one existed in 1968, the year of adoption of the current Criminal Code. If at that time the legislator had considered the supremacy of the *principle of territoriality* in criminal law enforcement, as an expression of the policy of "independence, and non-interference in the internal affairs of another state" a very sound slogan of the Romanian communist state's leadership, the current situation is radically different. Given the fact Romania is now a E.U. Member State which means a voluntary transfer of some of its attributes of sovereignty to the supranational E.U. institutions, is, also, a party of some international treaties creating supranational authorities such as the International Criminal Court, or taking in account its involvements in some international agreements aiming the States' cooperation in order to suppress the cross-border criminality, *the principle of territoriality* had to be seriously adjusted. No less important in reconsidering the *principle of territoriality* is the fact that within the E.U. borders, the free movement of the nationals of every E.U. Member States is guaranteed and also, the current phenomenon of globalization means an increasingly degree of the people's mobility. These all above mentioned phenomena do inherently influence the phenomenon of criminality and also entail some changes which affect the absolute supremacy of the national criminal law over the territories of the states. As a result, the national authorities have to reconsider the principle of territoriality of the national criminal law as well as many other principles related to the national criminal law enforcement.

For these reasons, we conclude, the matter of the *criminal law enforcement in time* prevails. It's likely the reason why, the authors of the draft new Criminal Code did the reversal of these two sections. As a general conclusion, we also observe, the matter of *criminal law enforcement in time* under in the new Criminal Code, underwent some changes which unveils the aim of the legislator this matter to be reshaped in the light of constitutional principles like: *the legality of penalties, the non- retroactivity of the criminal law, the most favorable criminal law* and *the separation of the state's powers.*

3. *The principle of criminal law's activity*

Enshrined as a basic principle of the criminal law, t*he principle of criminal law's activity,* as stipulated in the content of the Article 3, Section 1 of the new Criminal Code remains unchanged and states that "the criminal law shall be applied to all the crimes committed during the time this law is into force". This principle is nothing more than a corollary of the constitutional principle of *legality of incrimination and punishments*, and therefore, the legislator did not find as necessary to amend the existing rule.

Neither the existing provisions, nor the new Criminal Code provides some details about the moments the criminal law enter into or out of force, for which, we conclude the legislator makes a tacit reference to the general principles governing the matter.

In what concerning the entry into force of a criminal law, is not to point out any new rules than those of the Article 78 of the Constitution which provides, as a general rule, the law comes into force 3 days after the date of its publication in the Official Monitor of Romania, or on a specific date provided in its content. In what regarding the going out of force of a criminal law or only of some provisions contained therein, we have to make some commentaries about the specific provisions of the new Criminal Code.

Until couple years ago, the only cases a law or some provisions of a law went out of force were determined by the legislator's actions. The first situation was where the legislator adopts a new law which revokes or amends the law in force in that moment and the second situation was in the case of so called *temporary law*, which provides in its content the law is going to be applied only for a specific period of time or under certain special situations.

However, according to the current reality, these two ways depicted above, proved to be insufficient and therefore another one, *the judiciary way*, is going to be opened by the new Criminal Code. This new way provide the possibility a law or statutory provision (not just criminal) should not be applied, although it is not repealed, amended or reached the end, if declared unconstitutional by the Constitutional Court of Romania or incompatible with the EU legislation by the Court of Justice of the European Union (CJEU). These above mentioned courts have exclusive attributes to interpret the constitutional or E.U. legislation and both of them prevail over the national criminal laws, the decisions of these courts become mandatory and therefore, every national court is obliged not to apply the criminal provision into the question. Thus, we assist to the emergence of a new way of going out of force for a criminal law.

4. The extra-activity of the criminal law.

Beside the mentions we made in the previous section about the principle of *the criminal law's activity*, it seems to be natural to mention also the exceptions to the rule of *activity*, i.e., the situations where a criminal law extends its effects beyond the moment it went out of force, namely, the *ultra-activity of the criminal law* or the situations where a law is to be applied even to the crimes committed before its entry into force, namely *the retroactivity of the criminal law*. In regulating these situations of *extra-activity of the criminal law*, as we previously mentioned, the legislator tried to circumscribe the new Criminal Code provisions, as much as possible, to the light of the constitutional principles. In what regarding the matter we refer to, the Article 15 paragraph (2) of the Constitution, summarizing the both situations of *activity* and *extra-activity* of the criminal law, states: *"The law provides only for the future, excepting the cases where is to be applied the most favorable criminal law"*. In other words, the constitutional provision establishes the *activity* and *the most favorable criminal law* as key principles relating to the scope of the criminal law enforcement in time.

If we refer to what changes the new Criminal Code is going to introduce on these issues, as a general note, we can see a clear mention of the situations of the criminal law's extra-activity in every stage of the criminal proceedings, we also see some of the current provisions were removed as they do not comply with the constitutional principles, as well as a harmonization of the principle of *the most favorable criminal law* with other constitutional principles like *the separation of the powers in the state* or *the legality of the punishment*.

4.1. The enforcement of a decriminalization law.

The Article 4 of the new Criminal Code, entitled "*The enforcement of the decriminalization law"*, takes only the content of the first paragraph of the Article 12 of the current Criminal Code, entitled "*The retroactivity of the criminal law"*, which states that an old criminal law does not apply and all its consequences cease, where a new law decriminalizes a fact which is a crime according to the old law. The content of the paragraph 2 of the current Criminal Code stating "*The new law which provides safety measures and educational measures also applies to the crimes still on the trial"* was not considered as being a case where to apply the principle of *the most favorable criminal law*, so, it did not pass the test of constitutionality and therefore this text disappears in the new Criminal Code.

In what regarding the above mentioned provision, there are some opinions in doctrine according to which, the safety and educational measures should not necessarily be regarded as punitive measures in their nature and that they are provided by the criminal law rather as means of protecting the public interest than as ways of coercion. Based on this concept, the current Criminal Code established that these measures should not be applied in relation to when the crime has been committed but to the time when the crime is on the trial. Thus, the intervention of the legislator by adopting these measures is nothing more than a fresh expression of the current willingness of the society[1].

Even if the new regulation does not change the legal nature of these above mentioned measures, their retroactive enforcement is no more possible, because they are contrary to the constitutional principle enunciated in the Article 15 paragraph (2) of the Romanian Constitution.

4.2. The enforcement of the most favorable criminal law.

Established in the current Criminal Code and the Romanian Constitution, this principle of criminal law is also previewed in the new Criminal Code, with the mention, its provisions have suffered some changes.

The reason to apply this principle into an ongoing criminal proceeding is that of making a kind of social equity. Thus, if a new criminal law is more lenient than that into force at the moment the crime has been committed, then it seems to be natural to apply it even to the facts committed before its entry into force, because this new criminal law meets the new demands of the society for alleviated conditions of criminal liability, as expressed by the legislator. In the opposite situation, if the new criminal law is less favorable, then it is abnormal and against the constitutional principle of *legality of the penalties* for the perpetrator, who is expected to behave according to the requirements of the law in force at the moment of the crime commission, to burden some more severe conditions, as provided by the new criminal law, just because these are understood as being in accord with the current will of the society.

Known as *"eclectic"* or *"two-dimensional"*[2], this above mentioned theory about the enforcement of *the most favorable criminal law* prevails nowadays in this matter of the criminal law. Its double dimension consists in the fact, on the one hand, it takes the opinions of the classical school of law relating to the *ultra-activity of the criminal law*, considering the subjective rights which the person has already acquired, on the other hand, it takes also the opinions of the positivist school's representatives regarding *the retroactivity of the criminal law*, as it represents a fresh view of the society and also a better response to the crime in question.

We can note, also, that in the new Criminal Code, this matter has been restructured in the sense, its provisions were delimitated according to the fact there is or there is not a final decision of the chamber in the trial. This separation seems to be natural, because the things the judges are demanded to do, are different in these two cases.

4.2.1. The enforcement of the most favorable criminal law until the chamber gives a final sentence in its judgment.

In this first situation, the judge who is demanded to apply the *principle of the most favorable criminal law* has to compare the provisions of the all criminal laws which were into force in the period since the crime under discussion has been committed and until the moment the final decision has been issued. Following, the judge has to asses which one provision of these laws, according to the principles of doctrine and the concrete situation of the case on the trial, meets the criteria of being the most favorable, then to apply it, accordingly. However, it

[1] See, V. Dobrinoiu, I. Pascu, I. Molnar, G. Nistoreanu, A. Boroi, *Drept penal, Partea generală*, "Europa Nova" Publishing House, Bucharest, 1997, p. 75.
[2] See, M. Basarab, V. Paşca, G. Mateuţ, C. Butiuc, *Codul penal comentat. Vol. I., Partea generală*, "Hamangiu" Publishing House, Bucharest, 2007, p. 52.

should be mentioned that neither the present nor the new regulations have established some legal criteria according to which, the judge may asses the most favorable law. Therefore, the judge is called to determine, according to the concrete situation, the elements that qualify a law as being more favorable than others, but a combination of some provisions of those laws in the aim of creating a more favorable situation for the accused, is not allowed[3].

An innovatory provision of the new Criminal Code in this matter is that provided in the Article 5 paragraph (2) which explicitly state that among the laws, taken into account when making the application of the most favorable criminal law, must be found also the laws or part of laws which have been found unconstitutional, as well as the Government's Emergency Ordinances (G.E.O.), regardless the fact they have been later approved by the Parliament, amended, improved or rejected, provided that they had been into force in a specific period of time, since the crime had been committed until to the final judgment of the case. The reason for introducing this provision is obvious. The mentioned above laws and G.E.O., even if currently they are fully or partially out of work, they were in the past time into force and applied in some concrete situations, during the relevant period of time (i.e. since the crime had been committed to the final judgment of the case). Consequently, if compared with other criminal laws which were enforced within the same period of time and appear as being more favorable, then, it is natural these unconstitutional laws or G.E.O.s to be considered as "criminal laws" within the meaning of the Article 5, paragraph (1) of the new Criminal Code.

Another change in the new Criminal Code, belonging also to this chapter is that removing the content of Article 13 paragraph (2) of the current Criminal Code, relating to the regime of the *complementary penalties*. In the current regulatory regime has been set up a rule in what concerning the application of the *complementary penalties*, in the sense the new law will be always applied. The explanation of the Romanian legislator adopting this type of regulation lies in the influences of the *positivist law school* over the Romanian criminal doctrine at the time the current Criminal Code had been adopted, that is, in the matter of the *complementary penalties*, a new law always reflects the current needs of the social defense in a better way than the previews laws[4]. The legislator has chosen this regulatory pathway most probably because the *complementary penalties* are being imposed largely in the aim of protecting the public interest. The fact that the legislator gave up this provision in the new Criminal Code appears as being natural since it contravenes the constitutional principle of *non-retroactivity of the law*. As the only one exception is allowed where is to be applied the principle of *the most favorable law* in criminal matters and the hypothesis of applying it to the regime of *complementary penalties* can not be excluded, makes us to conclude that the provision to which we refer of the current Criminal Code is obviously unconstitutional and this is the reason of not including it among the provisions of the new Criminal Code.

4.2.2. The enforcement of the most favorable criminal law after the final sentence in the case is done.

Unlike in the situation presented in the previous section, the judge in the position to apply the principle of *the most favorable criminal law* to a case definitively tried has a different mission. The sentence of those cases has already established, the *principal penalty* as well as the *complementary penalty* or *safety or education measures*, where appropriate. The judge is required, then, to apply *the most favorable criminal law* solely in those cases where the new criminal law contains some lenient provisions regarding the limits of the punishments or the measures above mentioned. The enforcement of the most favorable criminal law appears to be justified even in some situations where a great deal of punishment or measures has already been done.

[3] The rule of "*lex tertia* exclusion" supposes that a judge cannot combine two or more favorable provisions belonging to distinct laws, in order to create a new one, as the most favorable. This is because the judge cannot substitute the legislator. See V. Paşca in M. Basarab, V. Paşca, G. Mateuţ, C. Butiuc, *Codul penal comentat. Vol. I, Partea generală*, "Hamangiu" Publishing House, Bucharest, 2007, p. 54.

[4] *Ibidem*, p. 58.

The new Criminal Code has taken over some of the current regulations relating the situations where the new law must be compulsorily applied, namely those of the Article 14 paragraph (1)-(3). We can see also, those regulations relating to additional penalties, education and safety measures provided in the Article 14 paragraph (4) of the current Criminal Code have been modified. The provisions of the Article 15 regarding the situations where the application of *the most favorable criminal law* is optional, does not appear in the new regulation. Further, we are going to examine in turn each of these cases.

With respect to the principal penalties (i.e. the life detention, imprisonment and fine), the regulation remains unchanged, meaning that, if the sentence of imprisonment or fine is greater than the maximum level set by the new criminal law for the crime under discussion, the penalty must be reduced to this maximum level of the new law and whether the new law provides for a lenient kind of penalty, like some years of imprisonment instead of life detention or or a fine instead of imprisonment, then it must replace it with the maximum of the penalty provided in the new law. If being previewed a fine in the new law, taking in account the imprisonment already done, it can be removed in whole or in part. These changes of punishment are required not only in the aim of applying *the most favorable criminal law* but also in the aim of complying with the principle of *the legality of the penalties*. If those persons convicted under the old criminal law had to burden a different kind of punishment or in some limits greater than those required by the new law, than we would be in a situation of a violation of this constitutional principle.

In what regarding the current provisions of the Article 14 paragraph (3), relating to the additional penalties, education and safety measures we can observe that their modification is justified since they allow the new criminal law to be retroactively enforced, even if it contains some provisions more stringent than those of the old law. As in the cases mentioned above, the regulation currently in force was designed so, at that time, for reasons of public interest. Currently, it would be contrary to the constitutional principle which allows a retroactive enforcement of a criminal law only if it's more favorable.

A substantive change introduced by the new Criminal Code is the fact, among its provisions are no longer previewed that regulating *"the optional enforcement of the most favorable criminal law in the cases the punishment is already established by a final sentence"* as provided in the Article 15 of the current Criminal Code. From the explanations of the Government[5], which accompanied the draft new Criminal Code during the debates in Parliament, we can conclude that the reason to abandon the regulation in question is the application of the principle of separation of the powers in state, explicitly enshrined in the Constitution. Based on this, it was considered that between *res judicata* as an attribute of the judiciary branch and the principle of *the most favorable criminal law* as a result of adopting a new criminal law by the legislative power, must be a balance. The legislator's aim was a judicial sentence to be subject of modification by the legislative branch, only in some exceptional circumstances. Specifically, if a criminal penalty was established by a final sentence, then it will be rightly changed by the new law, according to the Article 6 of the new Criminal Code, only if the nature differs or the limit of the penalty exceeds from those of the new law. The reason is obvious, namely, to avoid a conflict with another constitutional principle, namely *the legality of the penalties*. Otherwise, *res judicata* can not be changed by the legislative or executive branch.

5. The temporary criminal law enforcement.

The provisions relating to this matter can be found in the both criminal codes. The novelty is the fact, beside the provision of the current Criminal Code in Article 16, namely *"the temporary criminal law must be applied to the crimes committed while it was in force, even if the act not been prosecuted or tried at that time"*, in the new Criminal Code, the

[5] See, *** *Noul Cod Penal. Expunere de motive*, "Hamangiu" Publishing House, Bucharest, 2009, p. 6.

legislator has added a definition of the term *"temporary criminal law"*. Thus the Article 7, after the paragraph (1) which integrally took over the content of the provision mentioned above, states in the paragraph (2) that the temporary criminal law is that *"…which provides the moment of its out of force or whose enforcement is limited by the temporary nature of the situation which entailed its adoption"*. The definition has a beneficial effect in terms of clarifying the concept of *temporary criminal law* but otherwise, it does nothing but takes the definition already existing in the Romanian criminal doctrine.

Nevertheless, a problem in question still remains unclear after the adoption of the new Criminal Code, namely that concerning *the ultra-activity* of the temporary criminal law, because this temporary criminal law will be replaced by a new criminal law, most probably, a more favorable one. The authors in Romanian criminal doctrine support two contrary opinions.

On one side are those who argue that the temporary criminal law will be applied even after the period it was in force, for the acts committed during that period and still not definitively tried. The reason would be that it's the express will of the legislator in this respect since it explicitly regulated so[6]. Otherwise, given the limited and not very long period of time during which it becomes effective, this temporary law will be deprived of efficiency in a significant manner even more because is to be expected that most of these acts will be prosecuted and tried beyond the expiry of the temporary law.

On the other side are those who argue that the temporary criminal law cannot be an exception to the general rule of the enforcement of the principle of *the most favorable criminal law*, as it has been expressly provided in the Constitution, and prevails over any provision of the Criminal Code. They say also, if not being provided an explicit exception of the enforcement of this principle in what concerning the temporary criminal law, a different interpretation would cause major disruptions in practice[7].

Although the first view can be seen as a correct argument in the need for an effective enforcement of the temporary criminal law in a very special period, we believe that given the legal force of the principle which allows a more favorable criminal law to be enforced retroactively is likely to seriously limit the *ultra-activity* of the temporary criminal law.

Conclusions

The changes introduced by the new Criminal Code relating to the matter of *the criminal law enforcement in time*, in the greatest part of them, were expected since long time ago, for various reasons. Firstly, the enforcement of a criminal code, older than 40 years, who survived a radical change of political regime, was becoming more difficult to be enforced in the same time with a new Constitution adopted in 1991 which follows the model of the democratic states and which provides guarantees, rights and freedoms for the citizens. Even if not strictly in the matter discussed above, the provisions of the current Criminal Code clashed several times the constitutional principles and therefore, the Constitutional Court was asked to adjust a great part of these provisions. Over the time, the number of these unconstitutional provisions became greater and greater, and it has created the impression of a "patched building which does not deserve to be renewed but to be entirely rebuilt".

If the legislature has succeeded to create a modern and efficient legal framework in the matter to which we refer, is too early to say. What we see is that the mechanism of harmonization of each criminal provision with the constitutional principles did work efficiently and therefore, in the future, as long as this Constitution remains unchanged in what

[6] See, T. Vasiliu, G. Antoniu, Ş. Daneş, Gh. Dărângă, D. Lucinescu, V. Papadopol, D. Pavel, D. Popescu, V. Răműreanu, *Codul penal, comentat şi adnotat, Partea generală*, "Editura Ştiinţifică" Publishing House, Bucharest, 1972, p. 83.

[7] See, M. Basarab, *Drept penal. Partea generală, vol. I & II*, "Lumina Lex" Publishing House, Bucharest, 1995, p. 61.

regarding the principles above mentioned, we believe that the exceptions of unconstitutionality with respect to the criminal provisions will be invoked to a lesser extent.

Another category of changes were determined by the socio-political realities that characterize Romanian society nowadays. We refer to the fact Romania is a Member State of the European Union, which requires certain standards in the national legislation and also to be harmonized with those belonging to other Member States.

On the other hand, as a State Member of the Council of Europe which requires certain standards in the administration of justice, implicitly recognizing the jurisdiction of the European Court of Human Rights (ECHR) and the recommendations of this court, the Romanian state had to adapt its criminal legislation including the provisions of the new Criminal Code. There were not just a few the convictions of the Romanian state by ECHR's decisions caused by certain criminal provisions which violated the Human Rights Convention and consequently, the legislator had been enforced to adopt the new Criminal Code in accordance with these ECHR's requirements.

As a final conclusion we say that essentially in the near future for the new Criminal Code is to enter into force, together with some procedural provisions, highly correlated, as to allow a proper enforcement. It is quite possible that some of its provisions are still not appropriate from a constitutional perspective or in relation with the requirements of the European standards but all these troubles can be recovered. Its entering into force, even though with some challenged provisions, will be the small evil if comparing with the evil burden by the Criminal Code adopted in 2004 which did not ever enter into force.

Bibliography

*** *Noul Cod Penal. Expunere de motive*, "Hamangiu" Publishing House, Bucharest, 2009;

M. Basarab, V. Paşca, G. Mateuț, C. Butiuc, *Codul penal comentat. Vol. I., Partea generală*, "Hamangiu" Publishing House, Bucharest, 2007;

V. Dobrinoiu, I. Pascu, I. Molnar, G. Nistoreanu, A. Boroi, *Drept penal, Partea generală*, "Europa Nova" Publishing House, Bucharest, 1997;

M. Basarab, *Drept penal. Partea generală, vol. I & II*, "Lumina Lex" Publishing House, Bucharest, 1995;

T. Vasiliu, G. Antoniu, Ş. Daneş, Gh. Dărângă, D. Lucinescu, V. Papadopol, D. Pavel, D. Popescu, V. Rămureanu, *Codul penal, comentat şi adnotat, Partea generală*, "Editura Ştiințifică" Publishing House, Bucharest, 1972.

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THE EVOLUTION OF FUNDAMENTAL RIGHTS PROTECTION WITHIN THE EU LEGAL ORDER

K. Margaritis

Konstantinos Margaritis
PhD candidate, Faculty of Law,
National and Kapodistrian University of Athens, Athens, Greece
Attorney at Law
E-mail: konstantinos_margaritis@yahoo.com

Abstract

The issue of fundamental rights protection in the European Union is of highest importance. The discussion on the topic has been started as early as the beginning of 1970s, although the founding Treaties did not include any catalogue of fundamental rights. After a long evolutionary process with many actors involved, the final result is shown in the Treaty of Lisbon.

Keywords: *fundamental rights, EU primary law, ECJ case law*

Introduction

Already from the 17th century, the notion of fundamental rights as a burden in the arbitrariness of the rulers has been crystallized as an essential element of the polity organization in Europe. The father of classical liberalism, John Locke, has described the limitation of public authority based on the rights of the person; their protection and peaceful enjoyment is, according to the philosopher, the rationale for establishment of political society. We can clearly understand that in the European classical thought the concepts of fundamental rights and authority are mutually connected. The aim of this paper is to clarify the steps of fundamental rights protection in the peak of European civilization, the European Union.

In the case of the Communities and the Union, the public authority derives from the member states under the method of competence transfer. Hence, to the extent that the public authority is transferred, the protection of fundamental rights should follow the same way. Otherwise there would be no framework for the citizens of EU to be protected in cases of power abuse.

The absence of fundamental rights protection in the founding Treaties

At the time the Communities were established, the protection of fundamental rights seemed to be totally absent from the Treaty of Paris as well as from the Treaty of Rome. The creation of a common market in the European area and its development through the adoption of certain policies was the main aim during the first phases of the new organization, as proven by the wording of article 2 Treaty of Rome. The adoption of the so called Community freedoms (services, capital, good, workers)[1] acted as an important mean to the achievement of the above mentioned aim. The general institutional structure of the Treaties left no space for interpretation as to the approach on the protection of fundamental rights; it was the outcome of lack of political will on behalf of the founding member states to establish a protection mechanism and to include certain rights in the Treaties.

This lack of political will was not expressed for the first time at the establishment of the ECSC or the EEC. An entirely general provision, without any specific inclusion of rights

[1] For an extensive analysis of the Community freedoms, see Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford University Press, 2nd edition, Oxford, 2007.

as fundamental was contained in the proposal for the establishment of the European Defense Treaty in 1952 which was never adopted. The same result appeared in the proposal for the European Political Community where, nevertheless, the incorporation of the ECHR and its First Protocol at its legal order was included; after major disagreements, the idea was abandoned in 1954.[2] It can be said that the founding member states had not reached the level of institutional maturity required for the acceptance of common principles and their guarantee as rights in Community level.

Nevertheless, the Treaty of Rome contained certain articles that could be seen in the light of fundamental rights protection, even at a basic level, such as the prohibition of discrimination based on nationality (article 7) and the equal pay for equal work among men and women (article 119), yet more as necessary prerequisites for the normal operation of the common market, rather than rights *per se*. Furthermore, provisions that protect rights were added in the relevant chapters of community freedoms, for example the principle of non discrimination (articles 48, 52, 59 and 67 of the Treaty of Rome). In that case as well, we cannot speak of pure rights protection, but for burdens overcome in order to achieve the proper application of community freedoms as a mean for materialization of the common market.

The role of the ECJ

The position of the ECJ when issues of fundamental rights were raised was of highest importance in the evolution of their protection within the Union. Its initial approach at the end of the 1950s could be summarized in an attempt to avoid judging on the topic on the basis of not having jurisdiction.[3] The lack of explicit competence in conjunction to the absence of any fundamental rights catalogue in the community legal order, led the ECJ to adopt a more passive position in order not to create additional interpretational issues on the topic of (institutionally nonexistent) fundamental rights.

At the end of the 1960s, the situation changed dramatically. The ECJ got involved to issues of fundamental rights and substantially, on a case by case basis,[4] it established the principle of community protection of fundamental rights. Thus the ECJ drawn the conclusion that fundamental rights are part of general principles of community law and as such, the ECJ is obliged to protect. For that protection, the ECJ searched for sources which it found in the common constitutional traditions of the member states and the international agreements that the member states participate at. More specifically, it relied on the ECHR as a source of inspiration for the fundamental rights protection in the community legal order.

An important reason in the conversion of the ECJ was the founding decision of member states Constitutional Courts. Given the fact of the absence of a relevant catalogue in community legal order, the German Federal Constitutional Court[5] and the Constitutional Court of Italy[6] ruled that they retain the right to review Community acts for fundamental rights violations as guaranteed in the respective national Constitutions.

Despite explicit recognition in the ECJ case law, the ECHR had no binding effect in the Community legal order nor was the ECJ bound to follow the case law of the Strasbourg Court. Furthermore, there was no explicit concept of the protection of fundamental rights. In other words, there was no stability as to the extent of such protection; stability that could be secured only through formal institutional guarantee.

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[2] S. Martin (ed.), *The Construction of Europe: Essays in Honor of Emile Noel*, Kluwer Academic Publishers, Dordrecht, 1994, p.p. 19-40.

[3] C-1/58 Stork vs. High Authority [1959] ECR 17, C-36/59, 37/59, 38/59 and 40/59 Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG vs. High Authority [1960] ECR 423.

[4] Pivotal cases are C-29/69 Stauder vs. City of Ulm [1969] ECR 419, C-11/70 Internationale Handelsgesellschaft [1970] ECR 1125, C-4/73 Nold vs. Commission [1974] ECR 491, C-36/75 Rutili vs. French Minister of the Interior [1975] ECR 1219, C-44/79 Liselotte Hauer vs. Land Rheinland-Pfalz [1979] ECR 3745.

[5] Solange, BVerfGE 37, 271.

[6] 183/73 Frontini vs. Ministero delle Finanze.

Fundamental rights in the foreground: discussion on improvement

Under the influence of the case law, basically of the ECJ but also of member states courts, already from the 1970s, an extensive debate has started on the position and the role of fundamental rights in the community legal order. Given the institutional background of the time, the possible solutions for improvement of fundamental rights status were developed on two basic pillars: the accession of EC/EU to ECHR and the adoption of a community catalogue. The Commission directly expressed a detailed opinion on the first pillar in 1979 in the relevant Commission Memorandum[7] where the advantages and disadvantages of such a decision were analyzed.[8]

Firstly, a possible accession would empower the political position of the EC/EU as an organization that openly aims to the protection of fundamental rights by accepting the external review of the ECHR. Since the protection of rights is historically an integral part of the European identity, the EC/EU would prove its devotion to principles already outlined as rights in the ECHR.

In addition, accession to ECHR would clarify the relation between community law and ECHR in cases of possible conflict. In that sense, on one hand the member states would not held responsible for issues that are substantially related to violations on behalf of EC/EU acts, on the other hand the EC/EU would be in position to directly defend its legislation before the Strasbourg Court as a High Contracting Party of the ECHR.

Because of accession, the ones who were persistently demanding for a catalogue of fundamental rights in EC/EU would be reassured. As the formulation of such catalogue would be a difficult, laborious and time consuming attempt, the ECHR constituted a "ready" catalogue that all member states have included to their national legal orders. In that way, the danger of national courts decisions that are related to fundamental rights violations based on national constitutional provisions will be narrowed. Accession would also intensify attention of community institutions in issues of compliance with fundamental rights and at the same time in avoidance of conflicts.[9]

The basic arguments against accession of EC/EU to ECHR could be summarized in those of political and institutional character. The first category pertained the strict perception that the EC/EU should have its own catalogue of rights. Since the nature of EC/EU, especially at that time, prescribed the focus more on economic rights rather than traditional civil rights that are basically guaranteed in ECHR,[10] a possible accession would mislead the debate from the major topic which was the creation of a fundamental rights catalogue connected to the nature of EC/EU.

Another important argument against such accession was related to the institutional structure of the ECHR. Generally speaking, the ECHR has been established to accept states not unions of states. This is easily proven from the terminology used therein such as "State", "national security" or "country". In that sense, a large amendment should take place in the ECHR in order to be able to accept the EC/EU as a member. A fundamental parameter of that difference is that of limited access to justice in community legal order, unlike the other ECHR members; a right definitely important that should be noticeably improved within EC/EU.

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[7] Commission Memorandum, *Accession of the Communities to the European Convention on Human Rights*, Bulletin of the European Communities, Supplement 2/79, Brussels, 1979.

[8] K. Economides, J. Weiler, *Reports of Communities*, Modern Law Review, vol. 42, Blackwell Publishing, Oxford, 1979, p.p. 683-695, B. Paulin, Mary Minch, *The European Community and the European Convention on Human Rights*, Government and Opposition, vol. 15, Blackwell Publishing, Oxford, 1980, p.p. 31-47.

[9] Loreta Saltinyte, *European Union accession to the European Convention on Human Rights: Stronger Protection of Fundamental Rights in Europe?*, Jurisprudence, vol. 17, Mykolas Romeris University, Vilnius, 2010, p.p. 177-196.

[10] R. Blackburn, J. Polakiewicz (eds.), *Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000*, Oxford University Press, Oxford, 2001, p.p. 8-9.

Furthermore, the participation of EC/EU representatives could be problematic in the sense of complete connection between the citizenship of a member state and the EC/EU citizenship, but also because of the extremely large population of the Union. Although the participation of Union representatives to the ECHR institutions (Parliamentary Assembly, Committee of Ministers, Court) is necessary, it should be promoted in such a way that the balance between the Union's special characteristics and the other ECHR members would be maintained.

Concerning the second pillar for improvement of fundamental rights protection in EC/EU, the creation of a special catalogue, the general approach was much more positive. From the beginning of the whole debate, all institutional actors agreed on the creation of a fundamental rights catalogue within the Union. Besides the symbolic value that such a catalogue would add by enhancing the loyalty of the Union to fundamental rights, it would also contribute to the creation of legal certainty to its citizens. With the adoption of such catalogue in EU law, the position of the citizens would be highly empowered in relation to the Union and the member states when implementing EU law. Furthermore, this catalogue would be developed on the basis of the Union's special characteristics and would therefore contribute towards European integration.

However, despite all positive approach, formidable difficulties arose that delayed the progress of the formulation; difficulties related to political and technical character. Was it possible a consensus to be reached between member states with totally different traditions on issues of fundamental rights protection, such as the United Kingdom and Germany? Besides that, what rights should be included in the catalogue of the Union? Should there be merely economic rights or traditional civil ones?[11] As a result, it can be said that it is extremely hard for certain member states to accept a binding catalogue within the Union, especially in the case that the rights contained therein conspicuously differed from their constitutional traditions.[12]

Reference on primary law

A first attempt of institutional inclusion for the protection of fundamental rights in the EU primary law, based in substance and terms on the ECJ case law, took place in 1986 in the preamble of the European Single Act. The determination of the member states to enhance democracy on the basis of fundamental rights as recognized in the Constitutions and laws of the member states, the ECHR and the Social Charter, with emphasis on freedom, equality and social justice was demonstrated. Although politically important, this inclusion did not differ much from a political declaration since it did not have any binding effect.

Consequently, in the Maastricht Treaty article F, par. 2 stated that "the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law". In that way, a fundamental rights provision was included for the first time in the body of EU primary law. Nevertheless, this approach was not totally clear; respect of fundamental rights does not mean binding effect in legal terms towards ECHR or the common constitutional traditions. Therefore this attempt remained semi completed.

The Treaty revision that took place with the Amsterdam Treaty had little effect on the development of a more complete recognition of fundamental rights protection within the Union. In other words, the Amsterdam revision did not lead to a clear under identification of certain rights, either by forming a catalogue or by institutionalizing a possible accession to ECHR. Hence, the expression of respect towards fundamental rights as guaranteed in the ECHR and the common constitutional traditions of the member states was simply repeated.

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[11] The enrichment with all generations of rights is proposed in R. Hanski, M. Suksi (eds.), *An Introduction to the International Protection of Human Rights*, Abo University, Institute for Human Rights, Turku, 1999, p.p. 49-64.

[12] R. Bernhardt, *The protection of fundamental rights in the European Community*, Bulletin of the European Communities, Supplement 5/76, Brussels, 1976, p. 27.

The contribution of the Treaty of Amsterdam can be found elsewhere. The institutionalization of a specific mechanism to suspend certain of the Treaty rights, including the voting rights of the member state representative in the Council, to member states that seriously and persistently violate fundamental rights demonstrated political will for fundamental rights protection.[13]

In that institutional environment the creation of an EU catalogue started in 1999. Taking into account the general progress of European integration in other domains and the increasing need for a unambiguous recognition of fundamental rights for the EU citizens, the German Presidency put the issue as priority on its agenda and laid the foundation for its practical materialization. In that way, the Charter of Fundamental Rights of the European Union was formed.[14]

The Treaty of Lisbon and full recognition

After the revision of Nice and despite the declaration of the EU Charter of Fundamental Rights, there was no further progress on the institutional recognition of fundamental rights; it remained at the level of declaration. The giant step was taken with the Treaty establishing a Constitution for Europe, a Treaty that was never enforced. Hence, the full recognition of fundamental rights in EU legal order was achieved in the Treaty of Lisbon. In a general spirit of revision that led to fundamental institutional changes to the functioning of the European Union, the new article 6 TEU contained two major changes: 1) the recognition of the rights, freedoms and principles of the EU Charter which shall have the same legal value as the Treaties[15] and 2) the background for the EU accession to ECHR.[16]

Conclusion

In the field of fundamental rights protection in EU legal order, the Treaty of Lisbon inaugurated a period of important changes of constitutional value. The highly expected catalogue, the EU Charter, obtained the same legal value with the Treaties and the Union can finally access to the ECHR. In this manner, the European Union acquired an autonomous constitutional framework for the protection of fundamental rights within its legal order. The development of this achievement passed through many stages and followed an evolutionary route. This route reveals the burdens that need to be overcome during the process of integration. The initial lack of political will was fulfilled with brave judicial activism by the ECJ which acted as a true constitutional court in nature. Now, the practical application of this whole new framework remains to be seen.

Bibliography

A. Biondi, P. Eeckhout, Stephanie Ripley (eds.), *EU Law after Lisbon*, Oxford University Press, Oxford, 2012.

Loreta Saltinyte, *European Union accession to the European Convention on Human Rights: Stronger Protection of Fundamental Rights in Europe?*, Jurisprudence, vol. 17, Mykolas Romeris University, Vilnius, 2010.

Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford University Press, 2nd edition, Oxford, 2007.

S. Peers, Angela Ward (eds.), *The EU Charter of Fundamental Rights: Politics, Law and Policy*, Hart Publishing, Oxford, 2004.

[13] The mechanism belongs to negative integration, P. Alston, J. H. H. Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy*, European Journal of International Law, vol. 9, Oxford University Press, Oxford, 1998, p. 665.

[14] On the issue, S. Peers, Angela Ward (eds.), *The EU Charter of Fundamental Rights: Politics, Law and Policy*, Hart Publishing, Oxford, 2004.

[15] A. Biondi, P. Eeckhout, Stephanie Ripley (eds.), *EU Law after Lisbon*, Oxford University Press, Oxford, 2012, p.p. 155-179.

[16] A. Biondi, P. Eeckhout, Stephanie Ripley (eds.), *op. cit.*, p.p. 180-196.

R. Blackburn, J. Polakiewicz (eds.), *Fundamental Rights in Europe, The ECHR and its Member States, 1950-2000,* Oxford University Press, Oxford, 2001.

R. Hanski, M. Suksi (eds.), *An Introduction to the International Protection of Human Rights*, Abo University, Institute for Human Rights, Turku, 1999.

P. Alston, J. H. H. Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy*, European Journal of International Law, vol. 9, Oxford University Press, Oxford, 1998.

S. Martin (ed.), *The Construction of Europe: Essays in Honour of Emile Noel*, Kluwer Academic Publishers, Dordrecht, 1994.

B. Paulin, Mary Minch, *The European Community and the European Convention on Human Rights*, Government and Opposition, vol. 15, Blackwell Publishing, Oxford, 1980.

K. Economides, J. Weiler, *Reports of Communities*, Modern Law Review, vol. 42, Blackwell Publishing, Oxford, 1979.

Commission Memorandum, *Accession of the Communities to the European Convention on Human Rights,* Bulletin of the European Communities, Supplement 2/79, Brussels, 1979.

R. Bernhardt, *The protection of fundamental rights in the European Community*, Bulletin of the European Communities, Supplement 5/76, Brussels, 1976.

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ENGAGEMENT. PAST AND PRESENT

I. F. Moldovan

Iosif-Florin Moldovan
University Lecturer, Faculty of Legal Sciences
"Vasile Goldiş" Western University of Arad, Arad, Romania
* Correspondence: Iosif Florin Moldovan, 16 Alecu Russo St., Dej, Cluj County, Romania
E-mail: gerulaflorin@yahoo.com

Abstract

An institution of family law that is not currently found in the Family Code, engagement existed in the Romanian law prior to the current regulations, representing the mutual promise between two people that they will marry one another.

Regulated under the Article 266 of the new Civil Code, engagement has the same regulatory framework, this time legal, representing the mutual promise to conclude a marriage.

Keywords

Engagement, Romanian law, pre-marriage, trial marriage, promissory agreement, promise of marriage.

Engagement was and is defined as "mutual promise to end the marriage".

Unregulated in the Family Code, engagement existed in the Romanian law prior to the current regulations, representing the mutual promise made by two people that they will marry one another, usually made in a festive atmosphere. Engagement cannot be regarded as a promissory agreement, because it does not entail the existence of an obligation to enter into marriage. In other words, the freedom to marry, through its component - the right not to marry, makes such a legal obligation impossible. From a sociological point of view, engagement is an event that is as important as the religious marriage ceremony. It expresses the same covenant, feelings, emotions and may also be celebrated in a holy place of worship. It is a beautiful, natural thing preceding the definitive union through marriage. In the modern sense of the term, "marriage promises are reinforced by the prospective spouses' living together," a kind of "pre-marriage" or "trial marriage". Although, legally, the mere promise of marriage is sufficient to raise issues pertaining to legal qualification and responsibility, in practice there is no relevant litigation cause in this matter, which means that any potential disputes will be placed in the plenum of the patrimonial relations between the common-law spouses and of establishing paternity outside marriage, if there are any resulting children.

Under the old legal regulations, namely the Calimach, Caragea and Donici Codes, engagement was a promissory agreement obliging the betrothed to conclude the marriage. At that time, engagement was compulsory, and it had to be followed by marriage within 2 to 4 years.

In certain cases the dissolution of the engagement was allowed; engagement was thus a legal status prior to marriage. Subsequently, the Civil Code and the Family Code no longer regulated engagement in an effort to give full consistency to matrimonial freedom.

In the current Romanian legislation, engagement does not produce legal effect, and is not a legal requirement for marriage. Moreover, any promise of marriage is considered void if it tends to restrict the individuals' freedom to marry. Since it is not a contract, the conditions required thereof under the law do not apply to it.

The conclusion of the engagement is not subject to any formalities and may be proved by any evidentiary means.

The conclusion of marriage is not subject to the conclusion of the engagement.

While it is not compulsory for engagement to lead to the conclusion of the marriage (the penal clause stipulated for breaking an engagement is deemed to be unwritten), it may produce legal effects in certain situations.

Traditionally, engagement did not produce any legal effect, but in theory it was considered that only in the case of an unjustified withdrawal from a planned marriage, did the fiancé or the fiancée who was abandoned have the right to address the court, under Article 998 of the Civil Code, in order to demand that the person liable for breaking the engagement should be sentenced to damages, provided that the former could prove that the termination of the engagement had caused him of her injury. Under the new regulation, this may generate certain legal effects, in the cases provided by Article 268 - *The returning of the gifts* and Article 269 - *Liability for breaking the engagement,* of the New Civil Code.

Thus, in the case of a broken engagement, the gifts the fiancé or the fiancée received in consideration of the engagement or, throughout its duration, in consideration of the marriage, are subject to being returned, with the exception of ordinary gifts. It is not specified whether these are the gifts received by either of the betrothed from other people, or the gifts they gave to each other; in the silence of the law, we think that any of these gifts are subject to restitution. In future, jurisprudence bears the burden of establishing criteria based on which a unitary ascertainment may be made concerning which of these gifts can be considered ordinary, so that they may be excluded from the duty of restitution under the legal obligations.

The party that breaks the engagement in abusive manner may be forced to compensation for the expenses incurred or contracted for the marriage. Also, the party which culpably led the other party to break the engagement may be liable for damages.

The jurisdiction to hear such cases belongs, according Article 265 of the Civil Code, to the guardianship court and the right to file a claim is subject to a special term, one year after the breaking of the engagement.

Bibliography

The Civil Code of Romania, 2011

The Family Code - repealed by the entry into force of the Civil Code.

I.P. Filipescu, *Legea aplicabilă căsătoriei şi divorţului, potrivit dreptului internaţional privat român,* in "*Dreptul"* Reviw, no. 10-11/1994;

I. Albu, *Căsătoria în dreptul român,* "Dacia" Publishing House, Bucharest, 1988;

I. Albu, in *Perfecţiunea reglementărilor Codului familiei privitoare la căsătorie şi la relaţiile dintre soţi.*

V. Hanga, *Drept privat roman,* "Didactică şi Pedagogică" Publishing House, Bucharest, 1978;

The Calimach Code, 1817 – 1832;

The Caragea Code, 1817 – 1832;

Andronachi Donici Code, 1817 – 1817.

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CONSIDERATIONS ON THE NECESSITY OF USING THE CONCEPT OF PUBLIC ADMINISTRATION IN THE CONSTITUTIONAL FOUNDATION OF PUBLIC ADMINISTRATION IN THE FUTURE CONSTITUTION

A. L. Nicu

Alina-Livia Nicu
Faculty of Law and Administrative Science
Craiova University, Craiova, Romania
*Correspondence: Alina Livia Nicu, Craiova University, 107D Calea Bucuresti, Craiova, Romania
E-mail: nicu1940ion@gmail.com

Abstract

Beginning with the current social reality which described political actors preoccupied with the review of the Romanian Constitution, the present paper outlines the idea that the new Romanian Constitution has to offer, more than ever, the foundation for a clear, precise, coherent and concise legislation. This necessity is felt in all the areas related to the social life, but especially in public administration. Given that it is the moment for debates at the level of the society regarding how the future Constitution must look like, it has been asserted as appropriate to recall into discussion an idea stated since 2003 at monograph level. According to this idea, in the activity of molding the system of structures exerting public power prerogatives in general and molding the Romanian administrative system in particular, it is necessary and useful to use the concept of public institution as construction element used to craft the architecture the legislator desires. The proposal is argued as a critical analysis of reference regulations in this area. Proposals for lege ferenda are also made.

Keywords: *public institution, public authority, public administration, Constitution, legislative clarity and coherence.*

Introduction

In the past few years and in many cases, the Romanian legislation cannot be characterized as being stable and coherent. If regarding the excessively dynamic character of some judicial norms it is possible to justify that the dynamic of social relations in that area itself determine the frequent modification of the content of those norms, regarding the coherence and correlation there can be no justification.

As close observant of the social relations created between the personnel in the public administration and citizens and the social relations inside the structure namely public administration, since 1999, I felt that the tendency of the social actors exerting prerogatives of public power at the highest level to always start from the beginning and permanently redefine the social relations has affected the quality of the activity of regulation.

My preoccupation is centered on the pattern of the Romanian administrative system and the clarification of the content of the concept of public institution and public authority, the public institution being the basic structural element of the edifice that is the Romanian public administration system.

Beginning with the current social reality which described political actors preoccupied with the review of the Romanian Constitution, the present paper outlines the idea that the new

Romanian Constitution has to offer, more than ever, the foundation for a clear, precise, coherent and concise legislation. This necessity is felt in all the areas related to the social life, but especially in public administration. Given that it is the moment for debates at the level of the society regarding how the future Constitution must look like, it has been asserted as appropriate to recall into discussion an idea stated since 2003 at monograph level[1]. According to this idea, in the activity of molding the system of structures exerting public power prerogatives in general and molding the Romanian administrative system in particular, it is necessary and useful to use the concept of public institution as construction element used to craft the architecture the legislator desires.

Legal and doctrine determinations related to the usefulness of the subject

By analyzing the regulations in the Romanian Constitution reviewed in 2003, we observed that the following collocations are used: *public authority* (article 25, paragraph (1)), *public authority* (article 44, paragraph (5)), *public authorities* (article 26, paragraph (1); article 31, paragraph (2); article 49, paragraph (5); article 51, paragraph (4); article 59, paragraph (2); article 146, lit. e; name of the Title III), *public auhtorities* (article 16, paragraph (1); article 51, paragraph (1); article 80, paragraph (2); article 126, paragraph (6)), *authorities of the public administration* (article 121, paragraph (1)), *Public administration authority* (article 122, paragraph (1)), *local public administration authorities* (article. 16, paragraph (4)), *autonomous administration authorities* (article 116, paragraph (2); article 117, paragraph (3) and article 121, paragraph (2)), *legislative authority (*article 61, paragraph (1)), *public services* (article 120; article 123, paragraph (2)), *judicial authority* (article 148, paragraph (4)).

The concept *public institutions* was used in the first Fundamental law after the restoration of the state of law in Romania in a single article (article 136) and only related to the formation, administration, use and control of the financial resources, specifically with the state "financial system"[2]. In the current form of the Constitution, the concept of public institutions is presented in articles 136 and 137, related to rendering for administration of goods from public domain and the formation, administration, use and control of the financial resources of the state.

The Romanian legislation defines the public institution as a multitude of social structures[3] including what the Constitution defines as being public authorities. A series of questions are therefore shaped: *the public authorities and public institutions have to be understood as being distinct types of entities? They complete each other or have areas of interference? Isn't authority found in institution? Isn't the phrasing "authority and public institution" redundant in judicial language?*

Due to the ways of regulation found in the Romanian legislation at different moments in time, the literature has offered many perspectives regarding the concept of public institution. Therefore, regarding the public institutions as social constructions established for the satisfaction of general interests of the members of a community, several opinions have been stated. In a first opinion[4], regarding the subjects that can administer, rent and concession

[1] Alina Livia Nicu, *Instituția publică in dreptul administrativ,* "Universitaria" Publishing House, Craiova, 2003.
[2] Article 136: "(1) The formation, administration, use and control of the financial resources of the state, the administrative-territorial units and public institutions are regulated by law".
[3] For example, in article 2 – Definitions- Paragraph 30 in Law 500/2002 on the public finances the following definition is formulated "Public institutions- generic denomination that includes the Parliament, Presidential Administration, ministries, the other special organs of public administration, other public authorities, autonomous public institutions as well as the institutions subordinated to them, irrespective of their way of financing". Also, in article 1 of Law 273/2006 on the local public finances it is stated: "(1) The present law establishes the principles, general framework and procedures on the formation, administration, engagement and use of local public funds, as well as the responsibilities of the local administration authorities and public institutions involved in the sector of local public finances".
[4] A. Iorgovan, *Tratat de drept administrativ,* 2nd volume, "Nemira" Publishing House, Bucharest, 1996, page 106.

goods or public services in Romania, discussing the "public institution as authority that administrated the public domain" it has been appraised that "The notion of public institution, by elimination, evokes, in broad sense, any organ of the state or autonomous local administration that is neither overhead nor company". An observation is made that the text of the Constitution considers a narrower meaning and proposes as constitutional collocation to be "interpreted in a restrictive meaning evoking the idea of a structure exclusively budgetary of the public administration, more specifically: 1) ministries and organs subordinated to the Government; 2) authorities of the central special administration; 3) authorities subordinated to the ministries or central autonomous authorities and 4) institutions subordinated to the county councils or local councils".[5]

In another opinion[6] indicating that the state of law accomplishes its tasks and attributions through public services, a classification of the public services is proposed as follows: "a) administrative public services organized as organs of public administration; (…) b) public services organized as public institutions, which can be education (…), culture (…), health (…), scientific research, radio and television, information, legal medicine (…)". The opinion[7] that the notion of public institution is correspondent, to a certain extent, to the one of "organ of public administration" has also been forwarded.

In the French literature the collocation "institutions administrative"[8] is used. For example, Henry Puget wrote[9]: "Au-dessous des institutions politiques existent des institutions administratives; elles permettent à l'État de vivre et de satisfaire aux besoins communs du groupe, conformément aux décisions qui dégagent du jeu des institutions politiques (...)". Charles Debbasch states that the administrative insitutions and the political institutions are equally public insitutions. He asserts: " Les problèmes d'administration ne sont pas en eux - mêmes spécifiques. Le terme administration, à lui seul, est synonyme de *gestion* (...). Il est applicable aussi bien aux institutions publiques qu'aux institutions privées". "Commes les institutions administratives, les institutions politiques sont des institutions publiques".[10]

A question arises then: are the public authorities and public institutions distinct entities?

Interpretation of the concept of public institution

In our opinion, the public institution is a human collectivity constituted based on, and for the enforcement of law, equipped with material and financial means according to the law, legal entity and necessary competence to act in order to define those social values that are considered to be fundamental for a micro or macro collectivity and their consecration in judicial norms, to act for the organization of execution, effective execution and assurance of execution of the law, that collectivity being integrated in one of the systems of structures through which the legislative public service, the judicial public service or administrative public services are accomplished, with the purpose that, through the application of law, will obtain the satisfaction of the social requests of public interest.

In what concerns the answer to the question: "Which is the relation between the concept of public authority and public institution?" we assert that the relation between the

[5] Idem.

[6] V. I. Prisăcaru, *Actele şi faptele de drept administrativ,* "Lumina Lex" Publishing House, Bucharest, 2001, page 49.

[7] A. Negoi□ă, *Drept administrativ,"* Sylvi" Publishing House, Bucharest, 1996, page. 65.

[8] For example, the papers: Jean-Marie Auby et Robert Ducos-Adèr, *Institutions administratives*, Dalloz, Paris, 1966; Charles Debbasch, *Institutions administratives*, 3e édition, Librairie générale de droit et de jurisprudence, Paris, 1975; Henry Puget, *Les institutions administratives étrangères*, Dalloz, Paris, 1969.

[9] H. Puget, *op. cit.*, page 7: "The ins and outs of the political institutions are the administrative institutions; they allow the state to exist and satisfy the common needs of the group, according to the decisions resulting from the game of the political institutions".

[10] C. Debbasch, *op. cit.*, page 9: "The issues of the administration are not themselves specific. The term administration, alone, is synonym to inventory. It is applicable as well to public institutions as to private institutions" and page 10 "As well as the administrative institutions, the political institutions are public institutions".

concept of public authority and the concept of public institution is established using the concept of competence of public institution. "The authority is the right, empowerment to command, to instruct or impose obedience to someone.[11] In consequence, authority results from the competence of the public institution. It is a characteristic of the latter due to which it can accomplish its mission and is found in the attributions of each dignitary or public servant and in the legal investment of these categories of personnel. This is of course the functional significance of the term authority. Regarding the organizational meaning, authority can be perceived as that structural element – unipersonal or collegial- from the public institution with decisional attributions and with right of command and control related to the respect and execution of decisions. Irrespective the meaning that is taken into consideration, functional or organizational, the term authority is in a relation of inclusion with the term public institution, the latter enclosing the first.[12]

Application of the concept of public institution on the text of the Romanian Constitution in reviewed form

Given the space limitations of such a study, we will limit ourselves to the application of our interpretation regarding the concept of public instruction on the current version of the Fundamental law, in order to demonstrate that the theory is applicable, without complications in practice, but eliminating certain undesired situations in the judicial practice consisting in discussions regarding especially the passive procedural quality or the active one of the public institutions.[13] Thus, following the current text of the Constitution we asses that the following formulations are necessary and useful:

- Article 16, paragraph (1): "The citizens are equal in front of the law and the public institutions, without privileges and discrimination. The public institution represents a human coactivity constituted based on and for the exertion of the law, equipped with material and financial means in virtue of the law, with legal entity and necessary competence to act for the definition of those social values considered fundamental for a micro or macro community and their consecration in judicial norms, to act for the organization of execution, effective execution and assurance of the execution of law, that collectivity being integrated in one of the systems of structures through which the public legislative service, public judicial service or administrative public services are accomplished, with the purpose that, through the application of the law, the satisfaction of all the demands of public interest is accomplished."
- Article 26, paragraph (1): "The public institutions respect and protect the intimate, family and private life".
- Article 31, paragraph (2): "The public institutions, according to their competencies are obliged to ensure the correct information of the citizens on the public tasks and on the issues of personal interest".
- Article 44, paragraph (5): "For works of general interest, the public institutions with legal competence in matter can use the basement of any estate property, with the obligation to compensate the owner for the damages caused to the soil, plantations or constructions, as well as for other damages imputable to the public institution".

[11] DEX, quoted, page 75.

[12] Alina Livia Nicu, *op. cit.*, page 158.

[13] The most eloquent example is the one of the "city hall" that, until the clarification in article 21 in Law on the local public administration no.215/2001 that "(1) The administrative- territorial units are legal persons of public law, with full judicial capacity and own patrimony. They are judicial subjects of fiscal law, holders of sole registration code and accounts opened at the territorial treasury units as well as banking units. The administrative- territorial units are holders of rights and obligations deriving from the contracts for administration of goods belonging to the public and private domain to which they are part as well as from the relations with other private or judicial entities, under the conditions of law. (2) In justice, the administrative-territorial units are represented, depending on the case, by the mayor or by the president of the county council" was always called in justice especially in the cases involving the right to property or in cases in which rulings with the effect of authentic acts were requested.

- Article 49, paragraph (5): “The public institutions have the obligation to contribute to the assurance of the conditions for the free participation of the youth to the political, social, economic, cultural and sportive life of the country”.
- Article 51, paragraph (1): “The citizens have the right to address to the public institutions through petitions formulated in the name of the signatories”.
- Paragraph (4): “The public institutions have the obligation to answer the petitions in the terms and conditions established by law”.
- Article 52, paragraph (1): “The one whose legitimate rights or interests have been damaged by a public institution, by an illegal administrative act or by lack of solution in the legal term of a request related to a legitimate right or interest, is entitled to obtain recognition of the claimed right or interest, annulment of the act and repair of the damage”.
- Article 59, paragraph (2): “The public institutions are obliged to ensure the Ombudsman the necessary support in exerting his attributions”.
- Title III will be named: “Public institutions through which the public legislative service, public judicial service and public administration are accomplished”.
- Article 61, paragraph (1): “The Parliament is the sole public institution through which the legislative public service is accomplished”.
- Paragraph (2): “The public authority within this institution has two components: Chamber of Deputies and Senate”.
- Article 80, paragraph (2): “The President of Romania watches over the respect of the Constitution and the good functioning of the public institutions. To this end, the President exerts the role of mediator between the state and society, as well as between the public institutions accomplishing the tasks of the state”.
- Article 116, paragraph (2): “Other special public institutions can be organized under the authority of the Government or the ministries or as autonomous administrative public institutions”.
- Article 117, paragraph (2): “The Government and ministries, with the approval of the Court of Accounts, can establish special public institutions in their subordination, only if the law recognizes this competence”.
- Paragraph (3): “Autonomous public institutions can be established in virtue of an organic law”.
- Article 121, paragraph (1): “In communes, cities, municipalities, local councils are established through which the local autonomy is accomplished. The public institution named local council comprises the deliberative authority local council, which comprises local counselors, mayor as executive authority, deputy mayors, secretaries of the administrative-territorial unit and the special technical system under the subordination of the mayor. The local counselor and mayors are elected by the residents of that city, by universal, equal, direct, secret and free vote”.
- Paragraph (2): “The public institution named local council acts in virtue of the law, and autonomous administrative public institution and solves the public issues in the communes, cities and municipalities”.
- Paragraph (3): “And in the administrative- territorial subdivisions of the municipalities the public institution named local council can be established”.
- Article 122, paragraph (1): “County councils are established in counties as autonomous administrative public institutions for the coordination of the activity of local councils, in order to accomplish the public services of county interest. The public institution named county council comprises the deliberative authority county council, which comprises county councils, president of the county council as executive authority, vice-presidents, technical apparatus subordinated to the president of the county council. The county counselors and president of the county council are elected by the residents of the county, by universal, equal, direct, secret and free vote”.
- Article 123, Institution of the prefect

- In each county and in Bucharest the institution of the prefect is established as a public institution. The institution comprises the prefect, as public authority, deputy prefect and the special technical apparatus subordinated to the prefect. The prefect is invested by the Government, based on competition.
- The prefect is the representative of the Government at local level and conducts the de-concentrated public services of the ministries and the other entities in the central public administration in the administrative-territorial units.
- The attributions of the prefect are established by organic law.
- Between the institution of the prefect on one side and the institution of the local council and the institution of the county council on the other side, there are no relations of subordination".
- Title of Chapter VI: "Public institutions through which the judicial public service is accomplished"
- Article 125, paragraph (1): "Public institutions through which justice is performed are the High Court of Cassation and Justice and the other judicial instances established by law".
- Article 136, paragraph (4): "The goods belonging to the public property are inalienable. Under the conditions of the law, they can be given for administration to the public institutions or can be chartered or rented. Also, they can be given for free use to institutions of public utility".

In case the establishment of regions will be completed, the theory remains applicable at regional level, with the establishment of a regional public institution that will comprise a deliberative authority (collegial or unipersonal), an executive authority and a special technical apparatus subordinated to the deliberative or executive authority, depending on the case and according to the social, political and judicial role created by the legislator for the region and the regional public institution.

Conclusions

As can be observed from the brief exemplification with proposals of lege ferenda in chapter 4, if the Romanian legislation would use the concept of public institution with the interpretation proposed hereby, everything would be simpler. Any citizen would clearly know that everything that serves, through decision or performance, the interest of the citizens is a public institution. Any citizen would also know that in any public institution there is a deliberative and executive authority and their actions are operatively sustained by a special technical apparatus. The members of the parliament themselves, in elaborating the judicial norms, would have, as starting point, a simple and clear concept about the system of structures exerting the prerogatives of public power. Practically, we would work only with the concept of public institution and, if in the law of organization or functioning of such a structure it is desired that the weight is held by the activities of disposition and control, this will be observed in the regulation or denomination. For example, a structure is to be named "authority". The title of the normative act would be: "Law on the functioning and organization of the Authority…" following that the subsequent article would state that "The present law establishes the Authority…as public institution", in the text and probably in an annex representing a generic organizational chart, the structure with deliberative and executive role would be presented, followed by the personnel categories etc.

Bibliography

Alina Livia Nicu, *Instituția publică în dreptul administrativ,* "Universitaria" Publishing House, Craiova, 2003.

V. I. Prisacaru, *Actele şi faptele de drept administrativ*, "Lumina Lex" Publishing House, Bucharest, 2001;

A. Iorgovan, *Tratat de drept administrativ,* 2nd volume, "Nemira" Publishing House, Bucharest, 1996;

A. Negoita, *Drept administrativ,* Sylvi Publishing House, Bucharest, 1996;

C. Debbasch, *Institutions administratives*, 3e édition, Librairie générale de droit et de jurisprudence, Paris, 1975;

H. Puget, *Les institutions administratives étrangères*, Dalloz, Paris, 1969;

Jean-Marie Auby, R. Ducos-Adèr, *Institutions administratives*, Dalloz, Paris, 1966;

DEX, "Universul Enciclopedic" Publishing House, Bucharest.

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THE LEGAL PRACTITIONERS ACT: A CODE FOR REGULATING THE CONDUCT OF LAWYERS IN NIGERIA*

M. C. Ogwezzy

Michael Chukwujindu Ogwezzy
Faculty of Law, Department of Public International Law
Lead City University, Ibadan, Nigeria
* Corespondece: **Michael Chukwujindu Ogwezzy**, Lagos, P.O Box 30678 Secretariat, Ibadan, Oyo State, Nigeria
Email: ogwezzym@yahoo.com

Abstract

The legal practitioner is an expert whose services and expertise are required by members of the public. He is expected to maintain the highest standards of professional conduct, etiquette and discipline in the discharge of his duties. In addressing himself as a legal practitioner he represents to those who depend on his professional advice and other services that he has the requisite acumen and expertise. For this reason, under the general common law and the rule in *Hedley Byrne & Co Ltd v. Heller & Partners Ltd***,** the lawyer can be held liable for professional negligence. This paper will address "the Relationship between a Lawyer and the Client" in the Context of the Legal Practitioners Act and Case Law as negligence in handling of a client's affairs may be of such a nature as to amount to professional misconduct and if sued by the client will warrant prosecution and punishment of the Legal Practitioner. This is because it is the duty of a lawyer to devote his attention, energy and expertise to the service of his client and, subject to any rule of law, to act in a manner consistent with the best interest of his client. He shall consult with his client in all questions of doubt; and keep the client informed of the progress and any important development in the matter as may be reasonably necessary and warn his client against any particular risk which is likely to occur in the course of the matter.

Keywords: *Nigeria, lawyer, professinal ethic*

Introduction: Meaning of Professional Ethics?

In different parts of the world, dozens of ethics centres and programmes are established and devoted to the study of business ethics, legal ethics, bioethics, medical ethics, engineering ethics, and computer ethics. These centres are designed to examine the implications of moral principles and practices in all spheres of human activity on our lives. Ethics can be viewed from two angles, normative and prescriptive.

First, ethics refers to well-based standards of right and wrong that prescribe what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness, and specific virtues. Ethics, for example, refers to those standards that impose the reasonable obligations to refrain from rape, stealing, murder, assault, slander, and fraud. Ethical standards also include those that enjoin virtues of honesty, compassion, and loyalty while ethical standards include standards relating to rights, such as the right to life, the right to freedom from injury, the right to choose, the right to privacy, and right to freedom of speech

* LL.B, (Ibadan) B.L, LL.M, (Nigeria) ML.D, (DELSU) MASIO/LL.M, (ZH/Switzerland) (Ph.D in View), Lecturer I, Faculty of Law, Lead City University, Lagos-Ibadan Expressway, Toll Gate Area, Ibadan, Oyo State-Nigeria, Email address: ogwezzym@yahoo.com, Tel: +234 8035460865.

and expression. Such standards are adequate standards of ethics because they are supported by consistent and well-founded reasons. Secondly, ethics refers to the study and development of personal ethical standards, as well as community ethics, in terms of behaviour, feelings, laws, and social habits and norms which can deviate from more universal ethical standards. So it is necessary to constantly examine one's standards to ensure that they are reasonable and well-founded. Ethics also means, then, the continuous effort of studying of our own moral beliefs and conduct, and striving to ensure that we, and our community and the institutions we help to shape, live up to standards that are reasonable and solidly-based for the progress of human beings. [1]*"Ethics are moral standards that help guide behaviour, actions, and choices*. Ethics are grounded in the notion of responsibility (as free moral agents, individuals, organizations, and societies are responsible for the actions that they take) and accountability (individuals, organizations, and society should be held accountable to others for the consequences of their actions). In most societies, a system of laws codifies the most significant ethical standards and provides a mechanism for holding people, organizations, and even governments accountable." [2] The word ethics means rules of conduct pertaining to a particular class of human action. Therefore ethics of the legal profession refers to the actions of members of the Bar in the discharge of their duties and obligations and in the exercise of their rights and privileges. In Nigeria an allied thing to professional ethics and is professional etiquette which includes: decency, elegance and dignity that are to be observed by members of the profession. There should be no petty rivalry among lawyers and they shall always be bound by a bond of great sense of brotherhood and friendliness.[3]

1.1 Ethics of the Legal Profession in Nigeria

The legal profession is a noble profession and practitioners by their calling are regarded as ministers in the temple of justice saddled with the responsibility of assisting the courts and the state in the administration of justice. The profession is thus regulated all over the world by certain ethical codes of behaviour or ethics commonly referred to as the rules of Professional Conduct for Legal Practitioners. These rules were drawn with the intention of instilling in members a high sense of discipline, honesty and responsibility so as to maintain the honour, integrity and reputation of the profession. In Nigeria, an indebt and comprehensive ethical rules of professional conduct in the legal profession were first drafted and adopted by the General Council of the Bar in 1980. The rules were made by the General Council of the bar in 1967 and amended in 1979 and published in the Federal Government Official Gazette dated 18 January, 1980 on the 7th of February, 2007 the existing rules were reviewed and a new set of rules was made for the profession.[4]

The legal profession in Nigeria stands out as the oldest of the professions being practiced by the practitioners of these disciplines having existed in the country since 1876. The Supreme Court ordinance of 1876 was the first piece of legislation that gave birth to the

[1] Tengku Mohd T. Sembok, *Ethics of Information Communication Technology (ICT)*, paper presented at the "Regional Meeting on Ethics of Science and Technology", 5-7 November 2003, Bangkok, pp. 243-244.

[2]*Ibidem. S*ee also, K. C. Laudon, C.G. Traver, and J.P Laudon, *Information Technology and Society*, 1996, p. 513.

[3]K. Gururaja Chari, *Advocacy and Professional Ethics: In Retrospect and Prospect*, Wadhwa and Co., Allahbad, 2005, p. 476.

[4] A.J. Beredugo., *Nigerian Legal system*, 3rd edn, Malthouse Limited, Surulere, 2009, p. 215-216.

In Nigeria, the extant Rules of Professional Ethics are encapsulated in the Rules of Professional Conduct for Legal Practitioners, dated 7th day of February, 2007. The Ethics as contained in the Rules of Professional Conduct are geared towards maintaining the highest standards of professional conduct, etiquette and discipline. See also C.A. Agbebaku & Livewell Osahon Omoregie, "Teaching Ethics and Values in the Legal Profession: The Nigerian Perspective", available online at http://www.ialsnet.org/meetings/teaching/papers/Agbebaku.pdf, accessed on 30 May, 2012. See also the preamble to the first Rules of Professional Ethics codified by the then General Council of the Bar at its General Meeting in Lagos on the 25th December, 1967 and subsequently amended by the meeting of the Council held in Lagos on the 15th January, 1979.

profession in Nigeria. The ordinance provided for two types of people that could practice law in Nigeria at that time being the professionally qualified and local attorneys.[5]

The professionally qualified consist of persons who went through the basic legal education programme, passed the relevant examinations and got admitted into the English Bar to practice either as Barristers of Solicitors. Such professionally trained and qualified lawyers who wish to practice in Nigeria were automatically enrolled in the Supreme Court of Nigeria as legal practitioners. The Local attorneys were laymen because there were people who had no formal training or education in law, but were licence by the chief Justice of Nigeria to practice Law in the Country based on acquired experience in law and practice. This appointment then was necessitated by the obvious shortage of professionally qualified lawyers in the country at that time and their service was needed in the administration of justice but such appointed was discontinued in 1914 and since then, legal practice has been restricted only to professionally trained and qualified lawyers.[6] From here the author will look into the meaning of Legal Practitioner from the Nigeria Perspective.

1.2 Meaning of a Legal Practitioner under the Nigerian Legal Practitioner's Act

The legal profession in Nigeria is rightly identified with British Colonial rule and introduction of the British system of courts in 1862 though unlike in England were the profession is separated, in Nigeria it is fussed.[7] The Legal Practitioner's Act defines a Legal Practitioner as a person entitled in accordance with the provisions of this Act to practice as a barrister and solicitor either generally or for the purpose of any particular office or proceeding.[8] Therefore a legal practitioner in Nigeria is a person qualified to practice as a barrister and solicitor.[9] A Barrister is a legal practitioner whose duty is to represent a person in a court of Law and advocate on-behalf of such person, usually called a client. He is the professional advocate with right of audience in every court. As a consultant and advocate, the professional duties of a barrister include: the drafting of legal opinions on issues of facts and law, the settling of pleadings, and conducting cases in court to a logical conclusion in accordance with the rules of procedure and evidence while solicitors are legal practitioners who are consulted on issues, such as, the making of wills, administration of estates, formation of companies, drawing up of leases and conveyances, registration of land instruments, writing of contractual agreement and similar issues. In England, the solicitor has no business with advocacy in the court, except in the lower courts, the solicitor is consulted first to take instruction from the client and prepare the pleadings. He could then approach a barrister to represent the client in court at the trial proper.[10]

1.3 Categories of Legal Practitioners in Nigeria

There are three main types of Legal Practitioners in Nigeria viz:

(a). ***Lawyers Entitled to Practice Law Generally:*** By virtue of section 2 of the Legal Practitioners act, a person is entailed to practice law generally as a barrister and solicitor if, and only, he has been called to the Nigerian Bar[11] and his name enrolled in the Supreme Court.[12] They are private practitioners who practice either as barristers or solicitors or both.

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[5]A. J. Beredugo, *op cit*., p. 203.

[66] *Ibidem*

[7]J. O. Asein, *Introduction to Nigerian Legal System*, 2nd ed., Ababa Press Ltd, Surulere, 2005.

[8]Section 24 of the Legal Practitioners Act, 16 May, 1975 as amended by the Legal Practitioners (Amendment) Act (formally Decree) No. 21 of 1994) (Cap L.11 Laws of the Federation of Nigeria 2004).

[9]A.J. Beredugo., *op cit*., p. 204.

[10] *Ibidem*

[11]Section 4(1) of the Legal Practitioners Act provides that subject to the provisions of this section, a person shall be entitled to be called to the Bar if, and if- (a) he is a citizen of Nigeria; and (b) he produces a qualifying certificate to the Benchers; and (c) he satisfied the [body] of Benchers that he is of good character. Note that citizenship is no longer essential by virtue of Legal Education (Consolidation Act etc) (Amendment) Decree No. 8 and of 1992 and LPA (Amendment) Decree No.9 of 1992.

[12] Section 2(1) of the Legal Practitioners Act, 16 May, 1975.

The term general practitioners' also include in-house solicitors working in private or public institutions and agencies.[13]

(b). ***Lawyers Entitled to Practice by Virtue of their office:*** These are lawyers either in full time employment of the state or federal civil service or occupying and exercising the functions of designated legal office in the civil or public service. The Legal Practitioner Act provides that any person occupying and functioning as Attorney General, Solicitor General, Director of Public Prosecution either of the State or of the Federation are entitled to practice as Barristers and solicitors by virtue of their office.

(c). ***Lawyers Entitled to Practice in Particular Proceedings*:** These are lawyers from countries but who legal system is similar to that of Nigeria. Such foreign lawyers can apply for and be warranted by the Chief Justice of Nigeria to practice as barristers and solicitors for the purpose of a particular proceeding.[14]

1.4 Discipline in the Legal Profession in Nigeria

In all countries of the world, the legal profession pays a high premium to the maintenance of discipline among its members. Consequently, provisions are made in the Legal Practitioners Act to discipline Lawyers whose conduct falls below the ethical standards of behaviour expected of a legal practitioner. There are four professional offences provided for by Section 12 of the Legal Practitioners Act for which a legal Practitioner can be punished by the Legal Practitioner Disciplinary Committee: (i) infamous conduct in any professional respect; or (ii) being convicted of any crime which is incompatible with the status of a legal practitioner by any court of competent jurisdiction in Nigeria; or (iii) obtaining enrolment by fraud; or (iv) for any act that is generally regarded as incompatible with the status of a legal practitioner.[15]

A legal practitioner who commits acts considered to be infamous conduct in a professional respect is liable to be tried by the Legal Practitioners Disciplinary Committee. The type of conduct that qualified as infamous conduct was not stated in the Legal Practitioners Act but in the case of *Allison v. General Council Medical Education and Registration*[16] infamous conduct in relation to professionals was described as conduct "regarded as disgraceful or dishonourable by his professional brethren of good repute and competence". In *M.D.P.T. v. Okonkwo*[17] the court held that a charge of infamous conduct must be of a serious infraction of acceptable standard of behaviour, or ethics of the profession, a conduct that is so disreputable and morally reprehensible as to bring the profession into disrepute if condoned or left unpunished.[18]

A legal practitioner who has been convicted of any criminal offence by a competent court in Nigeria can also be tried by the Legal Practitioner Disciplinary Committee and disciplined under the Legal Practitioners Act. Under this provision therefore the offence need not be committed in professional respect. However, the conviction must have been by a court in Nigeria and there must not be an appeal against the conviction pending in any appeal court.[19]

A person who obtains enrolment by fraud under section 12(1)(c) of the Legal Practitioners Act is liable to be tried by the Legal Practitioners Disciplinary Committee and discipline under the Legal Practitioners Act. The enrolment must be by misrepresentation of acts and if the true facts have been known he would not have been enrolled and this provision may be invoked. This act of misrepresentation covers any condition that must be fulfilled to be called to the Bar since this is a precondition for enrolment under section 4(1) and 6(1) of

[13] A. J. Beredugo., *op cit*., p. 204.
[14] *Ibidem*, p. 207.
[15] See Section 11 of the Legal Practitioners Act of 16 May, 1975.
[16] (1894) 1 Q.B 750.
[17] (2001) 7 NWLR (Pt. 711) 206.
[18] See also The Nigerian Law School, *Course Handbook on Professional Ethics and Allied Matters*, Bar Part II Course 2003/2004, Council of Legal Education, Abuja, 2003, p. 53.
[19] A. J. Beredugo., *op cit*., p. 212.

the LPA. This provision also covers cases where a person obtained admission to the Nigerian Law School by fraudulent misrepresentation of academic status e.g by producing forged law degree certificate or representing that he/she passed a law degree when he did not.

Finally, by virtue of section 12(2) of the Legal Practitioners Act, all residual cases where conduct complained of could bring the legal profession into dishonour or disrepute such as seduction of a client's wife, habitual drunkenness in public and taking part in street brawl would appear likely to bring the profession into dishonour or disrepute.[20] These are behaviours or acts generally regarded as incompatible with the status of a legal practitioner.

1.5 The Legal Practitioners Disciplinary Committee

Section 10 of the Legal Practitioners Act establishes the Legal Practitioners Disciplinary Committee charged with the duty of considering and determining cases where it is alleged that a person whose name is on the roll has misbehaved in his capacity as such or should for any other reason be the subject of proceedings under the Act.[21] The Committee consist of the Attorney General of the Federation of Nigeria as the Chairman, the attorney Generals of the thirty six states in Nigeria and twelve legal practitioners of not less than ten years standing appointed by the Benchers on the nomination of the Nigerian Bar Association.[22]

1.6 Supreme Court of Nigeria and the Regulation of the Conduct of Lawyers

The Supreme Court of Nigeria is also vested with some disciplinary powers over the conduct of Lawyers on its roll. Section 13 of the Legal Practitioners Act provides that were it appears to it that a person whose name is on the roll has been guilty of infamous conduct in any respect with regards to any matter of which the court or any professional other court of record in Nigeria is or has been seized, it may if it thinks fit, after hearing any such other persons as the court considers appropriate, direct appropriate disciplinary measures as contained in section 11 of the Act, and cause the notice of the direction to be published in a federal gazette.[23] In similar circumstance, the Chief Justice of Nigeria under section 13(2) of the Legal Practitioners Act, where it appears to him that a certain legal practitioner should be suspended from practice, either with a view to the institution of disciplinary proceedings are pending, may in his discretion, after affording the practitioner in question an opportunity of making representation in the matter give each direction as suspending that person from practice for such a period as may be stated in the direction.[24] By implication, the Chief Justice of Nigeria may suspend a legal practitioner with a view to instituting, or during the pendency of, disciplinary proceedings against such legal practitioner.[25]

1.7 Penalties in View of Professional Misconduct of a Nigerian Lawyer

Section 11 of the Legal Practitioners Act provides that where a Legal Practitioner is adjudged guilty by the disciplinary committee for infamous conduct in professional or any other respect or; convicted by any court in Nigeria for an act that is incompatible with the status of a legal practitioner; or obtained enrolment by fraudulent means, the Disciplinary Committee may if it thinks fit, give a direction: (a) ordering the Registrar of the Supreme Court to strike off the name of the person from the roll of Practitioners in Nigeria; (b) suspend that person from practice as a legal practitioner for such period as may be specified in the direction; or (c) admonish that person. [26]Though where a legal practitioner is adjudged guilty of misconduct not amounting to infamous conduct but qualifies as a conduct that is

[20]Nigerian Law School, *Course Handbook on Professional Ethics and Allied Matters*, Bar Part II Course 2003/2004, Council of Legal Education, Abuja, 2003, p. 55.
[21]J. O. Asein, *Introduction to Nigerian Legal System*, 2nd edn., Ababa Press Ltd, Surulere, 2005, p. 207.
[22] *Ibidem*
[23] A.J Beredugo., *op cit*., p. 213.
[24] See Section 13(2) of the Legal Practitioners Act of 16 May, 1975.
[25] J.O Asein, *op cit*., pp. 276-277.
[26] Admonish mean to reprove gently but earnestly, to counsel (another) against something to be avoided; caution and to remind of something forgotten or disregarded, as an obligation or a responsibility.

incompatible with the status of a legal practitioner, the disciplinary Committee can either suspend or admonish the person. It cannot order his name to be struck off.[27]

1.8 Professional Etiquette and Negligence of a Legal Practitioner to the Client

Professional etiquette is an act of professional good manners which is by tradition and convention observed in the profession. A breach of professional etiquette generally does not attract thesame sanction as a breach of the rules of professional conduct.[28]

The Rules of Professional Conduct (RPC) in Legal Profession is the body of rules which guides the attitude of lawyers or the manner in which they conduct their professional legal services. In Nigeria the rules were first made in 1967 while minor amendments were done in 1980 and 1982 but were still filled with many lacunas. In 2005, the Attorney General of Nigeria came up with a revised draft Rules of Professional Conduct which was formally approved by the General Council of the Nigerian Bar[29] in the meeting of the Council held on 20 November, 2006 and published as the Rules of Professional Conduct for Legal Practitioners as Statutory Instrument (S.I) No.6 in the Federal Republic of Nigeria Official Gazette No. 11 Volume 94 of 24 January, 2007 with the commencement date of 2nd January, 2007.[30] Rule 55 of the Rules of Professional Conduct provides that if a lawyer acts in contravention of any of the rules or fails to perform any of the duties imposed by the rules, he is guilty of professional misconduct and liable to punishment as prescribed under the section 12(1) of the Legal Practitioners Act.[31] The issue now is that does professional misconduct amount to negligence of a legal practitioner to his client?

Negligence is the failure to exercise the standard of care that a reasonable prudent person would have exercised in similar situation; any conduct that falls below the legal standards established to protect others against unreasonable risk of harm except for conduct that is intentionally, wantonly or wilfully disregardful of others rights. The term denotes culpable carelessness which means negligence that is though not intentional, involves disregard of the consequences likely to result from one's actions.[32] The law imposes on all persons the duty to exercise care, skill and foresight of a reasonable man... the conduct which a reasonable man would avoid on the ground that it involves undue risk of harm to another.[33] The liability is no different from any other under the fault principle. However, in substance, there are two special characteristics. First, where a professional skill is concerned, the test for a breach of duty is not governed by the reasonable man test as such; but it is governed by the standard of the reasonable person exercising that professional skill.[34] The test is the standard of the ordinary skilled man exercising and professing to have that professional skill. An accountant, architect, lawyer or doctor need not possess the highest expert skill; all he or she needs to exercise is the ordinary skill of an ordinary competent man exercising that particular act.[35] In Nigeria, to think that a Legal Practitioner who is incompetent is immune from being sued over the way and manner he or she conducted a case in court or negligently handled a professional duty entrusted onto him or her is a fallacy because the functioning of the tort of negligence and the legal profession has been codified in the Legal Practitioners Act. This is in

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[27] Section 11(2) of the Legal Practitioners Act of 16 May, 1975.

[28] J.O. Orojo, *Professional Conduct of Legal Practitioners in Nigeria*, Mafix Books Limited, Yaba, 2008, p.127.

[29] *Ibid*em, Section 12(4) of the Legal Practitioners Act as amended now provides that, "it shall be the duty of the Bar Council to make rules from time to time on professional conduct and such rules to be published in the gazette and distributed to all the branches of the Nigerian Bar Association".

[30] *Ibidem*, p. 129. See Federal Republic of Nigeria Official Gazette No. 11, Volume 94 of 24/1/2007 at B.57.

[31] Rule 55, Rules of Professional Conduct for Legal Practitioners as Statutory Instrument (S.I) No.6 in the Federal Republic of Nigeria Official Gazette No. 11 Volume 94 of 24 January, 2007.

[32] Bryan A. Garner (ed), *Black's Law Dictionary*, West Publishing CO., 7th edn 2000, p. 846.

[33] K. Gururaja Chari, *Advocacy and Professional Ethics: In Retrospect and Prospect*, Wadhwa and Co., Allahbad, 2005, p. 482.

[34] *Bolam v. Friern Hospital Management Committee* (1957) 1 WLR 582, See also *Phelps v. Hiilingdon LBC* (2000) 3 WLR, 776, p. 809.

[35] Geoffrey Samuel, *Law of Obligations and Legal Remedies*, 2nd edn., Cavendish Publishing Limited, London, 2001, p. 483.

a bid to regulate the conduct of lawyers in Nigeria and to see that they hold firmly to the tenants of the profession.

1.9 Lawyers Duty of Skill and Care to the Client

Every Legal Practitioner is under professional obligation and duty to willingly accept briefs from clients without discrimination provided proper fees are offered and the case is within his area of practice and expertise and he is not otherwise engaged. Once a brief is accepted, a counsel is under an obligation to diligently and faithfully, pursues the matter to its logical conclusion. In this wise, counsel owes entire devotion in learning and ability to the interest of his client. Furthermore counsel is also required to give honest and sincere advice to his client and exhibit professional competence in handling of client's matters, otherwise he may be held liable for negligence.[36] Since the decision in decision in *Hedley Bryan v. Heller & Partners*,[37] there is a temptation to treat all cases of professional liability as falling into the category of tort. For, it is often the case that the act complained of is misleading or incompetent professional advice and, thus, the problem appears at first sight to be one of professional misstatement. Such an analysis is not wrong because the relationship between the professional lawyer and his client is governed by a contract. Thus any breach of the duty will be a breach of an implied term of the contract and this implied term [38] has it source in Section 9(1) of the Legal Practitioners Act of 1975 which provides that subject to the cases referred to in that section, "a person shall not be immune from liability for damages attributable to his negligence while acting in his capacity as a legal practitioner, and any provision purporting to exclude or limit liability in any contract shall be void ". To avoid liability, therefore, he must perform his duties with due care and diligence. Since the lawyer holds himself out as a person having special skill, he should also, execute such skill honestly, carefully, and with maximum devotion. He is bound to discharge his duties with a care and diligence equal to that of required of solicitors of competent skill and care.[39]

In Rule 14 of the Rules of Professional Conduct dealing with "Representing a client competently", it was provided that: "A lawyer shall not: (a) handle a legal matter which he knows or ought to know that he is not competent to handle, without associating with him a lawyer who is competent to handle it, unless the client objects; (b) handle a legal matter without adequate preparation; (c) neglect a legal matter entrusted to him; or (d) attempt to exonerate himself from or limit his ability to his client for his personal malpractice or professional misconduct".[40] While the old rule under section 14(c) provides that: "the lawyer owes entire devotion to the interest of his client, warm zeal in the maintenance and defence of the client's rights and the exertion of his utmost learning and ability to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavour or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of every remedy and defence that is authorized by the law of the land, and he is also entitled to expect his lawyer to assert every such remedy or defence. It must however be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of a lawyer does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery. He must obey his own conscience and not that of his client".[41]

1.10 Duty of Care Required of a Legal Practitioner in Discharge of His Duties

These duties have been classified as contractual, tortuous or even fiduciary in nature.

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[36] A. J. Beredugo., *op cit*., p. 216.
[37] (1964) A.C 465.
[38]Geoffrey Samuel, *op. cit*., p. 482.
[39] J.O. Orojo., *op. cit*., p. 175.
[40]Rule 14, Rules of Professional Conduct for Legal Practitioners as Statutory Instrument (S.I) No.6 in the Federal Republic of Nigeria Official Gazette No. 11 Volume 94 of 24 January, 2007.
[41]Rule 14(c) Rules of Professional Conduct for Legal Profession, Legal Practitioners Act Cap. 207 Law of the Federation of Nigeria 1990.

1.10.1 Examining the Contractual Duty of a Lawyer

Rule 18 of the Rules of Professional Conduct for Legal Practitioners deals with the contractual relationship of the lawyer and his client[42]. It provides that: (1) A Client shall be free to choose his lawyer and to dispense with his services as deems fit; provided that nothing in this rule shall absolve the client from fulfilling any agreed or implied obligation to the lawyer including the payment of fees. (2) the lawyer shall ensure that important agreements between him and the client are, as far as possible, reduced into writing, but it is dishonourable and a misconduct for the lawyer to avoid performance of a contract fairly made with his client whether reduced into writing or not. The essence of this relationship is the retainer of the client. The clients instructs or briefs his lawyer about his case and ones the lawyer accepts the brief and the clients pay the initial fee as charged by the lawyer, the contractual relationship commences and the lawyer is expected to discharge a professional service to the client using the best of his talent. The retainership may be written or oral or may be inferred from the conduct of the parties. It is in the interest of the parties that, at least, the nature of the retainer should be recorded, e.g., in the attendance note which every legal practitioner ought to keep, e.g., in the attendance note which every legal practitioner ought to keep. When a retainer is given it creates a contractual relationship which includes the duty on the part of the legal practitioner to protect the interests of the client and to carry out, by all proper means, the client's instructions in respect of the matter or service in question.[43]

1.10.2 Liability for Negligence

The legal practitioner may be liable on the tort of negligence based on the principle the case of *Donoghue v. Stephenson*[44] and *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd,*[45] This is because the client will obviously be in the contemplation of the lawyer requiring him to exercise reasonable skill and care so as not to injure the client.[46] It should be noted that the relationship between the lawyer and his client is one of confidence. By this fiduciary relationship owed to the client means that lawyer must make full disclosure of any interest in any matter on which he has been brief and he must not make a secret profit from the instruction of his client.[47] It is not always the duty of a counsel to win his client's case beyond a fair analysis of evidence touching on those matters. Counsel must however, be devoted to his client cause and should do all that is within his learning and ability to ensure that his client is not denied the benefit of any remedy or defence that may be permitted under the law. He should object promptly to any irregularity in the proceedings. He is expected to restrain his client from all forms of improprieties and should withdraw if his client so persists.[48] A legal practitioner may only withdraw from his client service as a counsel for good cause without jeopardising his client's case. He may so withdraw to safeguard his honour or self respect and were his client insists on an unjust or immoral course or persists over his counsel's remonstrance in presenting frivolous defences or deliberately refused to pay his fees or expenses etc.[49]

A legal practitioner like any other individual is liable for any wrong committed in his private capacity. He may therefore be sued in tort, contract or be prosecuted for criminal

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[42]Rule 18 of the Rules of Professional Conduct for Legal Practitioners as Statutory Instrument (S.I) No.6 in the Federal Republic of Nigeria Official Gazette No. 11 Volume 94 of 24 January, 2007.
[43]J.O. Orojo., *op. cit.*, p. 177.
[44](1932) A.C. 562.
[45](1963) 3 All E.R 575.
[46]J.O. Orojo, *op. cit.*, Note that the Fault Principle finds the party that is to blame before compensating the victim in personal injury cases. This then implies that if fault cannot be attributed, there can be no attribution of liability, so for example a victim of an accident may not receive compensation.
[47]*Ibidem*, p. 178. See also J.O. Asein, *op cit*., pp. 284-285.
[48]See Rules 14 and 15 of the Rules of Professional Conduct for Legal Practitioners as Statutory Instrument (S.I) No.6 in the Federal Republic of Nigeria Official Gazette No. 11 Volume 94 of 24 January, 2007. See also J.O Asein, *op cit*., p. 285.
[49] See J.O. Asein, *op cit.*, p. 286.

offences. His professional liability is limited to common law. The extent of his liability is contained in Section 9 of the Legal practitioners Act.[50] He owes himself a duty of care and diligence and may be held liable on appropriate cases for failure to discharge that duty.[51] Thus as a general rule, a legal practitioner is liable for any damage attributable to his negligence while acting in his professional capacity. A counsel who handles the case of his client carelessly or negligently and thereby creates a situation that causes an injury on the client paces himself at the risk of being sued for professional negligence. This is the decision in the case of *Ayua v. Agbaka*[52]and any such liability may not be limited or excluded by contract.[53]

1.10.3 The Duty of Skill and Care in Advising the Client and Avoidance of Delay

It is the rule that a legal practitioner who failed to advise his client against an action which has become statutes barred, he was considered negligent in the performance of his duty.[54] But where there was obviously no good cause or where the legal practitioner advised in favour of an action which was unreasonable and speculative.[55] Though, no one expects that the Legal Practitioner will not make an honest mistake. As Abbott C.J. pointed out in *Montriou v. Jeffresy*,[56] "No attorney is bound to know all the law. God forbid that it should be imagined that an attorney or a counsel or even a judge is bound to know all the law, or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious might fall into" it is sufficient if they have "espoused the interests of their clients in order to defend them as if they were the parties concerned". Sometimes, the beach may be the giving of wrong advice. Whether the legal practitioners can be held to be in breach of his duty or not will depend on the nature of the subject matter on which the advice was given. If the point is a common one where the law is clear, he is more likely to be in breach of his duty.[57]

At times lawyers are found wanton when they delay in taking action on a clients brief and this undesirable habit militate against the principle of due diligence in the execution of his professional duties to his client. Where the delay is of a gross nature, it will constitute a professional offence. No doubt, if a legal practitioner by his unreasonable delay or neglect causes loss to the client, he may be liable in negligence to the client.[58]

1.11 What Amounts to a Reasonable Standard of Skill and Care in the Performance of a Legal Practitioner's Duty

Though a lawyer is expected to exercise a reasonable skill of duty and care in the performance of his duty but this is not absolute. He is required to exercise the skill in duty and care that is reasonable in the circumstance. A lawyer cannot be expected to know all the law but he is expected to know where to find the law in respect of the matter which he undertakes to handle. The skill and care of the ordinary lawyer cannot be judged by the standards of exceptionally good lawyer. The test is what the reasonable competent practitioner would do

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[50]Section 9 of the Legal Practitioners Act, 16 May, 1975 as amended by the Legal Practitioners (Amendment) Act (formally Decree) No. 21 of 1994) (now Cap L.11 Laws of the Federation of Nigeria 2004).

[51]J.O. Asein, *loc. cit*., p. 295.

[52] (1997) 7 NWLR 659

[53]J.O. Asein, *op cit*., at 295. However a legal practitioner is not so liable where he renders his services gratuitously or the damage complained of is in the conduct of proceedings *ex facie curiae*. By implication a legal practitioner may be liable for negligence in respect of his conduct as a solicitor, the conduct of a case in court is left at his absolute discretion and he is not liable for any negligence in that capacity as a barrister. See the cases of *Usun v. Anwan* (1947) 18 N.L.R 144 and *Bello Raji v. X (A Legal Practitioner)* (1964) 18 N.L.R 74. *Rondel and Worsley* (1967) 1 Q.B 443 (1969) 1 A.C. 191.

[54] See *Bello Raji v. X (A Legal Practitioner)* (1964) 18 N.L.R 74.

[55] *Cocottopoulos v. P.Z. & Co. Ltd* (1965) LLR.

[56] 172 E.R. 51.

[57]*Otter v. Church Adams Tatham & Co.* (1953) Ch. 280. Though if the point on which the advice is given is a difficult or recondite one, the practitioner is not likely to be in breach of duty. See also J.O Orojo., *op. cit*., p. 181.

[58] J.O. Orojo., *op. cit*. Such negligence may arise in a practitioner's failure to process the papers in connection with a sale of property or with an investment or has to pay a higher price. Loss may also arise because, as a result of failure to file an action in good time, an action becomes statutes-barred.

having regard to the standard usually adopted in the profession.[59] On this issue, the Supreme Court in Nigeria observed in *Orizu v. Anyaegbunam*, held, as follows: "we think there is need to remind members of the legal profession who are obliged to prosecute or defend claims in court on behalf of their clients that *vis-a-vis* their clients, the advocate or counsel involved in such duties... undertake to bring to the exercise of it a reasonable degree of care and skill. He does not undertake... that, at all events, he shall gain he case, nor does he undertake to use the highest of skill... but advocate undertakes to bring a fair, reasonable and competent degree of skill....[60]

An advocate must in the discharge of his professional duty refrain from asserting his personal belief; he must however not compromise his conscience for a plate of pottage. Above all, a counsel also owe his client the professional duty to refrain from improprieties, where the client is however not bent or persists in these acts, the Legal Practitioner should terminate the relationship.[61] A counsel must preserve his client confidence, and must not expose or disclose to other persons facts disclosed to him by his client in confidence. In preserving his client's confidence, a legal practitioner must refrain from formulating a defence to questionable transaction or putting up a false claim; this kind of conduct is unethical and could be responsible for the prejudice in some quarters against Legal Practitioner's.[62]

1.12 Exceptions to Liability for Negligence in the Performance of a Legal Practitioner's Duty

Since a Legal Practitioner has a duty of care and diligence in the performance of his duty, it means that if he fails in the discharge of that duty, i.e., if he is negligent and the client suffers loss thereby, he will generally be liable to the client for the loss and this is subject to Section 8 of the Legal Practitioner Act 1975 which provides as follows: (1) Subject to the provisions of this section, a person shall not be immune from liability for damages attributable to his negligence while acting as a legal practitioner, and any provision purporting to exclude or limit the liability in any contract shall be void. (2) nothing in the forgoing section shall be construed as preventing the exclusion or limitation of the liability aforesaid in any case where a legal practitioner gives his services without reward either by way of fees, disbursements or otherwise. (3) Nothing in subsection 1 of this section shall affect the application to a legal practitioner of the rule of law exempting barrister from liability aforesaid insofar as that rule applies to the conduct of proceedings in the face of any court, tribunal or other body".[63]

1.13 Exceptions to the Provision of Section 8(1) of the Legal Practitioner's Act 1975

Under section 8(1) of the Legal Practitioners Act, 1975, it is clear that the Legal practitioner is liable for negligence in the careless conduct of his professional assignment since he is bound to discharge his duties with a care and diligence equal to that required of solicitors of competent skill and care but there are exception to this rule under section 8 (1) of the LPA are where the service is give gratuitously and, secondly, where barristers are exempted from liability in the conduct of proceedings *ex facie curiae*.

(a) Free Legal Services: where a Legal Practitioner gives a gratuitous service, the contract of service, if any will be without consideration and will therefore not be enforceable. In the case of a lawyer he will therefore not be liable on the contract for the contractual duty of skill and care. However having undertaken to give the service, he will owe a duty of skill and care to the client independent of contract. This is the position of section 9(2) of the Legal

[59]*Ibidem*, p.178. See the case of *Midland Bank v. Hott Stubbs & Kemp* (1979) Ch. 384 as per Oliver J. pp. 403-405

[60]*Ibidem*, p.179.

[61]Sonia Akinbiyi, *Ethics of Legal Profession in Nigeria*, Augustus Publication, Sango-Ota, 2003, p. 181.

[62] *Ibidem.* See Rules 14(a)-(c) of the Rules of Professional Conduct for Legal Practitioners as Statutory Instrument (S.I) No.6 in the Federal Republic of Nigeria Official Gazette No. 11 Volume 94 of 24 January, 2007.

[63] J.O. Orojo., *op. cit*., pp.197-198.

Practitioners Act, 1975 which preserves the right of the Legal Practitioner to exclude or limit his liability in negligence. In this respect it is the position that the Legal Practitioner shall take no reward either by way of fees, disbursement or otherwise. Thus if the client refunds court fees to the Legal Practitioner, the service will not be without reward; but if the client pays the fees into the court or gives it to the legal practitioner to be paid to the court, the service will still be without reward.[64]

(b) Immunity of Barristers Conducting Litigations in Court

It is the provision of section 9(3) of the Legal practitioners Act, 1975 provides that the liability stated in sub-section (1) of the section shall not affect "...the application to a legal practitioner of the rule of law exempting barristers from the liability aforesaid in so far as that rule applies to the conduct of proceeding in the face of any court, tribunal or other body". The rule of law referred to in section 9(3) above was developed in the from the common law by the English Court in the Case of *Rondel v. Worseley*[65] which is the most reliable authority on this point. At the beginning of this Appeal in the House of Lords, the arguments according to *Lord Reid*, directed to the general question of Barristers' liability. It was contended that all other professional men, including solicitors, are liable to be sued for damages if loss is caused to their clients by their lack of professional skill or by their failure to exercise due care, so why should not barristers be under thesame liability? The old age rule is that if a barrister acts honestly in the discharge if his duties, he is not liable to an action by his client for negligence, or for want of skill, discretion or diligence in respect of any act done in the conduct of cause, or in the public interest that he should be liable.[66]

One of the emphatic supports given to the immunity of barristers or counsel in litigation was given by Lord Denning when he observed in thesame case of *Rondel v. Worseley* cited above, "that is in my judgement, a sure ground on which to rest he immunity of a barrister. At any rate, so far as concerns the conduct of a cause in court. It is so that he may do his duty fearlessly and independently as he ought, and to prevent him being harassed by vexatious action such as this present one before us. It is the ground on which the judge cannot be sued for an act done in his judicial capacity, however corrupt...and on which a witness cannot be sued for what he says in giving evidence, however perjured... and which an advocate cannot be sued for slander for what he says in court however malicious.[67] "It is a fearsome thing for a barrister to have an action brought against him, to have his reputation besmirched by a charge of negligence. To have the case tried all over again, but this time with himself, the counsel, as the defendant. To be put to all the anxiety and, I would add, all the costs of defending himself, even though in the end he should win". "Faced with this prospect, a barrister would do all he could to avoid rather than risk it; he would forever be looking over his shoulders to forestall it. He would be tempted to ask every question suggested by the client, however irrelevant, to call every point, however bad, to prolong the trial inordinately, and in case the client should be aggrieved and turn round him and sue him for negligence". "If a barrister is to be able to do his duty in court fearlessly and independently, he must not be subjected to the threat of action for negligence.[68]

Though the immunity given to the Legal Practitioner in section 8(3) of the Legal Practitioners Act of 1975 only protects him against an action in court. If his negligence even in conducting proceedings in the face of the court amounts to unprofessional conduct, the legal practitioner may be dealt with accordingly by the Legal Practitioners Disciplinary Committee or the Supreme Court as the case may be.[69]

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[64] *Ibidem*
[65](1967) 3 All E.R 993.
[66] J.O. Orojo., *op. cit.*, p. 199.
[67] *Ibidem*, p.201.
[68] *Ibidem*
[69] *Ibidem*, p. 204.

1.14 Damages as a Consequence for Breach of Legal Duty by a Practitioner

An action may be brought for damages against a legal practitioner by a client who suffers loss as a result of his negligence. This is the usual remedy but the alternative is for the Legal Practitioner to pay for the cost of the action in an appropriate case.

Conclusion

This paper has shown that a Legal Practitioner in Nigeria can be charged for negligence in the conduct of his duties where he failed to exercise due diligence in the performance of clients duty for which professional fees have been advanced and the client suffers a loss as a result of his negligence. The statutory authority to that effect is section 9(1) of the Legal Practitioners Act, 1975 which provides; "that a person shall not be immune from liability for damage attributable to his negligence while acting in his capacity as a legal practitioner, and any provision purporting to exclude liability to any contract shall be void". Though in the course of this academic inquiry, it was also noted that legal Practitioners in Nigeria are also protected by some level of professional immunity from being sued by his client for negligence and this is provided under section 8(3) of the Legal Practitioners Act, 1975 but such immunity is limited to action of the Legal Practitioner in the course of representation in a litigation in court and were his action in this respect amounts to professional misconduct in the face of the court, necessary legal action will be taken against the Legal Practitioner for professional misconduct[70] which falls under the purview of the Legal Practitioner Disciplinary Committee and the Supreme Court of Nigeria.

Bibliography

A. J. Beredugo., *Nigerian Legal system*, 3rd edn, Malthouse Limited, Surulere, 2009;

J. O. Orojo, *Professional Conduct of Legal Practitioners in Nigeria*, Mafix Books Limited, Yaba, 2008;

Federal Republic of Nigeria Official Gazette No. 11, Volume 94 of 24/1/2007 at B.57;

K. Gururaja Chari, *Advocacy and Professional Ethics: In Retrospect and Prospect*, Wadhwa and Co., Allahbad, 2005;

J. O. Asein, *Introduction to Nigerian Legal System*, 2nd edn., Ababa Press Ltd, Surulere, 2005;

K. Gururaja Chari, *Advocacy and Professional Ethics: In Retrospect and Prospect*, Wadhwa and Co., Allahbad, 2005;

Tengku Mohd T. Sembok, *Ethics of Information Communication Technology (ICT)*, paper presented at the "Regional Meeting on Ethics of Science and Technology", Bangkok, 5-7 November 2003;

Sonia Akinbiyi, *Ethics of Legal Profession in Nigeria*, Augustus Publication, Sango-Ota, 2003;

The Nigerian Law School, *Course Handbook on Professional Ethics and Allied Matters*, Bar Part II Course 2003/2004, Council of Legal Education, Abuja, 2003;

Geoffrey Samuel, *Law of Obligations and Legal Remedies*, 2nd edn., Cavendish Publishing Limited, London, 2001;

B. A. Garner (ed), *Black's Law Dictionary*, West Publishing CO., 7th edn, 2000;

C. A. Agbebaku & Livewell Osahon Omoregie., *Teaching Ethics and Values in the Legal Profession: The Nigerian Perspective*, available online at http://www.ialsnet.org/meetings/teaching/papers/Agbebaku.pdf, accessed on 30 May, 2012.

Legal Practitioners Act, 16 May 1975 as amended by the Legal Practitioners (Amendment) Act (formally Decree) No. 21 of 1994, (Cap L.11 Laws of the Federation of Nigeria 2004).

[70] See Section 12 of the Legal Practitioners Act, 1975 which sets down what amounts to unprofessional conduct of a Legal Practitioner in Nigeria.

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CONSIDERATIONS REGARDING THE COMPLEX NATURE OF JUDICIAL HEARINGS PREPARATION

G. I. Olteanu

Gabriel-Ion Olteanu
Faculty of Law, the Forensic Department,
Police Academy "Alexandru Ioan Cuza", Bucharest, Romania
*Correspondence: Gabriel Ion Olteanu, Police Academy "Alexandru Ioan Cuza", 1A Aleea Privihetorilor St., Sector 1, Bucharest, Romania.
E-mail: gabrielolteanu10@gmail.com

Abstract

The author takes over and develops a classic theme of the criminal discourse: preparation for interrogation. By presenting the considerations related to less analysed aspects of the doctrine and ignored by the Romanian investigators, the author brings to attention a theme for meditation both necessary and profound – from adequate preparation of the judicial hearing to the heard person's scientific evolution and personal needs.

Keywords: *Judicial hearing, judicial interview and interrogation, investigator, suspect, hearing effectiveness*

Introduction

Practitioners say that two minutes of preparation can save several hours of investigation. Although judicial hearings can take place outside a formal framework, proper preparation is essential for the success of any hearing. In the street, at a person's domicile, in the offices of a multinational company or in the hearing room, the investigator's performance must be attentively prepared. He/she must not forget that he/she has specific objectives of the investigation which must be carried on, that the investigated person has his/her own interests and behavior and that nothing was ever easy to do within a criminal investigation. The preparation of judicial hearings is not only complex but also compulsory. If the obligation means to observe the previsions of legal norms and criminal tactics assimilated by the professional environment, then when we speak of complexity, we must have in mind the investigator's active thinking. The investigator has to adjust himself/herself to each person and case particularities. The simple application of patterns cannot bring the necessary success in each investigator's undertaking.

The preparation of hearing within judicial investigations means, in a classic approach, to determine the issues which have to be settled within the hearing, the order in which the evidence presented has to be used, the establishment of tactic procedures of hearing, according to the data obtained regarding the accused or defendant's psychology and personality as well as the circumstances in which the crime was committed.[1] I consider that here it is necessary to notice certain evolutions and, as a consequence, pay the necessary attention to certain elements further described.

The hearing objectives – a person's hearing results in obtaining an important amount of information useful for the ongoing investigation development where it is highly important that the investigator adequately evaluates the nature and importance of the information obtained.

[1] C. Aioniţoaie, T. Butoi, *Ascultarea învinuitului sau inculpatului*, in *Tratat de tactică criminalistică*, "Carpaţi" Printing House, Craiova, 1992, p. 91.

The investigators usually find it necessary to approach the investigation general framework, ask questions which allow the investigated person to offer a large amount of information. It is considered that important unsolicited information is actively revealed for the investigator. Thus, the "information sources" can be protected; information which cannot be otherwise provided is thus verified.

Each important information has to be attentively analysed – the context it was communicated in, its relevance to the person who offered it, normal personal relations and purposes which are pursued, the non-verbal manifestations in this case, etc.

Every time, after the stage of the easy approach, it is necessary to use rigour as the rule says that each person who testifies within a criminal investigation uses the testimony as an "alibi", as recitals in order to support his/her own interests. Everything has to be as complete as possible in order to precisely establish what is true and false. Even more, one must not forget the necessary correlations between the heard person's declarations and his/her behaviour at different times during the hearing.

The evidence available in the file – in order to know the evidence which can be used within the hearing, the investigator should have in view the possible answers which can be given by the suspect when confronted with each piece of evidence. Obviously, the investigator cannot determine the suspect not to offer erroneous explanations regarding the aspects and circumstances for which there is incriminating evidence. What can be done is that the investigator conducts the suspect's answers – refer to circumstances or aspects which later on can be blocked with other highly convincing evidence. Thus, lies can be controlled by overvaluation in circumstances of inability to offer evidence to support over dimensional lies and/or by referring to "regular lies" which are so usual that nobody believes in.

General information – behind this notion there must lay the investigator's so called general knowledge regarding the case under investigation. Basically, it refers to any information about the people involved, the crime scene, the formal and/or factual rules which govern a certain economic or administrative activity related to the illicit did. Any information could be useful – it is easier to discover lies fabricated by the suspects hoping that the investigator does not know certain information; information which cannot be known by "anyone". Even more, in the case of managed intakes such as public acquisitions or accountancy or the way a certain internal labor methodology "works", the suspects base their lies by relying on "convenient" lies.

It is also possible that the listener has a "hidden agenda", something which can influence their behavior.

The investigator must not forget that **the heard persons' audition order** within a case is very important. It is hard to give advice in this field – Who should be the first? The oldest, the youngest, women, the main suspect, the victim, in case there are several suspects, who should be the first? etc Inspiration can help save time and energy.

If the alleged criminal or the main suspect, as we can never be sure enough, finds out that another participant in illicit activities such as a co-author, accomplice, instigator, someone who has organized and/or financed an illicit activity – will have an extra reason of stress and a concern which he/she will try to hide in order not to be discovered by the investigators.

The order in which the people undergoing an investigation are heard in routine cases is not very important as it is done according to the investigator's wish. In special cases, where undercover investigators were used and the information was obtained from certain informers, it is recommended to establish the hearing order at administrative level after serious previous risk analysis has been done.

The way in which each hearing is done, the "choreography" according to which the heard people are moved from one room to another, "the surprise meetings" on the hallway or the "doorway", the investigators' replacement, the pauses, the meals, the visit to the room with the corpora delicti, etc can highly influence the results of the investigation.

Within the doctrine[2], the way in which the suspect reacted along previous hearings – how did the suspect react when meeting the investigators? is highly debated. Was he docile, did he react violently, did he try to use illness as a means of avoiding the hearing in the hearing room, did he pretend to faint, etc?

Experienced investigators know the fact that most people adopt typical behaviour in typical situations that they go through. Under these circumstances, the suspect who was verbally aggressive within the research 3-4 years ago is expected to behave in the same manner each time he/she is heard during an investigation.

Normally, this type of information is extremely useful but obtaining it is not easy as it is not always easy to find people who know enough information based on which the dominant trait of behavior can be determined in a special situation such as the development of a judicial hearing according to which we can find out the normal behavior of the person undergoing the investigation.

Investigator appointment – in practice, it is considered as a good solution for the development of the hearing underdone by the investigator who manages the case file. Still, often, he is not the most suitable person to pursue certain hearing. Even though he could have the best representation of the investigation stage, has the strategic option regarding the investigation evolution, or has heard several people or all people involved in the investigation, the investigator may not obtain the suspect's trust as there is suspicion (often real) that the investigator is already convinced that the suspect is guilty. There is the possibility that the investigator had certain contact with the suspect – the occasion which has led to a conflict such as a communication barrier – or an arrest and other hard feelings, etc. Even more, in certain cases it is possible that the suspect had been the investigator's superior.[3] Also, it is possible to lead to cultural or gender problems – a woman investigator will face more resistance if she hears a male suspect with rigid, traditional opinions regarding cultural and gender differences – which have to be taken into account when the investigator decides to conduct the hearing. In many cases, it refers to a so-called politics of the judicial organisms which approaches the case under the pressure of the public opinion, higher administrative institutions, mass-media, natural desire to close the case, to provide examples for the society.[4]

The case file and the evidence – during a suspect's hearing, each detail can become very important.

In fact, the case file is a file...which contains, beyond the specific criminal terminology, pages with the investigation data, regardless of their names – minutes, declarations, reports, etc. It is tangible, represents the present stage of the investigation and could be used by the investigator in order to amplify the pressure on the suspect. The investigator can admire or touch it and say "Look what we've got here", "Let's see what it's written here", "Yes, it's an obvious... waste of time". In fact, he can be either convincing or not or at least give the impression that "he understood how things work", that he has the results of certain activities which, in fact, have not taken place – declarations of people who had not been heard, minutes of undone searches, reports of expertise which has not been done, etc.

At least, as a principle, it is not advisable to use these types of elements – video cassettes, objects used during the illicit activities, objects bearing traces which confirm the person's presence at the crime scene – which could complicate the "image" presented to the suspect. The motive is simple – the suspect may entirely refuse to make any declaration: "if

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[2] J. K. Barefoot, *Employee Theft Investigations*, Butterworth Publishers, Stoneham, Mass., 1980, p. 57.

[3] Author's note – it is possible that the investigator, before joining the judicial police, or a close relative or friend had had a subordination relation with the suspect and this affects the good development of the hearing

[4] D. Zulawski, D. Wicklander, *Practical Aspects of Interview and Interrogation*, CRC Press, LLC, 2002, p. 59. It is highlighted the fact that in the private environment, everything is decided according to the company's politics and interests; in the public sector, the situation is slightly different as the situation is never abandoned before the legal procedures are finalized.

there is so much evidence, why do you need my declaration?" Even more, there is the possibility that the suspect asks to see the evidence which proves his involvement.

Although it may resemble a humbug, it is advisable that the investigator carefully manages only the file and allows the suspect reach his own conclusions regarding what he may obtain.

In most cases, the investigator, while preparing to hear a suspect, pursues it with little evidence against him. Sometimes, it involves only indirect evidence or the results of a reasoning based on simple logics.

Under these circumstances, the file can be used as a bench-mark, as a support element for the investigator; he can only refer to the file existence with a lateral head movement, with an explicit or resolute inclined head movement. The investigator can get back and approach the file in a threatening way as "this doesn't work anymore". Anyway, the file will contain the forms necessary for declarations, minutes, etc. A suspect's hearing should not be interrupted, the investigator being prepared for anything. It is important for his mind to be "set" in order to obtain the suspect's confession.

Regarding the guilt evidence, I believe that it has to be prepared seen after the suspect's clear position in relation to each evidence in part. Of course, to the extent to which a scenario is drawn and a positive reaction is expected, for the investigation, the investigators can leave an object to the suspect's sight which relates him to direct involvement in the illicit activity. Every time an object, a writ, or any other object which can be considered evidence is present in the hearing room, the investigator must take the necessary measures for the evidence protection – the suspect may destroy, swallow, throw the evidence out of the window, etc.

Time interval and the place of hearing – usually, investigators have the possibility to establish and rigorously prepare the time interval and the room for the hearing. If the hearing is done with the occasion of new activities on the field – such as research at the crime scene, search, or in flagrante delicti situation – the investigator has few options and, as a result, there cannot be real preparation.

In spite of all these, it is advisable that the investigator undergoes the hearing in an "intimate area" which can ensure confidentiality and facilitates communication. Thus, there is the risk that the suspect's concentration diminishes. Even more, people with hidden interests or passersby can interfere so that both the heard person and the investigator's security are at risk. Sometimes it is enough that the investigator changes the place of "discussion" by a few meters, other times, and the place can be the police car (the better equipped with listening and image devices, the better). It is very important that the heard person had undergone body search before hearing as it is important not to under consider the risk of carrying guns with the purpose of hostage taking.

The hearing intimacy, the confidentiality of the information revealed is highly important in order to obtain the information necessary for the investigation. Investigators must have in view the fact that the declarations can have extremely important consequences for the heard person and his/her relatives. One cannot explain something illegal, shameful, or wrong in any circumstances. One can hardly confess in front of a trustworthy person; under no circumstances in front of several people or the mass-media. Usually, secrets are told in moments of intimacy.

The purpose of the hearings underdone on the field, as is the crime scene case, means to obtain information regarding the nature of the activities, the identity of the people involved, the motifs, the circumstances under which the activity took place and so on. Although there are resemblances between a formal hearing and a crime scene hearing, there are also differences, of which the most important are the following:

- Certain spontaneity of the declarations obtained based on lack of preparation due to confusion, strong emotions, the time lapsed, impossibility to obtain a satisfying level of

concentration to synthesize the interests and aspects of different circumstances which may be important;

- Incertitude regarding the suspects' guilt;
- Incertitude regarding the deed consequences;
- The need to obtain as many and as detailed information based on which the research is extended.

The heard person and any other suspect can be arrested based on the hearing results underdone at the crime scene. The more the hearings were underdone by respecting confidentiality and the heard persons were convincing regarding their testimonies, the more confident the investigator becomes and the better the investigation is led.

Usually, the investigators undergo hearings in the offices or houses where the witnesses or the victims carry their daily activities. There are many disadvantages where the most important are interruptions due to telephone calls, arrival and/or intervention of a third person, children, etc. These types of interruptions can draw attention; can offer the necessary time to the heard person to make up a story full of lies – more or less credible – can make certain drainage in a not so well systematized memory which tries to do something with uncertain information.

The hearing outside the judicial office must be accepted as part of the hearing – it has to be done for several reasons such as: the main suspect has not been identified yet, it is necessary to obtain the suspects' alibis, the fact that one person had been called at the police station should remain unknown, etc – and, under these circumstances, hearings have to be properly prepared. Thus, it is preferable that the investigator waits, if necessary, for the time interval which allows the hearing to take place in "silence", in a confident area, where the interviewed people feel comfortable and totally attentive and nimble regarding the judicial procedure.

The hearing place must ensure confidentiality and intimacy and this is possible in a private framework. If there are no interruptions, if there are no distractive events, it is possible that the heard person can focus on the hearing, on what he/she has to say, the way he/she testifies. It is advisable that the investigator prepares the heard person so that he/she can focus on the investigation, the effort to identify the criminal, etc thus avoiding as much as possible the less desirable consequences of altering the declarations during the investigation.

The hearing room, beyond the fact that it has to be available during the entire hearing, must be decorated so that it does not influence the investigated person in a negative manner, does not inspire cold atmosphere which might limit communication; the investigated person should not want to end the hearing too early. The room can generate fear, it can amplify the fear feeling in relation to what might happen worse in the investigation development. In this type of atmosphere, the investigated person is tempted to deny everything, avoid offer the investigator any type of information.

The choice of a common-looking office, with specific furniture, which is familiar to several investigated people, is a good solution. Everything has to look familiar. Although one might say that this type of room does not offer the investigator the facilities of a hearing room, still, the warmth and comfort can lead to less resistance, less preoccupation for defence specific to most people who undergo investigation with criminal investigation. Even more, communication is facilitated and even encouraged. In an office, jokes can be told – the official nature of the hearing has to become more familiar – the investigator can move, notice something on the wall or out of the window. It is important that the atmosphere specific to a confrontation, expected by the person who has to be heard, is not confirmed, is not present.

Even more, the investigator could use a third person to be present as witness during the hearing. On condition that this person is trustworthy, there are a few advantages which should not be neglected, such as:

- There is a second person who can confirm the fact that during the investigation there have not been any threats, illegal promises, no constraint measures were used in order to offence the heard person's honor and dignity, etc.;
- There is a second set of eyes and ears which observe what is being said as well as the investigator and heard person's behavior;
- The assistant witness (who can also be another investigator, the second investigator) hears and observes everything that had taken place during the hearing although the two investigators' perception cannot be identical, evaluations regarding the investigator's responsibility and professionalism can be done.
- In case the main investigator does not know that the assistant witness is also an investigator, there is the possibility that the second investigator presents later on his/her own result of the hearing;
- In case of any incident or cause which makes ineffective the first investigator's endeavor, based on a sign of maybe a scenario, the second investigator will be able to take over the hearing.

Regarding the positions, it is advisable that the heard person stays with his/her back to the door[5]. The assistant witness or the second investigator should be positioned slightly in the lateral of the heard person, out of the reach of peripheral view of the heard person so that he/she would not be distracted during the hearing. The heard person while seated with the back at the door will not feel the need to leave and will not feel as if he/she is kept in the room due to the fact that the exit is blocked by the investigator, as he/she positions his/her chair on the door trajectory. One should not neglect the fact that an assistant witness/ the second investigator is a woman could be an advantage in case of a male duel.

Referring back to the hearing room, at the natural positive impact of the comfort on the heard person, I mention that it is good not to have an object inflation, not to create a crowded image as this will willingly or unwillingly diminish the heard person's attention as he/she focuses on an object or several objects displayed in the room. The fewer reasons, the fewer objects which draw attention, the easier for the investigator to interpret what determined the investigated person's behavior – each behavioral act analyzed in association with what the heard person writes or says.

If in an office it is easy for the investigator to analyze and understand the heard person's behavior, things change a lot when hearing is underdone in a street with an aggressive barking dog, a car with lights on or a speeding car, another person who has to ask or say something, etc. Under these circumstances, there is a variable in the heard person's behavior which makes it more difficult for the investigator to interpret his/her behavior. The same may happen if the investigated person is directly or indirectly allowed to smoke by offering him/her an ashtray – everything becomes more complicated. What we see as behavior manifestation is the result of the possibility to smoke, is a specific manifestation when perceiving tobacco flavor, the joy of nicotine recognition, etc. For example, if the suspect, as an answer to the investigator's questions directs his/her hand to his/her pockets, takes out the pack of cigarettes, takes one cigarette and tries to light it although he/she hasn't finished the light one – will be interpreted by the investigator as a manoeuvre to gain time or will be considered as a reflexive gesture manifested each time the person has something important to do.

The same happens when the heard person is offered something to drink. When the suspect leisurely takes the glass and sips, he/she wants to delay the answer or it is a simple coincidence or a result of emotional tension specific to judicial hearing. Leaving pencils, paper clips or other objects on the desk at the heard person's disposal can create similar interpretation problems – if the investigated person starts playing with a paper clip which

[5] D. Zulawski, D. Wicklander, *Practical Aspects of Interview and Interrogation*, CRC Press, LLC, 2002, p. 63.

he/she bends, this means that the suspect either avoids to look at the investigator, lies, or likes to play with the paper clip. It is obvious that in most cases the investigated persons will try to get time in order to formulate the best answer according to his/her interests.

A further source of attention distraction is the investigator's power and valorization of signs. I recall that some time ago I went on a documentation trip to Italy and while invited in a police officer's office, I was impressed by a big framed picture extracted from a paper which showed the policeman as a young and victorious man with the gun in his hand beside a Mafia boss. The text following the picture was eloquent: "The mafia godfather has found his policeman godfather, congratulations to the policeman, congratulations to the policeman... for catching the dangerous mobster!" Along the entire visit, I watched this picture and the policeman's victorious smile and his gun at the mobster's head created a strange sensation. Other objects can also be used, such as: the plaque which reveals the merits, badges placed on the uniform, the pistol, the handcuffs insidiously moved from time to time, can build an emotional state of mine for the suspect –it is a special situation with serious consequences.

The heard person's attention can be influenced by several factors, some more important than others.

What can the investigator do? Probably the best thing would be to put himself in the heard person's shoes, visualize the hearing room and notice the sources of attention grabbing which could negatively influence the hearing development. He would probably take care of the draperies, the land line, and any other element in the superior part of the room.

If the hearing cannot take place in an office and a conference room, a warehouse are chosen instead, it is necessary to upgrade this space – minimum dust cleaned and the furniture arranged in a manner which facilitates communication.

Neither in the hearing are room, upgraded in the judicial headquarters, things simple. Usually, here we find a cold atmosphere, with closed air, and phonic isolation which allows no noise from the outside, the door's closing system, it is possible that the door and the windows – if they exist – have bars – nothing suggests comfort and openness to free communication so that neither an experienced investigator feels at ease. Although these hearing rooms have a clear role – for example, when arrested people are heard or further security measures are needed – it is advisable to use this type of rooms when investigators wish to put further pressure on the heard person after previous preparation.

The investigator's preparation – It is often said that judicial hearing is a type of duel.

What happens in fact?

The heard person becomes nervous, develops frustrations as he/she considers that he/she faces a rival who has to be defeated – the man who wants to find out more than he wants to tell and has to be defeated, should be put in his place and made understand that "if I want to tell something, I will tell, and if I don't want, nobody and nothing will convince me to do it". The investigator himself can become as nervous and frustrated as the heard person as he becomes nervous due to the situation and bothered by the fact that he does not have enough means to determine the person to change attitude. Thus, the investigator can change his attitude, become sarcastic, use indecent or malicious language, etc.

It would be probably best for the investigator to understand both the need and the negotiator. He must accept the idea that it is normal and it is the heard person's "job" to omit, forget, hide, find out, and try to trick the investigator in any way. Understanding the two main actors' roles – the investigator and the heard person – can lead to accepting the fact that conflict is not productive. As negotiator, the investigator can better manage the hostile feelings, frustrations, the way the criminal investigation should go, what might happen with one or other people involved in the illicit activity, how and if it is possible to recover the prejudice, etc.

Without developing mediation theories, I believe it is necessary to have a "win – win"[6] situation. This will allow the investigator understand the heard person's situation and will also allow the heard person to understand that the investigator has something important to do and, in his position, he cannot afford to lose. The investigator cannot defend the heard person but can "negotiate" so that he finds out the truth and the truth – the most credible variant of the way the searched illicit activity took place –can support best the interest of the people involved.

As a negotiator, the investigator can think he can act as a theatre director: he can choose the setting, establish the choreography, the way each dialogue begins, can think of the way he will be able to use to hearing room, can establish the outfits – his; can also influence the heard person's outfit. For example, a lot of investigators consider that the outfit with a suit and tie is absolutely professional and fits all situations, which can be true in most cases. Still, there are cases where this type of outfit can generate limitations and distance as they lead to frustration relating to the investigator's wellbeing by comparison to more precarious financial situation of the investigated persons. The rule should mean that the investigator changes his outfit according to the heard person and take into account the heard person's needs[7].

By anticipating the heard person's possible attitudes, the way he/she prepares and approached the hearing, the investigator should also prepare. He should chose his outfit, smile, own way of approach. This should mean the investigator adjusts his/her own approach and behavior – for predictable moments of the hearing, etc. With the risk of repeating myself, the investigator's behavior should be adequate to everything which could mean fury, suspicion, reserved attitude or despise. It would be better for the investigator to learn from a seller's behavior when faced with a possible client[8]. In sales, an agent must identify the client's needs – emotional, financial, self image, etc. – present the benefits of his product and highlight the way he answers to the client's needs. In principle, if the product's benefits can compensate the client's objections, and if the product satisfies the client's needs, he will buy it. In a similar way, within a hearing, the benefits seen as a result of communication with the investigator, information provision, will have to pass his objections. Otherwise, the heard person will not speak.

Bibliography:

C. Aioniţoaie, T. Butoi, *Ascultarea învinuitului sau inculpatului* in *Tratat de tactică criminalistică*, "Carpaţi" Printing House, Craiova, 1992;

J. K. Barefoot**,** *Employee Theft Investigations*, Butterworth Publishers, Stoneham, Mass., 1980;

N. J. Gordon, W. L. Fleisher**,** *Effective interviewing and interrogation techniques*, Elsevier Inc., 2006;

D. Zulawski, D. Wicklander**,** *Practical Aspects of Interview and Interrogation*, CRC Press, Boca Raton LLC, 2002.

[6] Author's note – in negotiation practice there are known four types of negotiation: win – win; loss – win; win – loss; loss – loss; all these types have advantages and disadvantages and can be used effectively by taking account of the negotiation object

[7] Author's note – in practice, I have met people with no material possibilities who considered that they should be heard by suit investigators and saw this as a matter of respect; on the other side, there are young people who consider that the official outfit blocks communication as they do not agree to traditional values

[8] N. J. Gordon, W. L. Fleisher**,** *Effective interviewing and interrogation techniques*, Elsevier Inc., 2006, p. 42; D. Zulawski, D. Wicklander**,** *Practical Aspects of Interview and Interrogation*, CRC Press, Boca Raton LLC, 2002, p. 67.

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SOME CONSIDERATIONS REGARDING THE QUALITY OF PARTY IN INDIVIDUAL LABOUR DISPUTES

L. Onica Chipea

Lavinia Onica Chipea
Faculty of Law, Department of Law and Administrative Sciences
University of Oradea, Oradea, Romania
*Correspondence: Lavinia Onica Chipea, University of Oradea, 26 General Magheru St., Oradea, Romania
E-mail: laviniachipea@gamil.com

Abstract

The paper proposes, based on the analysis of the Code of Civil Procedure and of labor legislation, particularly those of the Labor Code and the Law on social dialogue, to nominate, to develop analytically and synthetically the institution of the quality of party in a individual labour conflict.

Along with the cited legal provisions, the examples of judicial practice in Bihor County point out the specific of labor jurisdiction in the Romanian legal system, jurisdiction governed by the Code of Civil Procedure, as common law, which is adapted to the special legislation of the spirit of this institution.

Keywords: *individual labour disputes, parties, employees, employers, accessory voluntary intervention, call in guarantee*.

Introduction

Individual labor conflicts are defined as labor disputes that have as object the exercise of rights and fulfillment of obligations arising from individual and collective labor contracts or from collective bargaining agreements and relations of civil servants, as well as from laws and other legal acts (article 1 letter.p. of Law 62/2011 of Social Dialogue).

Also individual work conflicts are considered: conflicts in connection with the payment of compensation for damages caused by parties by the failure or improper performance of their obligations under the employment contract or service report (Article 1 letter p 1 (i) of Law no. 62/2011 of Social Dialogue); conflicts about the nullity of individual employment contracts or clauses (article 1 letter p 2 (ii) of Law no. 62/2011 of Social Dialogue); conflicts in connection with termination of service or clauses thereof (article 1 letter p 3 (iii) of Law no. 62/2011 of Social Dialogue).

Labor jurisdiction is "the settlement activity by certain organs of labor disputes and other demands on labor relations and related reports, including regulations relating to competent authorities to resolve such conflicts and demands, as well as the applicable procedural rules"[1].

We believe that the specific nature of the judicial process by which individual work conflicts are resolved lies in the quality of party in an individual labor dispute.

Parties in Individual Labor Disputes. Theoretical and Practical Aspects

The provisions of article 267 of the Labor Code and that of Article 1 letter q. of Law 62/2011 of Social Dialogue nominate analytically individuals or legal persons who may be parties in labor disputes:

[1] A. Țiclea, A. Popescu, C. Tufan, M. Țichindelean, O. Ținca, *Dreptul muncii*, "Rosetti" Publishing, Bucharest, 2004, p.798.

a. employees and any other person, holder of a right or obligation under the Labor Code, other laws, or collective bargaining contracts (agreements);

b. employers - individuals and / or legal persons, temporary work agencies, users, public authorities / institutions and any other person who is employed;

c. unions and employers

d. other natural or legal persons who have this vocation under special laws and the Code of Civil Procedure

The parties of individual labor disputes (before the amendment by the Law of Social Dialogue, regarding conflicts of rights with collective character) that have as an object *the exercise of rights and fulfillment of obligations arising from contracts or collective bargaining agreements* are all *employer* as in the case of individual conflicts work that concern the exercise of rights or performance of obligations arising from individual employment contracts or relationships of civil servants (formerly conflicts of individual rights) and *employees* of this unit. All employees of a collective unit can be part of such a dispute, including employees of a sub-unit (section, workshop) or employees of a particular profession or trade.[2] In this context arises the problem of representation of both sides of the work conflict. Thus, the employer is represented by its management bodies (director, general manager, manager, etc.). Employees are represented by unions and in establishments where there are no unions by representatives of their delegates elected for this purpose.

Wage-servants (employees) are part of labor disputes, having, as a rule, standing.

Under the provisions of the Labor Code, *the employee is a person who is party to an individual contract of indefinite duration, fixed or working part-time or full-time*. While major workers defend their own interests, minor employees once employed may be part of a personal work conflict and can support their own work and interests. But under protection rules contained in the law, they are entitled to be assisted when necessary by their legal guardians.[3]

In the community legislation we find the concept of community worker. For example, Regulation nr.1621/from October the 15th 1968 on the free movement of Community workers, Part I is entitled "Employment and family of worker" and Regulation nr.24347 from July the 27th 1992 amending Regulation Part Two nr.1612/68. Thus, the worker is a person who: exercises effective and genuine activity, under the direction of someone else and receives remuneration.[4]

Also in the literature, reference to seasonal workers, cross-border workers are made when speaking of categories for temporary migrants.[5]

By the provisions of Law nr.62/2011 of Social Dialogue, the notion of *salaried employee* as part of an individual labor dispute, used by Act nr.168/1999 and the provisions of art.248 of the Labor Code Annotated, was replaced by the notion of *employee*.

The reason of the legislator was to include as part of a conflict of individual employment *civil servants* also, who are in service relation to the administrative institution where they are operating. As a result, legal and doctrinal analysis of the position of the employee as party to a work conflict can individually apply in the case of public officials.

Regarding *the employer*, that employer is a party to the conflict who has (or had) the co-contractor quality, so he was in employment relationship with that person being eventually obliged to him.[6] Extending the interpretation, based on new legal provisions applicable, may

[2] D. Top, *Tratat de dreptul muncii*, Wolters Kluwer Publishing, Bucharest, 2008, p.544.

[3] Employees aged 15-16 years do not fully exercise their rights, having with a limited capacity of labor law, in the process they will be assisted by parents, or in their absence, by the guardian.

[4] Elena Ana Nechita, *Libera circulație a persoanelor în spațiul Uniunii Europene*, Agora University Press, Oradea, 2010, pp.89-90.

[5] N. Iancu, *Migrația internațională a forței de muncă*, Pro Universitaria *Publishing House*, Bucharest, 2013, p. 92.

[6] For example, in disputes concerning the calculation of the wages due to teachers, teacher standing is entitled to payment of wages. Passive locus belongs where appropriate, to the school (school, college, university, college),

be part of an individual labor dispute that employer who has (or had) the co-contractor quality, so he was in employment or service relationship with that employee.

The law allows the individual employer and the employer's legal entity to be a party to an individual work conflict to[7]. Part of such conflicts may also be temporary[8] employment agencies, users[9], and any other person who has a job held under the Labor Code, such as employers for whose benefit seconded employees operate.[10]

The employer is represented in an individual labor dispute by his management organs, in accordance with the law, the articles of association or the statutes. According to the provisions of letter g 62 of *Law 62/2011 of Social Dialogue, employers' organizations, at the request of their members, have the right to attend and represent before the courts at all levels, law enforcement jurisdiction or authority of other institutions, by their elected defenders*.

Article 222 of the Labor Code Annotated provides that, upon request of their members, unions can represent them in labor disputes under the law. In exercise of the powers conferred expressly to unions, and under art. 28 of Law no. 62/2011[11], *they are entitled to take any action provided by law, including litigation made on behalf of their members under a written power of attorney from them.* Thus, unlike the old regulation (Article 28 of Law no. 54/2003 union, repealed), the new law text establishes the obligation of the union to act following an express mandate from those concerned, including in the case of individual dismissals. The employee in question "must be consulted about the opportunity to trial the employer and the action cannot be brought or continued by the trade union if the concerned objects or discontinues the proceedings"[12]. In practice a challenge to article 28 of Law of unions was raised, repealed by Law no. 62/2011 on the grounds that these provisions violate Article 51 par. 2 of the Constitution, which states that legally established organizations have the right to address petitions on behalf of the groups they represent. The Constitutional Court rejected the objection[13] on the grounds that legal action may be brought by the unions not only in partnership, on behalf of their members but also on individual names. In this respect, the Constitutional Court held that "the fundamental right to petition governed by Article 51 of the Constitution, is reflected in demands, claims, complaints and suggestions about solving personal or group problems that do not assume the way of justice, to which authorities are required to meet the terms and conditions established by law, while courts referral for turning a subjective right, ignored or violated, or for having interest obtainable only by way of justice, it is a matter of access to justice, governed by Article 21 of the Constitution and not of the right to petition".

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school board territory, even to the main credit coordinator (mayor). Such capacity does not belong to the local council, which is responsible for calculating the salaries. For details see Gabriela Cristina Fren□iu, *Salarizarea personalului didactic din învă□ământul preuniversitar/superior*, in "Revista Română de Dreptul Muncii" Review no.1/2005, pp.55-57.

[7] Individual employer has no capacity to be sued if the object concerned is carrying the mentioned in his employment terms. This interpretation arises from the provisions of Article 2 of the Law nr.130/1999 on measures to protect employed persons, republished in the Official Gazette of Romania, Part I, no. 190 of 20 March 2007, under which labor certificates of employees of individual employers are kept and supplemented by labor inspectorates.

[8] Temporary employment agency is the company which provides users temporary skilled and/or unskilled who employs and pays a for this purpose.

[9] The user is the person that temporary employment agency shall provide temporary personnel and whish employs to fulfill a certain specific and temporary task.

[10] Posting is temporarily change of workplace, because of the employer, to another employee for the execution of works in the interest of the latter, detachment is governed by Art. 42-47 of the Labor Code.

[11] In accordance with article 28 of Law no. 62/2011 social dialogue unions defend their members' rights, arising from labor law, civil service statutes, collective agreements and individual employment contracts and agreements on relations of civil servants in court, enforcement jurisdiction of other institutions or state authorities, or elected by their defenders.

[12] A. Athanasiu, Luminița Dima, *Dreptul muncii. Curs universitar*, "All Beck" Publishing House, Bucharest, 2005.

[13] Decision no.175/2004 published in the Official Gazette of Romania no. 440 of 17 may 2004.

In connection with the mentioned legal provisions, in doctrine[14] arose whether higher associative forms such as federations, confederations and unions have standing territorial capacity in the formulation of judicial action on behalf of workers' unions that represent them. Solutions of judicial practice were contradictory, some Courts ruling that unions have no higher standing, thus rejecting the action and others have decided otherwise.[15]

I concur with those who support the doctrinal opinion based on relevant arguments that "it is illogical and unnatural that a legal union representation is limited to the union of which he is part, excluding the superior organization which has in its structure also the union". The law uses the phrase *unions* that includes both the employers unions (art. 3, 4 of the Law of social dialogue) and those resulting from their association (41) and union members units that are federations, confederations or territorial unions and at the same time are also members of higher organizations.

The union is able to make a request for intervention under Article 61 of Civil Procedure Code,[16] but only in the interest of the employee. As an exception, as in the case of discrimination, Article 22 of Government Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination confers standing to NGOs, the trade union may, in such a situation, make a request for intervention on his behalf.[17]

As we mentioned, the provisions of the Labor Code stipulate *that may be parties in individual labor disputes, any person holding rights or obligations under the Labor Code, other laws, or collective agreements, as well as other individuals who have this vocation under special laws or the Code of Civil Procedure.*

According to legal provisions, the representation of employees in individual labor disputes is recognized by law only to trade unions; elected employee representatives can not represent the employees.[18] However, employee representatives are recognized, as main task, their representation in solving collective labor disputes, as provided by law nr.168/1999[19], now repealed, and by the new legislation, Law nr.62/2011 of Social Dialogue.

Thus, the *employee's heirs* may be parties in an individual work conflict in the following situations[20]:

- The employer must compensate the deceased employee for pecuniary prejudices which he produced by his negligence (e.g. unpaid wages, holiday pay, etc.) (Article 269 paragraph 1 of the Labor Code);
- In the case of restitution, when the deceased employee received from the employer undue amount of money, received goods which he has not earned and which cannot be returned or if he has been rendered services to which he was not entitled, then he is obliged to pay their fee;
- The employer must be compensated by the deceased employee for damage to property caused by his fault and in connection with his work (Art.270 para.1 of the Labor Code).[21]

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[14] A. □iclea, *Tratat de dreptul muncii*, 5th edition revised, "Universul Juridic" Publishing House, Bucharest, 2011, p.357.

[15] Gabriela Cristina Fren□iu, *Salarizarea personalului didactic din invatamantul preuniversitar/superior*, in "Revista Română de Dreptul Muncii" Review no.1/2005, pp.122-123.

[16] Civil Procedure Code, republished in the Official Gazette of Romania, Part I no. 545 of 03.08.2012, entered into force on 15 February 2013.

[17] I. T. Ştefănescu, I., *Tratat de dreptul muncii*, Wolters Kluwer Publishing House, Bucharest, 2007, p.875.

[18] The doctrine argues that we should extend the role of employee representatives and the representation of employees in individual and collective conflicts of rights, starting from legal provisions that consider the employees' representatives as an alternative of trade unions, exercising powers only in the absence of trade unions; for details see M. Gheorghe, *Căi amiabile de soluționare a conflictelor de muncă*, "Universul Juridic" Publishing House, Bucharest, 2010, pp.242-243.

[19] R. Dimitriu, *Conflictele de muncă și soluționarea lor*, "Tribuna Economică" Publishing House, Bucharest, 2007, p.51.

[20] R. Florian, *The procedure of determining the patrimonial liability within the employment relationship*, Agora International Journal of Juridical Sciences, no. 2/2012, pp. 44-53.

People who are *parties* in relation to the subject of the individual labor dispute can be part in this conflict if they prove an interest. Participation of a third party in a labor dispute can take, given the specifics of the legal work, just the form of an *accessory intervention*[22] when, according to art. 63 of the Code of Civil Procedure, it seeks to support defending the interests of any party in the dispute that is the subject of the case.

Concerning the participation of third parties in individual labor conflicts, *Labor Inspectorate* is entitled, in accordance with paragraph 2 of Article 23 of the Labor Code, to notify the competent court in order to reduce the effects of non-compete clause.

In practice[23] it is considered appropriate to introduce in the cases that concern individual labor disputes the Labor Inspectorate in order to facilitate the enforcement of the judgment, which will thus be opposable.

In the category of other persons who may have the status of parties to a labor dispute, the doctrine refers[24] to a situation in which, according to Article 86, paragraph 6 of Law nr.85/2006 on insolvency proceedings, the liquidator / receiver undoes individual work contracts of employees in the unit. Against the redundancies, employees may sue the liquidator / trustee and the legal dispute will be solved according to the rules of labor jurisdiction.

Also, the person selected for employment who has not acquired the status of employee, because the employer hasn't concluded an individual labor contract, can request the competent court, under Article 19 of the Labor Code, compensation for damages due to the failure of the employer of the duty of disclosure[25].

Article 92 paragraph 2 of the Code of Civil Procedure provides that "The *prosecutor* may draw conclusions in any civil proceedings, in any phase of it, if he considers it necessary for defending the rule of law, the rights and freedom of citizens". As a result, prosecutors may participate in solving individual labor conflicts in their capacity as official subject of the civil trial, as well as the judge.[26] So, the prosecutor is part only in procedural meaning or main part or next part and the judgment cannot be ruled in favor or against him.[27] Thus, the Prosecutor's role in individual labor disputes is reduced; he can intervene in cases where a party of the conflict is a minor employee.[28]

Conclusions

The analysis of this topic points out again the specific of labor jurisdiction in the Romanian legal system, jurisdiction governed by the Code of Civil Procedure, as common law, which are adapted to the "spirit of labor law".

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[21]The amendment to the Law no. 40/2011 Article 270 of the Labour Code allows parties to agree on the recovery of employee of prejudice and court intervention is necessary only if there is an agreement of the parties to recover damages.

[22]According to the Civil Procedure Law, the participation of third parties in a process can be achieved by voluntary action, institution that allows a person to intervene in the process to achieve or preserve a right of his; accessory voluntary intervention that allows a person to intervene in support of defending the interests of one of the parties; forced or indirect intervention allows summons to another person, call warranty and appearing the right holder; for details see V. M. Ciobanu, *Tratat teoretic şi practic de procedură civilă*, Vol I, "National" Publishing House, Bucharest, 1996, pp. 323-327.

[23] It's about the issues raised following a specialist interview guide applied within the territorial labor inspectorate Bihor, June 2010.

[24] A. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole,* vol. II, C.H. Beck Publishing House, Bucharest, 2011, p. 413.

[25] A. Athanasiu, Luminița Dima, *op.cit*., p. 358.

[26] Decision nr. 68/2005.

[27] Gârbaci, C., *Cadrul actual al activității procesual-civile a procurorului* in "Dreptul" Review, no. 10-11/1994;

[28] M. Gheorghe, *op.cit*., p. 240.

Law no. 62/2011 of Social Dialogue brought, as we mentioned, significant semantic changes on phrases that define the two parts of the employment relationship. Thus, the text uses the term employer, which is given a broader sense, however, in comparison with the Labor Code, as the employer is "any natural or legal person who may, *by law, hire workers based on individual employment contract or service report*". In this new understanding, the term employer includes government institutions that are in service relation to officials and employees and who may be parties in individual labor disputes.

Bibliography

N. Iancu, *Migrația internațională a forței de muncă*, Pro Universitaria Publishing House, Bucharest, 2013;

R. Florian, *The procedure of determining the patrimonial liability within the employment relationship*, Agora International Journal of Juridical Sciences, no. 2/2012;

A. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole*, vol. II, "C.H. Beck" Publishing House, Bucharest, 2011;

Al. Ticlea, *Tratat de dreptul muncii*, 5th edition revised, "Universul Juridic" Publishing House, Bucharest, 2011;

Gabriela Cristina Frentiu, *Discuții privind dreptul federațiilor, confederațiilor sau uniunilor sindicale de reprezentare a membrilor de sindicat ce constituie federația, confederația sau uniunea sindicală* in "Dreptul" Review, no. 4/2011;

Lavinia Onica Chipea, *Regimul juridic al conflictelor individuale de muncă*, "Universul Juridic" Publishing House, Bucharest, 2011;

Elena Ana Nechita, *Libera circulație a persoanelor în spațiul Uniunii Europene*, Agora University Press, Oradea, 2010;

I. T. Ştefănescu, *Tratat teoretic şi practic de drept al muncii*, "Universul Juridic" Publishing House, Bucharest, 2010;

M. Gheorghe, *Căi amiabile de soluționare a conflictelor de muncă*, "Universul Juridic" Publishing House, Bucharest, 2010;

L. Uta, F. Rotaru, S. Cristescu, *Contractul individual de muncă. Practică judiciară*, "Hamangiu" Publishing House, Bucharest, 2009;

D. Top, *Tratat de dreptul muncii*, Wolters Kluwer Publishing, Bucharest, 2008;

I. Leş, *Tratat de drept procesual civil*, Fourth Edition, "CH Beck" Publishing House, Bucharest, 2008;

Leontina Constantina Dutescu, Maria Cristina Letu, *Unele aspecte privind soluționarea litigiilor având ca obiect nerespectarea clauzei de neconcurență inserată în contractele individuale de muncă* in "Revisra Română de Dreptul Muncii" Review, no. 5/2008;

I. T. Ştefănescu, *Tratat de dreptul muncii*, Wolters Kluwer Publishing House, Bucharest, 2007;

R. Dimitriu, *Conflictele de muncă şi soluționarea lor*, "Tribuna Economică" Publishing House, Bucharest, 2007;

A. Athanasiu, Luminița Dima, *Dreptul muncii. Curs universitar*, "All Beck" Publishing House, Bucharest, 2005;

Gabriela Cristina Frentiu, *Salarizarea personalului didactic din învă□ământul preuniversitar/superior*, in "Revista Română de Dreptul Muncii" Review no.1/2005;

A.Țiclea, A. Popescu, C. Tufan, M. Țichindelean, O. Ținca, *Dreptul muncii*, "Rosetti" Publishing, Bucharest, 2004;

V. Verdinaş, *Legea nr. 188/1999 privind Statutul funcționarilor publici, cu modificările ulterioare, republicată, comentată*, - 3rd edition, revised and enlarged, "Lumina Lex" Publishing House, Bucharest, 2004;

S. Ghimpu, A. Țiclea, *Dreptul muncii*, 2nd Edition, "All Beck" Publishing House, Bucharest, 2001;

D. Firoiu, *Dreptul muncii şi securităţii sociale*, "Junimea" Publishing House, Bucharest, 1996;

V. M. Ciobanu, *Tratat teoretic şi practic de procedură civilă*, vol. I, "Național" Publishing House, Bucharest, 1996;

Gârbaci, C., *Cadrul actual al activităţii procesual –civile a procurorului* in "Dreptul" Review, no. 10-11/1994.

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LEGAL AND MORAL APPROACH OVER PRESS OFFENCES IN WESTERN DEMOCRACIES IN ROMANIA

C. A. Păiuşescu

Cristina-Anca Păiuşescu
Faculty of Political Sciences
"Dimitrie Cantemir" Christian University, Bucharest, Romania
*Correspondence: Cristina Anca Păiuşescu, "Dimitrie Cantemir" Christian University, 176 Splaiul Unirii St., 4 District, Bucharest, Romania
E-mail: ancamili@yahoo.com

Abstract

The essence of a democracy consists of *the political rights of its citizens of their ability to influence political decision, to challenge and to participate directly in the management of the state. How it could all this* happen *without a free press to express the level of externalization of thoughts and ideas of freedom of expression of public opinion. The press is one of the forms of expression of public opinion and in terms of its functions, the average is of major importance for society as a whole and for the individuals who compose it. However, it is imperative to create moral and legal rules that guide the work of journalists, to avoid press offenses. They are created both by the state and journalists, themselves, by selfreglementation.*

Keywords: *press-freedom, press-democracy, legal limits, selfreglementation*

Introduction

World Democracies faces a number of various challenges, both inside and outside problems which have to cope with, starting on the level of political representation, the problem of technocracy, the matter of oligarchy within powerful parties, to the institutional problems. A new challenge for western democracies is the pressure coming from the increasing demands for recognition of various types of human rights and the increasing requirement of legalization of relationships that once belonged to the sphere of "immorality".

1. The relationship between law, morality and ethics in the media

For the media, the triad law - morality – ethics has an unique connotation and its casting is presenting as an intractable paradox[1]. Although the media is governing our lives and they are indispensable public service, the journalists hardly accept, or reject the idea legal constraint in their profession, some journalists even ignoring the rules of morality or ethics.

Because the term "ethics" often irritates media professionals and because a minimum consensus of professional conduct is required, there is a new concept created for them - *quality control* – a concept that covers both ethics, morality, professional ethics within the existing legal frame of the media[2]. A practitioner is virtuous as an ideal professional purposes and may become a successful practitioner, but this often means to win badly. He focuses on excellence and the customer and too little on money and his image.

[1] D. T. Popa, *Dreptul comunicării,* Norma Publishing House, Bucharest, 1999, p. 49.
[2] *Idem.*

"Professional ethics" relates to compliance of the supreme ideal or value pursued by practicing a certain profession, a value that can not be the "enrichment" unconditional, but rather it is an immaterial amount and honorable man who is dedicated to the profession[3].

The juridical norms draw their consistency from social norms, especially from the religious norms; it is the religious norms that imposed respect of man toward man and respect for the rights and liberties of each and every individual. The state of law - as a political institution - is forced to assure the observance of each individual's rights and to contribute to their entering into practice; more precisely, the state has to create simple and efficient mechanisms directed toward a concrete achievement of the fundamental rights[4].

When we talk about the relationship between law, ethics/morality and ethics in the professional media we must consider all possible nuances that can result from this juxtaposition of concepts. Options offered by the justice system, for instance the concepts of "innocence" or "guilt", are simply inappropriate for issues involving news production. Courts are instruments with lack from words shades. They often require evidence that may be appropriate in a legal process, but that stifles political speech. Some judges expect journalists to prove everything they write, just like a lawyer with forensic and concrete evidences, and witnesses. They forget that journalists do not have the power to arrest a person and that people shamelessly lie to reporters. Journalists write as much as they can about a topic in the time they have available. They know from experience that the great revelation they have today could be contradicted by what they could find tomorrow.

2. Freedom of expression in the media and press offenses

Freedom of expression can be achieved by speech, writing, images or sounds. Freedom of expression is general and it involves the "freedom of the press", but cannot to be confused with it. Expression of the press has certain features in the object or the holders. Freedom of expression needs no limitations or restrictions as there is a need for news media in general. Press freedom is subordinated to the right to information. It is the nature of freedom of expression in the media unlike other forms of freedom of expression (eg, artistic). Due to the nature of freedom of expression, many constitutions of democratic countries regulates distinct media freedom of expression from freedom of speech. We may even say that the press does not enjoy the same fullness of freedom of expression as other forms of expression of thoughts or feelings (e.g. artistic manifestations) it does not have the same constitutional immunity. In every State there must be maintained the law established by the Constitution and the press[5] shall enjoy immunity only if disclosures are consistent with the constitutional order[6].

The Romanian Constitution prohibites defame of the country and the nation, any instigation to a war of aggression, national, racial, class or religious hatred, incitement to discrimination, territorial separatism or public violence and obscene conduct contrary to morality. Media must obey these limits of expression and any item that could defame Romanian nation or that would incite to discrimination, or to overthrow the constitutional values enshrined, could be considered that reverses the order desired by constituent and is therefore punishable and is being considered "news offenses".

3. The need of imposing legal rules on freedom of press

The freedom of the press is essential for democracy and pluralistic culture. A free press requires a variety of publication that derives a variety of information and views from. Of these, people gather what they themselves useful to process information according to their own convictions. Thus people can knowingly participate in social life, to defend democratic

[3] M. Luburici, *Teoria generală a dreptului*, Oscar Print Publishing House, Bucharest, 2010, p. 26.
[4] Nicoleta Elena Buzatu, Cristina Anca Păiușescu, *"Man's Rights" or The "Harmonious Communion Between Lay and Religion in the Universal Order"*, Agora International of Juridical Sciences no 2/2011, Agora University Press, Oradea, p. 290.
[5] V. Ionescu, *Unele controverse în dreptul penal la sfârşit de mileniu* in "Dreptul" Review, no 7/1999, p.70.
[6] *Idem.*

values. For information reaching the public to be real and honest, the press must be free. The role of media is to play as real and accurate information on the one hand, but the media's role is also to problematize and discuss and debate political decisions, on the other hand. A democratic political system is characterized by the ability to engage people in politics, the right of everyone to vote and to be elected to state and everyone's right to question political decisions. And press freedom had provided an essential condition so that the exercise of these functions had positive effects.

The term "legal" or "legislative" or refer to any action initiated by a parliament on media activity[7]. Legislation on defamation and/or insulting, which is found in many countries fall into this category; also in this category are the laws against incitement to racial hatred and restrictions on the right of journalists to name victims of rape or sexual abuse, which are found in many countries. Freedom of information legislation requires authorities to provide all information, including journalists, on request. In many countries still exists rigid laws covering state secrecy, but, progressive, the advocates of freedom of information successfully change these restrictions. In some European countries with a tradition of experimentation democracy such as France, Britain and others, the duty of journalists to protect confidential sources required by law. Thus, legislative regulation is already part of the work of journalists[8]. In some cases, they appreciate it[9].

4. Self-regulation or Code of Ethics for journalists

There is an ethical issue in almost everything he does a journalist. Objectivity and accuracy must be the journalist gold, whether they report or take account of a common event, a fashion event or serious political problems. Because of the pressures that bear during their work, journalists must constantly review their professional values.To ensure this, some media companies invest serious training or setting up their own schools of journalism or working with academic institutions specializing in journalism.

The first and most important step towards self-regulation in the media is the commitment of the journalist to an ethical code[10]. The journalists can create their own code of ethics but isolated working environment. Difficult to ask questions without fear of retaliation, a reporter must have solidarity behind colleagues, which is generated by membership of a trade union. In addition of solidarity, a trade union of journalists can provide a platform for discussion on ethical issues[11]. For example, in the UK, the National Union of Journalists has an Ethics Council whose function is to promote the Code of Ethics of the Syndicate by issuing guidance notes to its members and by analyzing complaints concerning violations of the Code[12].

In practice, every media company has adopted a certain style of reporting and editing the news. The main reason is that the reader, listener or viewer may be confused when a newspaper changes his approach to certain issues. This style can affect the quality of the paper or station appears. In most Western media organizations, work style is on paper as a "manual" that becomes tool for each team member. These manuals can provide guidance on ethical issues for journalists, while the institution of media self-regulation involves the creation of a mechanism to respond to public complaints of any violation of accepted standards. One example is the appointment of a representative of readers at some national newspapers - usually heads of departments, experienced people - whose role is to receive complaints and to link the plaintiffs and newspaper. The purpose of this institution is to enable reader's greater access to newspaper and provide as impartial judge. Few newspapers -

[7] Cristina Anca Păiuşescu, Oana Duță, *Dreptul comunicării. Considerații teoretice şi legislație relevantă*, "Editura Universitară" Publishing House, Bucharest, 2011, p. 19.
[8] *Idem.*
[9] *Idem.*
[10] C. F. Popescu, *Etica jurnalistică şi legislația presei*, A.N.I. Publishing House, Bucharest, 2006, p. 11.
[11] Idem.
[12]National Union of Journalists Ethic Code, http://www.nuj.org.uk/inner.php?docid=59&PHPSESSID=41fe42e05 e0c3abd4c7432db5c23f61d.

usually among serious - have such an initiative. For example, the UK newspaper The Guardian is one of three national newspapers called a representative of readers, whose mission is to respond directly to complaints, to write erratum lists and clarifications that are published daily and writes a weekly column to deal with ethical issues[13].

5. Ethical Councils

When speaking of self-regulation, generally peoples refers to national "ethics board", "the complaints Committee" or to "ombudsman" who must monitor each newspaper to observe a set of Universally accepted values. These "Ethical Council" may be entirely financed by industry media journalists only or both groups, and sometimes receive government assistance. A Board of Ethics will publish a code of conduct approved by media organizations and journalists. It is crucial that newspapers across the country join this code. Sometimes it joins both radio and TV stations, as is the case in Norway where, in 1997, broadcasting standards are fully maintained by a board of self ethical council[14]. Traditionally, ethical councils were limited to written press, given the legal and state institutions governing the audiovisual sector. However, as technological developments in the media industry erase the boundaries between print (written press), electronic and broadcast media, it becomes necessary to redefine the exclusive mandate ethical councils.

Germany - German Press Council. German Ethics Council, *Deutscher Presserat*[15], receives complaints and seeks to promote high standards and fight for press freedom.

United Kingdom - The first attempt to control than the boulevard press was the General Council of the Press in 1953, created by media owners with minimal participation of General Syndicate of Journalists. Later, it became Board of Ethics. No matter how many problems the press had and how works the negative impact of tabloid media over ethical standards, both the current system of self-regulation in the UK, solidarity and strength guild is a powerful antidote. Later, the journalists in UK founded the National Union of Journalists (NUJ) that developed and the current code of ethics of journalists. In February 2005, when it reappeared the proposal to create a council of state regulated press, a minister presented at the debate concluded his statement in favor of keeping the current model of self-regulation of the press in this way: *"The government has no intention of put an end to 300 years of press freedom"*[16].

Conclusions

Generally, journalists accept regulations that protect vulnerable people against state action, other institution or powerful individuals, but reject those that restrict democratic debate. But in most cases, journalists are afraid of legislation that would regulate them. Many journalists think that the current restrictions are too harsh, that prevents journalists to provide public services needed to carry out free speech as they would like. However, there are situations that need to be considered as requiring legislative provisions - such as audiovisual17. In most European countries the state Radio and TV was the first public television signal transmitter. Thus, broadcasting was developed as a branch of public service. The State could lead these companies through people power, people who were not always able to maintain independence. Until the late 60's in many western European democracies government considered public radio and television as an instrument of state propaganda[18].

[13] http://www.guardian.co.uk/Columnists/Archive/0,5673,-20,00.html, 6th of March 2012.
[14] R. Shannon, *A free and responsible Press*, John Murray, London, 2001, p. 12.
[15] www.presserat.de; http://www.presserat.info/uploads/media/Press_Code.pdf; 5th of April 2012.
http://www.publications.Parliament.uk/pa/cm200405/cmhansrd/cm050225/debtext/50225-19.htm; 6th of March 2012.
[17] See Article 10 (1) of the European Convention on Human Rights: "This article shall not prevent States to request authorization from the radio, TV and cinema".
[18] C. J. Bertrand, *Media Ethics and Accountability Systems/Media Ethics & Accountability Systems*, Transaction Publishing House, Bucharest, 2000, p. 14.

The doctrine of the audiovisual public service - first appeared on the BBC – according to which the post is obliged to serve the entire country, both opposition and government, became a majority[19]. The State's right to interfere is now subject to certain restrictions, legally known as "triple test"[20]. The proposed regulation must comply with Article 10 of the European Convention[21], and must be:

- Prescribed by law (e.g. a written parliamentary status publicly accessible);
- A legitimate aim (e.g. to protect legitimate public or private interest);
- Necessary in a democratic society.

Bibliography

Nicoleta Elena Buzatu, Cristina Anca Păiuşescu, *"Man's Rights" or The "Harmonious Communion Between Lay and Religion in the Universal Order"*, Agora International of Juridical Sciences no 2/2011, Agora University Press, Oradea, 2011;

Cristina Anca Păiuşescu, Oana Duță, *Dreptul comunicării. Considerații teoretice şi legislație relevantă*, "Editura Universitară" Publishing House, Bucharest, 2011;

M. Luburici, *Teoria generală a dreptului*, Oscar Print Publishing House, Bucharest, 2010;

R. Chiriță, *European Convention on Human Rights. Comments and explanations*, vol. II, "CH Beck" Publishing House, Bucharest, 2007;

C. F. Popescu, *Etica jurnalistică şi legislația presei*, A.N.I. Publishing House, Bucharest, 2006;

R. Shannon, *A free and responsible Press*, John Murray, London, 2001;

C. J. Bertrand, *Media Ethics and Accountability Systems/Media Ethics & Accountability Systems*, Transaction Publishing House, Bucharest, 2000;

V. Ionescu, *Unele controverse în dreptul penal la sfârşit de mileniu* in "Dreptul" Review, no 7/1999;

D. T. Popa, *Dreptul comunicării*, Norma Publishing House, Bucharest, 1999;

European Convention on Human Rights

National Union of Journalists Ethic Code - www.nuj.org.uk

Press Code - www.presserat.de

United Kingdom Parliament - www.publications.Parliament.uk

The Guardian - www.guardian.co.uk

[19] *Idem.*

[20] *Ibidem*, p. 21.

[21] R. Chiriță, *European Convention on Human Rights. Comments and explanations*, vol. II, "C.H. Beck" Publishing House, Bucharest, 2007, p. 82.

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PROTECTING THE SEAS AND OCEANS OF THE WORLD BY MEANS OF SANCTIONS AND OTHER MEASURES OF PUBLIC INTERNATIONAL LAW

D. Ş. Paraschiv

Daniel-Ştefan Paraschiv
Faculty of Law and Public Administration, Râmnicu Vâlcea,
"Spiru Haret" University, Râmnicu Vâlcea, Romania
*Correspondence: Daniel-Ştefan Paraschiv, 30 General Magheru St., Râmnicu Vâlcea, Vâlcea, Romania
E-mail: drept_vl.paraschiv.daniel@spiruharet.ro

Abstract

The maritime zones recognized under international laws – are formed from the high seas, with the riches at the bottom of the oceans and seas from this perimeter – which is regulated by international conventions, whose infringement may lead to the application of sanctions in conformity with the dispositions stipulated, or, in the lack of such dispositions, to taking other measures, such as repression or retaliation, which are considered, in the public international law, as being general sanctions included in the category of countermeasures.

At high seas serious acts of a criminal character are also committed, such as: piracy, illicit traffic of narcotics and psychotropic substances, etc., thus all states must cooperate in view of repressing these acts and sanctioning the culprits.

Key-words: *international law of the sea, repressions, retaliation, maritime areas*

Introduction

The seas and oceans, which cover approximately 70% of the planet's surface present a particular global interest for the proper development of navigation by all states concerned, due to the acute necessity to extend research in these areas, as well as for unexpected biological, mineral and energetic resources, necessary to the development of people's economy. Thus, the forming of the international law of the sea constitutes a major imperative for the protection of international maritime order, establishing principles and norms of conduct which imply, besides the rights and obligations, responsibilities imposed on the states. The nations have intuited for a long period of time the necessity of recognizing law for the equal usage of the sea by all the people, starting from the idea that the sea must be considered a good of common use for all the people. Nevertheless, in time, as a result of changing different objective conditions in the exploitation and capitalization of oceans and seas, diverse view concerning the usage of the global ocean have appeared. The conception itself upon the stretching of maritime areas and state laws to exploiting the riches they contain evolved depending on the possibilities of discovering the mysteries of the planetary ocean and the capacity to understand the development of marine flora and fauna.

Sanctions and other measures stipulated in the Montego Bay Convention for acts which breach the law of the sea

For a long period of time, the regulations regarding the law of the sea were mainly customary, as in the 12th to the 16th century, the practice of the property law with a tendency of monopoly of powerful states over a part of the seas "adjacent" to their coasts, up to the "adjacent sea" of other states was dominant. England, France and Holland objected to these pretensions reclaiming the liberty of navigation for their ships in the oceans and seas of the world.

Becoming a great maritime power, England claimed, commencing with the 17th century, supremacy over the seas and oceans for its ships, thus creating the famous dispute between the conception of "mare liberum" expressed by the Dutch lawyer Hugo Grotius and the conception of "mare clausum" of the English John Selden.

In the framework of the Geneva Conference from 1958, based on the works of the International Law Committee four Conventions1 were adopted which regulate many aspects specific to marine law. Within the third Conference of the law of the sea, convoked by UNO, the UNO Convention regarding the law of the sea2 was adopted, which represents a veritable "Constitution of the Sea", embodying a complex system of norms and principles, meant to coordinate reports between states in the domain of sea law.

In conformity with the international norms, in the present two maritime areas are

only in the following cases: if the consequences of the felony influence the coastal state; if the infraction may result in disturb the peace of the country or order in the territorial sea; if the assistance distinguished: those upon which the state coast exercits its prerogatives and those which derive from an international status. From the first category, there are: the territorial sea (up to 12 sea miles commencing from the base lines of all states), the continental shalf3 and the exclusive economic one4, and the second consists of the high seas with the riches on the base of the oceans and sea, which form the maritime zone recognized under international law.

In conformity with international norms, responsibility for illicit acts committed in the territorial sea and the continental shelf is, principally, engaged in conformity with the legislation of every state which manages them, and for the acts committed in the area of international marine spaces, responsibility is established in conformity to international conventions, especially the Montego Bay Convention.

Being aware of the importance of maintaining legal order in the areas of international maritime spaces, in the very preamble of the Convention5, the state parties express their conviction that, by means of this Convention, they contribute to the reinforcement of peace, security, cooperation and friendly relationships between all nations, in conformity with the principles of justice and equality in rights, favouring economical and social progress of all the people in the world, according to the objectives and principles of the United Nations Organization, as they are stipulated in the United Nations Charter.

In the Convention more measures for the infringement of the norm are stipulated, whose diversity is generated by the multitude of situations which may be found in the domains regulated.

Generally, measures that acquire a sanctioning character are ordered by the state parties, for the cases and according to the competences established by means of the dispositions embodied in this international Convention. Thus, in the art. 27, entitled: " Penal jurisdiction on board of a foreign ship", it is shown that the coastal state must exercite penal jurisdiction on board a foreign ship which passes through the territorial sea, proceeding to the arrest of persons or accomplishing certain acts of penal research, as a result of an

[1] The Convention regarding the continental shelf, the Convention concerning fishing and preserving biological resources of the high seas, the Convention regarding the high seas and the Convention referring to the territorial sea and the contiguous area.

[2] Adopted at Montego Bay, on the 10th of December 1982.

[3] The continental shelf of a coastal state embodies the seabed and the underground submarine regions situated beyond the territorial sea, through all natural extension of land territory of this state, until the external limit of continental margins or to a distance of 200 sea miles from the baselines from which the width of territorial seas is measured, when the external limit of the continental margins is situated at an inferior distance (art. 76 from the Montego Bay Convention).

[4] The maximum width is of 200 miles from the baselines (art. 57 of the Montego Bay Convention).

[5] Adopted on the 10th of December 1982, at Montego Bay (Jamaica), at the third UNO Conference regarding the law of the sea, entered in force on the 16th of November 1994, ratified by Romania by the Law no. 110 from the 10th of December 1996 (Official Gazette of Romania, no. 300/21 November 1996).

infringement committed on board of this ship while passing, however of local authorities was required by the captain of the ship or a diplomatic agent or a consular officer of the flag state; if these measures are necessary in order to repress illicit traffic of narcotics and other psychotropic substances.

Referring to the civil jurisdiction towards foreign ships, the coastal state will be able to take measures of execution or preservation regarding these ships, but only for liabilities incurred or responsibility for these vessels or during and in view of the passing through the waters of the coastal state.

In the circumstance of breaching coastal state reglementations on straits, by means of transit by a ship or aircraft which benefits from sovereign immunity, the state under whose flag the ship is operating bears the international responsibility for any loss or damage which may result from it for the coastal states.

According to art. 73 pt. 1 in the Convention, the coastal state, in exercising its sovereign rights of exploitation, preservation and management of biological resources from the exclusive economic area, may take any measure, including the approach, inspecting, sequestration and juridical pursuit as to ensure compliance with laws and regulations adopted in conformity with the present Convention6.

Sanctions stipulated by the coastal state for breaching rules and regulations concerning fishing, in the exclusive economic zone, do not include prison sentences, except the case when interested states agree upon it, "and no corporal sentence" (art. 73 pt. 3).

In case of collision or any other navigation incident in the high seas, of nature to engage penal or disciplinary responsibility of the captain or any other person in service of the ship, penal or disciplinary pursuit may be performed only by the juridical or administrative authorities of the state flag or of the state whose citizenship is detained by those in cause. The flag state may order the retention or immobilization of the ship for performing acts of investigation.

The measures of withdrawal of the commander patent, of the capacity certificate or of the permit may be disposed only by the state which issued these documents.

All the state parties must cooperate as to repress piracy in the high seas or in any other place not submitted to the jurisdiction of a state, taking measures of retention of pirat ships and aircrafts or captured by pirates. Also, they can arrest persons and seize the goods on board, after which the courts will order the punishments and concerning the ships, aircrafts or other goods retained or seized. Moreover, all the state parties will cooperate as to repress unauthorised broadcasts, aired on the high seas7, being able to arrest any guilty person who will be brought to justice, or to immobilize any aircraft which transmits these broadcasts and seize the broadcasting device (art. 109 pt. 1 and 4 in the Convention).

In the contents of the Conventions other measures against states which breach its regulations are also stipulated, such as applying pecuniary penalties, in the case of producing damages to another state by polluting the environment, or at the demand to slow down the marine research works performed in the economic area or on the continental shelf of another state, in case the conditions to perform these works have not been respected.

[6] In art. 73 pt. 2 from the Convention it is shown that "The ship retained and its crew will be released immediately after depositing a bail or a proper guarantee", and at pt. 4 it is stipulated that "In case of retention or immobilization of a foreign ship, the coastal state will immediately notify the flag state, by means of adequate methods, the measures taken, as well as the sanctions pronounced as a consequence".

[7] According to art. 109 pt. 2 of the Convention, by unauthorised broadcasts, we understand: radio or television broadcasts destined to be recepted by the general public, aired on a ship or installation in the high seas, with the infringement of international regulations, except transmitting SOS.

Aspects regarding the international jurisdiction on international marine spaces

In order to judge the disputes which appear from the interpretation and from applying the Convention, in conformity with art. 27 of the Montego Bay Convention, The International Court for the Law of the Sea was founded and headquartered in Hamburg8.

This court solved numerous cases, from which we submit to analysis the case concerning the Bluefin tuna (Australia and New Zeeland versus Japan)9. In this case, The International Court for the Law of the Sea took a series of measures, such as: Australia, Japan and New Zeeland must guarantee that they will not take measures which could affect or prolong the litigations submitted to the court; the same countries must guarantee that they will not take measures which could prevent the accomplishment of some decisions made by the court. Moreover, the three countries must guarantee that they will not exceed the annual quantities of Bluefin tuna allocated at the level mutually agreed upon by the parties; the state in cause which will refrain from performing an experimental fishing program which implies taking a Bluefin tuna capture, except the cases when the agreement of the other parties is present or when the experimental capture is reduced from the annual quantity allocated. It was also established that the three countries should immediately resume negotiations, with the objective of reaching an agreement concerning the measures for preserving and managing the Bluefin tuna species and continue to make efforts in the sense of reaching agreement with other states and fishing entities, engaged in Bluefin tuna fishing, aiming to promote the optimum usage objective of stock from the above mentioned fish species.

By studying the practice of the International Court of Justice, we observe that the international responsibility for acts performed at sea was established, in some cases, and by this court. Thus the Court admitted the invocation of the international responsibility of Albania for the reason that, in the year 1964, the british war ships which navigated in the Strait of Corfu, situated in the Albanian territorial waters, clashed into several mines, thus causing losses of human lives and material damage.

The Court decided that Albania was liable to warn foreign ships concerning the presence of mines in its territorial waters, motivating that this obligation is founded on "several general and acknowledged principles: principle of liberty concerning international communications and the obligation which is viable for every state, of not permitting its territory to be used in view of acts contrary to other states' rights"10.

In an earlier case11, the Permanent Court of International Justice decide in favour of Turkey, which condemned a French officer to prison and paying a fine because in the high seas, the French packet boat "Lotus" abandoned a Turkish ship which sank and eight Turkish citizens lost their lives.

[8] The Court is formed of 21 independent members who function within: Court Chamber of summary procedure, the Dispute Resolution Chamber on submarine spaces and room for settlement of disputes relating to the exploitation of the seas. One of the cases submitted to the International Tribunal for the Law of the Sea was one of Chile and the European Community in 2000 on the exploitation of swordfish stocks in the Pacific Ocean. The Chamber responsible with the case proceedings was formed of International Tribunal for the Law of the Sea by order of December 20, 2000, according to art. 15 § 2 of the Statute of the Tribunal. Finally, the parties reached an agreement which ended the dispute

[9] The dispute between Australia and New Zealand on the one hand and Japan on the other hand, dating from 1999, concerns the conservation and management of the blue fin tuna (a migratory species overseas, stipulated in the list of migratory species in the Appendix I of the United Nations Convention on the Law of the Sea). Of the cases judged by the International Tribunal for the Law of the Sea we mention: the Volga case (Russia vs. Australia) case regarding the territorial expansion of the Strait of Johor Singapore (Singapore vs. Malaysia) case regarding the MOX plant (Republic of Ireland vs. United Kingdom); case regarding the delimitation of the maritime border between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh vs. Myanmar), case M / V "Louisa" (Saint Vincent and Grenadines vs. Kingdom of Spain).

[10] Decision from the 9th of April 1949, in the case Great Britain vs. Albania.

[11] Decision from the 7th of September 1927, in the case France vs. Turkey.

France pleaded for the competence of the flag state for solving the case, however the Court admitted that Turkey was also considered competent, as a state whose ship was abandoned, thus it acted accordingly by sanctioning the guilty French officer.

From the decision of the Court it is assumed that the boat is assimilated to the territory of the state: "Except for particular situations determined by international law, ships in the high seas are subjected only to the authority of the state whose flag it addresses. In the virtue of the principle of sea freedom, namely in the absence of sovereignty in the high seas, no state may exercise jurisdictional acts upon foreign ships".

Conclusions

The people – in the effort to reinforce adequate norms in the process of international cooperation– have and are still manifesting a particular interest for relations in the maritime domain, expressing certain fundamental requirements concerning the rights and responsibilities of each state in using the oceans and seas on the Earth and in expressing the practical forms and methods of cooperating in view of capitalizing the riches they contain. These major aspects were the subject of the UNO Conferences in the last decades.

In the depths of the vast international marine surfaces there is sufficient food for 30 billion people and energetic resources, presently estimated to 160 billion barrels of oil and 14 billion cubic meters of natural gas manganese for 4.000 centuries, cobalt for 200 millenniums.

From the waters of the planetary ocean 4 billion tones of uranium can be "extracted", and in a single year 10 million tones of coal from the underwater mines can be obtained. Likewise, the energy of the sea tides may replace, in a year, the consumption of 70 million tones of coal equivalent, and the total of fishing products "harvested" on the planet is doubled every 10 years.

Taking into consideration the immense potential present in the waters of the planet, it is estimated that, in the next 50 years, the man will be able to freely move across the sea and in the sea, occupying and exploiting it as an integral part of the planet in order to extract minerals, obtain food, as a landfill of waste, for transport operations and, as the population of the globe increases, as a place to live.

For these considerations, a new legal order would be necessary for the international maritime area, which would take into consideration the changes that occurred and lay the possibility of equally capitalizing the immense natural resources.

The debates from the last years revealed the outstanding significance of reinforcing an adequate regime for the oceans and seas on Earth, in the efforts to establish a new economic international order, starting from: the increasingly important place of marine riches in global economy, the importance of maritime spaces for developing interstatal cooperation and the role attributed to the planetary ocean in maintaining peace and security in the world.

Bibliography

D. Mazilu, Dreptul internațional public, 5th Edition, "Lumina Lex" Press, Bucharest, 2010;

Gh. Moca, M. Duțu, Dreptul internațional public, volume I, "Universul Juridic" Publishing, Bucharest, 2008;

Ch. Rousseau, Droit international public, tome IV, Sirey, Paris, 1980;

S. Oda, D.M. Johnston, J.J. Holst, A. Hollick, M. Hardy, A New Regime for the Oceans, The Triangle Papers, 1976;

V. Gliga, Peaceful uses of ocean space: zones of peace and security, Statement at 68th Plenary Meeting at Third United Nations Conference on the Law of the Sea, Official Records, vol. I, New York, 1976;

D. Coulmy, J. P. Page, Les ressources de l'océan, mythe ou réalité?, Presses de la Cité, Paris, 1974;

I. Brownlie, Principles of Public International Law, Second Edition, Oxford University Press, New York, 1973;

J. Andrassy, International Law and the Resources of the Sea, Columbia University Press, New York and London, 1970;

S. Oda, International Law of the Resources of the Sea, Hague Academy of International Law, 1969.

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INTERESTS OF THE EUROPEAN COUNCIL AND THE EUROPEAN UNION IN THE AREA OF ENVIRONMENT PROTECTION

E. Paraschiv

Elena Paraschiv
Faculty of Law and Public Administration, Râmnicu Vâlcea,
"Spiru Haret" University, Râmnicu Vâlcea, Romania
*Correspondence: Elena Paraschiv, 30 General Magheru St., Râmnicu Vâlcea, Vâlcea, Romania
E-mail: e.paraschiv.dvl@spiruharet.ro

Abstract

Due to the environment's importance in the development of life, protecting it has also become the main concern of regional organizations worldwide, an outstanding contribution in this sense having been brought by the European Council and the institutions of the European Union, which, by adopting numerous legal instruments, significantly contributed to the preservation of nature and protection of the environment , also establishing several interdictions, behevioural norms and principles that are specific to the domain researched, as well as sactions applicable to those who affect these values by committing illicit acts.

Key-words: *preservation and protection of the environment, legal instruments, environmental law*

Introduction

In the framework of its preoccupations regarding environment protection, the European Council adopted a convention[1] which aims at uniforming and stimulating legal regulations of the member states regarding the damage compensation resulted from a perilous activity and environment restoration. These are qualified as "dangerous" activities resulting from the use of harmful substances, but also any production or usage of genetically modified organisms, any use of an microorganism susceptible to present risks for humans or the environment, as well as any exploitation which deals with or deposits waste[2].The liability The operator or the person who exercits control is generally liable for the acts.

The contribution of the European Court of Human Rights' practice to environment protection

Even though in the European Convention of human rights and fundamental liberties, environment protection is not listed among the treated subjects[3], this issue is revealed by the

[1] Convention on civil responsibility for damage resulting from dangerous activities to the environment, adopted at Lugano, in the date of 21 June 1993.
[2] Managing waste by the member states of the European Union was recently regulated, by the Directive 2008/98/CE of the European Parliament and the Council, from the 19th of November 2008, regarding waste and repealing certain Directives.
[3] Unlike the European Convention, other regional instruments explicitly consecrate this right. Thus, in art. 24 of the African Charter on Human and Peoples of 27 June 1981, it is stipulated that "All peoples have the right to a satisfactory, global and suitable environment for their development", and the Protocol of San Salvador, in addition to the American Convention on Human Rights, on economic, social and Cultural Rights of 17 November 1988, is the first convention which included the right to a wholesome environment in the corpus of human rights, saying that "Everyone has the right to live in a salubrious environment and to benefit of essential, collective equipment" (art. 11 § 1).

practice of the European Court of Human Rights[4], the evolution of realities imposing the consecration of certain norms in a jurisprudential manner.

Thus, in the decision from 18 December 1996, pronounced by the European Court of Human Rights in the case *Loizidou vs Turkey*[5] it is illustrated, concerning the European Convention, as a treaty of guaranteeing human rights, that this is a "live instrument which should be interpreted in the light of the present life's conditions. Moreover, its objective and aim demand an interpretation and application of its dispositions in a way which would make the demands practical and effective".

Practically, in this situation, the praetorian technique of "indirect protection" was used, which permits the extension of protection of certain rights guaranteed by the Convention, concerning rights which are not explicitly stipulated in it. Consequently, in the cases of environment damage, the infringement of a "right to a healthy environment" cannot be brought directly to the European Court of Human Rights, as this right allocated to the individual does not benefit from a guarantee except by "attraction" from another right and under its cover.

Although it was initially suggested – for the protection of the right to a healthy environment– to invoke the right to health and welfare which results from the right to life, stipulated in art. 2 in the Convention, the Court preferred to appeal to art. 8 § 1, which recognizes the right of any individual to the respect of its own private, familial life and domicile, as well as to art. 6.1. that guarantees the right to a fair trial..

The European judge does not reduce the significance of the term "private life" to the intimate sphere of personal relationships, but extends it to the right of the individual "to establish and develop relations with his peers, consequently covering the professional or commercial activities, as well as the places it is exercised"[6].

In one of its sentences[7], the European Court of Human Rights admitted that the noise from the planes :reduced the quality of the private life and tranquillity at home[8] and decide that serious harm brought to the environment may affect the welfare of a person and may prevent her from normally using the benefit of its domicile , which leads to harming her private and family life, even if it does not represent a grave danger for the health of the person[9].

The Court also extended the sphere of application of art. 8 in the Convention to the protection of health affected by the exposure of British soldiers to nuclear radiations[10], considering that it "embodies a sufficiently strong connection with their private family life".

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[4] According to the European Court of Human Rights on the Guerra and Others v. Italy, 19 February 1998, environmental protection intervenes in an incidental manner towards the protection of privacy and family life, asserting itself as an inseparable element of the "right to a healthy environment ". In the decision it is stated that the emissions of a hazardous chemical plant has a" direct impact "on the right protected by art. 8 of the Convention.

[5] Available on the website of the European Court of Human Rights (http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/, accessed on 09.20.2011), as and further commented.

[6] The Niemietz v. Germany case, decision of 16 December 1992, § 29 A251B.

[7] Sentence from 21.02.1990, § 40, in the case Powel and Rayner.

[8] The López-Ostra v. Spain case, the general sentence of 9 December 1994 according to which the European court stated that the right of every individual "to respect of his private and family life and home" implies the right to live in a healthy environment.

[9] The notion of private life means that it involves a certain level of comfort, "of wealth" without which the respect of the right of private or family life or home would not be effective, but only fictional.

[10] The decision from 9 June 1988, in the case *Mc Ginley and Egan Vs Great Britain*, in which it was stated that when dangerous activities are being developed, such as nuclear experiments which may result in "devastating and hidden consequences" upon the health of a person, those interested must have access to pertinent information regarding these documents. Moreover, in the case of Guerra and Others v. Italy it was considered that art. 10 of the European Convention demands states to provide environmental information necessary for the protection of individuals against whom negative effects may be produced.

The practice of the European Court of Human Rights also stated the obligation of the state parties to the Convention by adopting "positive measures" destined to guarantee the right to a healthy environment, sanctioning the passivity of public authorities[11].

In another case[12], the European Court of Human Rights motivated the admittance of the request and invoked the dispositions of the Constitutions of the respondent State, which guarantees the right to live in a healthy environment.

The Court also established that a state may also respond when, as a result of certain military actions- legal or not- it breaches the environment norms in the areas situated outside the national territory, if in practice it exercises control upon the respective areas.

As a conclusion, in interpreting art. 8 §1 and art. 6 §1 (the right to a fair trial) from the European Convention of Human Rights, the European Court of Human Rights considers the right to a healthy environment as being an individual right from the category of intangible civil rights, which may be the object of certain derogations only in exceptional cases[13], and the states may limit it only by means of the law[14].

The Contribution of the European Union Court of Justice in the area of environment protection

The protection mechanism of rights concerning a healthy environment were achieved by mean of the jurisprudence belonging to the European Union Court of Justice, as well as through the existence of principles which are common to the state members referring to this issue. In the framework of the European Union there continue to exist concerns for the creation of a complete and unitary regime concerning environment protection in the area of the European Union, the regulations issued[15] being based on the principle, as shown, that the *polluter pays*[16].

The Court of Justice of the European Union is developing an intense activity on establishing the guilt of member states for not complying with the obligations laid down in the norms of the European Union and with harmful effects upon the environment. In this sense we exemplify by mentioning the decision pronounced on the 4th of October 2007 by the Court of Justice of the European Union, Sixth Chamber, in the case C-523/06 regarding the action of establishing non-compliance of a state member of the obligations regarding the reception of waste resulting from ship exploitation and cargo residues, with negative consequences upon the environment (Directive 2000/59/EC, article 226 from the Treaty establishing the European Community)[17].

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[11] The sentence stated by the European Court of Human Rights in 1994, in the López-Ostra v. Spain case, which also establishes the fact that the measures taken by the states to ensure a healthy environment must be practical and effective, ensuring the effectiveness of protected rights, even against negative actions of third parties.

[12] Decision from 10 December 2004, in the case *Taskin and others against Turkey*.

[13] Art. 15 from the European Convention of human rights.

[14] Article 8 § 2 in the Convention provides that the limitation of such rights is a measure which; in a democratic society is necessary to national security, public or economic safety of the country, or protection of the rights and liberties of citizens in general.

[15] On the 9th of February 2000, The European Commission adopted the "White Charter on environmental liability," and on the 23rd of January 2002 the proposal of the European Parliament and of the Council concerning environmental responsibility to prevent and repair environmental damage was published (COM 2002/17 final), which was amended on 26 January 2004 (COM 2004/55 final) and 21 April 2004 (Directive 2004/35/EC).

[16] The "polluter pays" was introduced in the EU regulations by the Single European Act of 1987 (art.130R.2 and art.130S.5), regulation also maintained in the Treaty of Amsterdam in 1997; an application of this principle is found in the Council Regulation no. 1013/2006 regarding the supervision and control of waste shipments within and outside the European Community. " The Polluter pays" principle is the foundation of Civil Liability Directive 2004/35/EC regarding the prevention and remedying of environmental damage. "An example in this respect, is the Court of Justice of the European Union (Grand Chamber) of 9 March 2010 in Joined Cases C 379/08 and C 380/08.

[17] The applicant, namely the European Commission, filed on 22 January 2006, infringement proceedings under Art. 226 of the Treaty establishing the European Community, against the defendant, namely the Republic of Finland. The Court of Justice of the European Union, by the decision pronounced on the 4th of October 2007,

By studying the practice of the Court of Justice of the European Union, we may state that there are also other decisions in which non-compliance of the member states regarding waste management resulted from electric and electronic equipment[18] was established , along with the lack of necessary measures to shut down or rehabilitate illegal or uncontrolled waste deposits[19], non-compliance with the obligation to elaborate management plans of dangerous waste[20] etc. Likewise, decisions were adopted in the domain of water quality protection, such as the decision of the European Union Court of Justice, pronounced on the date of the 25th of October 2007, in the case C-248/05, referring to non-compliance with the obligations of a state, of protection of groundwater against pollution caused by hazardous substances (Directive 80/68/CEE, article 226 of the Treaty establishing the European Community)[21].

By researching the practice of the European Union Court of Justice, we state that multiple decisions were pronounced by which the non-compliance of the directives issued by the European institutions regarding the protection of the quality of the water were observed, such as: not taking adequate treatment of urban waste water from more urban areas[22], non-compliance with obligations concerning the guarantee of the quality of water destined for

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stated that, due to the fact that the Republic failed to establish and apply the reception and handling plans of waste in all the ports, the Republic of Finland did not comply with all the liabilities based on art.5 par.1 and art.16 par.1 in the Directive 2000/59/EC of the European Parliament and the Council, from the 27th of November 2000, regarding port reception facilities for ship-generated waste and cargo residues.

[18] The plaintiff, the European Commission, formulated on the 10th of March 2006 proceedings against the United Kingdom of Great Britain and Northern Ireland, based on the art. 226 from the Treaty establishing the European Community. The Court of Justice of the European Union, by the decision pronounced on the 1st of 2007 stated that because of not adopting acts with law power and the necessary acts to conform with the Directive 2002/96/EC of the European Parliament and of the Council, from the 27th of January 2003, regarding waste and electric and electronic equipment and the Directive 2003/108/EC of the European Parliament and of the Council, from the 8th of December 2003, of amendment of the Directive 2002/96/EC, the respondent states did not fulfill their responsibilities stipulated in these directives, case C-139/06 (JO C108 from 6 November 2006, p. 14).

[19] The plaintiff, namely the European Commission formulated an action to court on 29 November 2005, against France under art. 226 of the Treaty establishing the European Community. By the decision pronounced on the 29th of March 2007 in the case C-423/05 (Official Gazette C48 from the 25th of February 2006, p. 14), the European Union Court of Justice noticed that, not taking all the possible measures to ensure observance of art. 4.8 and 9 from the 75/442/EEC Directive of the Council, from the 15th of July 1975, regarding waste, as amended by the Directive 91/156/EEC of the Council, from the 18th of March 1991, and of art. 14 let. a, b and c from the Directive 1999/31/EC of the Council, from the 26th of April 1999, regarding the waste deposits, the plaintiff has not fulfilled the obligations undertaken in conformity with the dispositions.

[20] The European Commission brought to court, on the 8th of February 2008, the case against the Italian Republic, in conformity with art. 226 of the Treaty establishing the European Community. By the decision pronounced on the 14th of February 2007, in the case C-82/06 (Official Gazette C86 from the 6th of April 2006, p. 17), the European Union Court of Justice noticed that the plaintiff has not fulfilled the obligations undertaken in conformity with art. 7 par. 1 in the Directive 75/442/CEE of the Council from the 15th of July 1975, regarding waste as amended by the Decision 91/156/EEC of the Council, from the 18th of March 1991, as it did not develop a waste management plan for the regions Rimini, Lazio Friuli – Venezia Giulia and Apulia, as well as for the autonomous region Bolzano- Alto Adige and province Rimini.

[21] On the 14th of June 2005, the plaintiff namely the European Commission formulated an action to court against the plaintiff Ireland, which stated the unfulfillment of obligations, in conformity with art. 226 from the Treaty establishing the European Community. By the decision pronounced on the 25th of October 2007, the European Union Court of Justice noticed that, due to the fact that it did not take all necessary measure to conform to articles 4, 5, 7 and 10 from the 80/68/EEC Directive of the Council, from the 17th of December 1979, regarding the protection of underground water against pollution caused by certain dangerous substances concerning the municipal waste deposits of Ballymurtagh (Wicklow shire), Ireland has not fulfilled the obligations undertaken in conformity with this directive (Official gazette C205 from the 20th of August 2005, p. 9).

[22] The European Commission has formulated action on the 18th of November 2005, against Great Britain and Northern Ireland, in conformity with art. 226 from Treaty establishing the European Community. The European Union Court of Justice stated, by the decision pronounced on the 25th of January 2007, in the case C-405/05 (Official Gazette C48 from the 26th February 2006, p. 11) that the plaintiffs did not take the necessary measures because, until 31 December 2000, they would fulfill their obligations to adequately treat wastewater from multiple urban centres in the two countries, thus breaching art. 4 par. 1 and 3 from the 91/271/EEC Directive of the Council, from the 21st of May 1991, regarding treatment of urban wastewater.

consumption, which had a higher concentration of nitrates and pesticides[23], urban waste water discharge into a sensitive area without adequate treatment[24].

The Court of Justice of the European Union revealed, by numerous decisions pronounced and by infringements of the European Union directives referring to environment protection, other domains, such asa integrated pollution prevention and control, access to information, public participation in decision making and access to justice regarding environmental problems, the air quality and climatic changes, preserving natural habitats and species of savage flora and fauna, the evaluation of the effects of certain plans, programs, public and private projects upon the environment etc.

From the decisions mentioned the one pronounced on the 3rd of May 2007, in the case C-391/06, upon establishing the European Commission from the 26th of September 2006 was submitted to analysis, based on art. 226 from the Treaty establishing the European Community, against Ireland. The European Union Court of Justice stated that, by not adopting in the term established of the necessary legal documents and administrative documents necessary to conform to the 2003/4/EC Directive of the European Parliament and the Council, from the 28 of January, 2003 regarding public access to environment information and abrogation of the 90/313/CEE Directive of the Council, Ireland has not fulfilled the obligations which it undertook based on this directive. Moreover, by analysing the decision pronounced on the 11th of January 2007 by the Court of Justice of the European Union in the case C-183/05, upon establishing the European Committee, in conformity with art. 226 from the Treaty establishing the European Community against Ireland, we consider the conclusion of the court that, by not adopting all necessary specific measures for effectively applying the rigorous protection system, stipulated in art. 12 par. 1 from the Directive 92/43/CEE of the Council, from the 21th of May 1992, regarding natural habitats preservation along with the species of savage flora and fauna, Ireland has not fulfilled the obligations undertaken in conformity with this directive. Moreover, by analysing the decision pronounced by the European Union Court of Justice from the 24th of May, in case C-376/06, upon establishing the European Commission from the 14th of September 2006 against Portugal, we consider the conclusion of the court, that by not adopting in the term established of the necessary legal documents and administrative documents necessary to conform to the 2001/42/EC Directive of the European Parliament and the Council, from the 27th of June 2001, regarding the evaluation of effects of certain plans and programs upon the environment, Portugal has nt fulfilled the obligations undertaken in conformity with this directive.

According to international requests, which advise states to adopt measures and sanctions to ensure environment protection[25], with the regulations of the European Union, as

[23] The European Commission has formulated action on the 13th of March 2007, against France, stating the unfulfillment of obligations, in conformity with art. 226 from the Treaty establishing the European Community. By the decision pronounced on the 31st of January 2008, in the case C-147/07 (Official Gazette C95 from the 28th of April 2007, p. 6) The European Union Court of Justice stated that, by not adopting all necessary measures to conform with art. 4 in the 95/83/EC Directive of the Council from the 3th of November 1998, regarding the quality of water destined for human consumption, the plaintiff did not fulfill the obligations undertaken in conformity with this directive.

[24] The European Commission formulated, on the 18th of May 2005, an action in stating the unfulfillment of obligations, in conformity with art 226 in the Treaty of establishing the European Community against the Kingdom of Spain. By the decision pronounced on the 19th of April 2007, in the case C-219/05 (Official Gazette C96 from 28 April 2007, p. 8), the Court of Justice of the European Union, the fifth Chamber, noticed that the plaintiff did not adopt the necessary measures to guarantee that, commencing with the 31st of December 1998, the underground waters coming from the Succa city, from other regions, were to be submitted to an adequate treatment before their flow in an area considered to be sensitive, thus breaching the dispositions of art. 3 par. 1 and art. 5 par. 2 corroborated with art. 4 par. 4 from the 91/271/ECC Directive of the Council, from the 21st of May 1991, regarding treatment of wastewater.

[25] The international declaration from de la Rio de Janeiro (1992) presents the necessity that the states establish a national legislation regarding liability for pollution and other damages brought to the environment by means of international offenses; the states will predict methods of action brought to courts, for the actions of restoring the damages and losses.

well the analysed international practice, our country regulates legal liability for not observing the norms of environment right, by the Government Emergency Decision no 68/2007 regarding environment liability, referring to the prevention and restoration upon the environment.[26].

Conclusions

The fact that pollution knows no boundaries is an undeniable truth. The polluted air and toxic waste circle around the entire Europe and numerous lakes and water flows are divided among several states. Thus, the European Union constitutes a favourable framework for solving these multiple issues, comparative to the more narrow national one and the glob al framework which lacks the constraint force, the common action of the states of the European Union having the ability to manifest by means of a single voice regarding the key-issues of the area.

Qualitative differences between living and working conditions of citizens of those countries may arise by applying divergent economic policies in the various member states of the Union. Likewise, this may lead to economic disparities that affect the proper functioning of the common market. Defining different national norms would prevent the free circulation of goods between the member states, while imposing unequal tasks to enterprises would create distortions of competition. From here results the economic interest of a common policy, especially in the context of establishing a common market after the year 1992.

Bibliography

M. Duțu, *Dreptul mediului*, 3rd Edition, "C.H. Beck" Press, Bucharest, 2010;

Petre Maria-Cristina, *Drept comunitar al mediului. Culegere de spețe*, "Universul Juridic" Press, Bucharest, 2008;

M. Duțu, *Principii şi instituții fundamentale de drept comunitar al mediului*, Economic Press, Bucharest, 2005;

M. Duțu, *Dreptul internațional al mediului*, Economic Press, Bucharest, 2004

Szönyi Dandachi Amira, *La Convention sur la protection de l´environnement par le droit pénal*, Revue Juridique de l'Environnement, no. 3, 2003;

Sudre Frederic, *La protection du droit à l'environnement par la Coureuropéene des droits de l'homme*, in the vol. Les Nations Unies et la protection d'environnement, Pedone Press, Paris, 1999.

[26] The Emergency Government Ordinance no. 68/28 June 2007 was published in the Official Gazette no. 446 from the 29th of April 2007, was approved by the Law no. 19 from the 29th of February 2008, and then amended and completed by the Emergency Government Ordinance no. 15/2009.

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CONSIDERATIONS REGARDING ENVIRONMENT PROTECTION IN HUMAN SETTLEMENTS

G. Paraschiv

Gavril Paraschiv
Faculty of Law and Public Administration, Craiova,
"Spiru Haret" University, Romania
*Correspondence: Gavril Paraschiv, 30 General Magheru St., Râmnicu Vâlcea, Vâlcea, Romania
E-mail: gavril.paraschiv@yahoo.com

Abstract

Across time, the concept regarding the quality of life determined public authorities to take into consideration the improvement of urban and rural space, the zoning, the servitudes, imposed on individuals and even authorities, being gradually accepted in the name of the necessity for a collective welfare, including from the point of view of the natural environment. Inveterated legal regulation, which concern the protection of ancient monuments in order to save common cultural heritage, were gradually added to the ecological requests, which tend to acquire preponderance compared to the traditional domains of urbanism and territory planning.

Human settlements represent the traditional environment of human communities, thus the approach to their sustainable and ecological development must be primarily acquired.

Resolving ecological issued in human settlements greatly depends of the dimensions of localities, of their relations with the free territory, of the nature and manner of exploiting this territory, of the existent resources, of the network communication means, of the industrial objectives, etc. Thus many parameters must be taken into consideration when studying the habitats of these settlements compared to those used in natural ecosystems.

Key-words: *the quality and protection of environment, sustainable development, regulations*

Introduction

The right to a healthy environment that is ecologically balanced constitutes a natural right, of the same importance as the right to property, and in close connection with the latter.

Being one of the fundamental human rights, the right to a healthy environment that is ecologically balanced is characterised by a special dynamics regarding its acknowledgement and legal guarantee.

Initially being internationally proclaimed by the Declaration in Stockholm, from the year 1972, this right is constitutionally and legally consecrated on state level. It stands for human liability for environment, especially conjugated with its correlative right to a healthy environment that is ecologically balanced, in case the ecological issues are mainly generated by the socio-human impact upon the surrounding nature.

General conditions regarding environment factor protection in human settlements

The general principles, action framework and objectives of human settlements protection were established at the Conference in Vancouver from 1976. In the Declaration adopted it was stated that in the conditions in which the majority of the population, especially underdeveloped countries, is living in poor settlements conditions, if concrete measures are not taken at a national and international level, the situation will degenerate due to: inequitable economic growth, unequal social, economic and ecological conditions, increasing food and housing necessities and other

indispensible elements., along with the increase in population and uncontrolled urbanization which will lead to overpopulation in cities and dispersions in the rural environment.

The measures which were taken from adopting this document and to the present proved to be extremely scarce and almost inefficient compared to the existent realities, thus it would be necessary that governments and the international communities to act in favor of adopting efficient strategies and policies concerning human settlements, taking into consideration the necessities of defavored groups, especially children, women and cripples – in order to ensure medical care, services, education, food and workplaces.

Sustainable development of human settlements imposes the guarantee of a healthy environment which is functionally and culturally coherent, at the level of rural and urban localities, in the conditions of preserving a balance regarding the resource resorts of the natural capital.

Environment protection in human settlements focuses on environment factors: air, water, soil, subsoil, noise, radiations, etc. and is achieved by pollution control methods by means of technical methods and procedures such as: placing polluting industries at a distance from localities; reducing pollution resulted from means of transport, using technological methods that produce as less contaminants as possible; neutralization of unrecoverable waste; reduction of noise pollution; developing dangerous activities for humans and the environment in conditions of safety, etc.

The effects of pollution affect the quality of air – the basic component of the environment, which by its physical, chemical and thermical properties sustains the planet life - as well as a series of atmospherical processes and phenomenon, which may produce meteorological and climatological effects especially difficult to control, such as: the greenhouse effect, acid rain, ozone depletion.

The quality of air is statistically relevant for many indicators which represent the pollution phenomenon under the form of polluting residual substances spreading into the air, resulted from economical activities or other sources, which requires the monitoring of air quality in the areas with strong polluting emissions.

Noise pollution is, also, an environment and health issue, especially in crowded urban centers where noise levels exceeding the standards in the domain are recorded, as a result of intense automobile traffic.

For human ecology, one of the most urgent issues is ensuring drinking water, which strongly requires the limitation of excessive consumption of water and pollution, thus restoring the consumed water which now possesses more natural properties to the environment.

Likewise, it is necessary to ensure the protection of the quality of water, which also implies distinguishing the pollution sources and the composition of wastewater, in order to correctly apply the treatment and evacuation procedures in the local sewerage networks.

The soil also represents an important factor for human settlements, as its degradation may be the result of erosion produced by water and wind, but especially of inadequate agriculture practice, irrational chemicalization, and poorly applied irrigations as well as the absence of the later.

In order to synchronize sustainable development actions within the member states of the European Union, in the year 2001 the Strategy for Sustainable Development of the European Union was established, which provide the following main objectives: redimensioning and reshaping economic and social structure, transforming it into a sustainable system; determining sectors and directions with a competitive potential as priorities of sustainable development; ensuring the health state of the population; ceasing the deterioration process of the natural capital and initiation of its restoration; improving a coherent legal system, compatible with the developed countries in the European Union; forming human resources at the level of scientific, technological and informational requirements on an international scale, from all economic and social sectors; permanent monitoring and evaluation of the economic, social and environment protection performances.

Environment protection measures in Romania

Being a responsibility of the public administration authorities, as well as natural and legal persons, human settlement protection is regulated by the Emergency Ordonance no. 195/2005[1], which stipulates the impositions of obligations on such liable actors and establishing some ecological requirements regarding the urbanism and territorial management plans

Art. 70, from this normative act stipulates, for ensuring a healthy environment, that local authorities, natural and legal persons are compelled:

- To improve locality microclimate, by managing and maintaining springs and pockets of water from within and adjacent areas, to embellish and protect the landscape, to maintain street cleaning;
- To anticipate, in the establishing of urbanism and territorial management plans, the improvement of natural landscape background, landscape and ecological restoration of deteriorated areas, sanitary protection of drinking water intakes and safety measures against floods;
- To comply with dispositions from the urbanism and territorial management plans regarding the localization of industrial objectives, sewage networks, wastewater treatment, municipal, road and industrial landfills as well as other objectives and activities, without damaging the environment, recreation, treatment and relaxation spaces, health state and comfort of the population;
- To inform the public upon the perils generated by the functioning or existence of objectives involving risks for the population health and for the environment;
- To comply with the regime of special protection for spa localities, tourist interest and recreational areas, historical monuments, protected areas and monuments of nature;
- To adopt adequate architectural elements, to optimize the density of dwellings, while maintaining, sustaining and developing green areas, parks, of trees alignments and road protection belts, of landscape management embodying an ecological, aesthetical and recreational function, in conformity with urbanism and territorial management plans;
- To regulate, including by permanent or temporal prohibition, the access of certain types of vehicles or development of activities which generate discomfort to the population in certain locality areas, predominantly in the areas destined to dwellings, treatment, rest, recreation and enjoyment;
- Not to degrade the natural or landscaped environment, by uncontrolled deposit of any types of waste;
- To adopt compulsory measures, for natural and legal persons, regarding the maintenance and embellishment of buildings, courts and their fencing, of the green spaces from the courts and buildings, of trees and decorative shrubs;
- To initiate, at a local level, sewage management, maintenance and development programs.

For adopting urbanism plans and programs in the domains specifically mentioned by law, the environment evaluation is necessary, before commencing the compulsory regulation procedure of activities that produce negative effects upon the environment, proceedings which focuses on the integration of environment protection obligations and requirements in adopting certain plans and programs, taking into consideration the environment report and the results of these consultations in the decisional process and ensuring informing upon the decision taken.

The environment evaluation procedure, the structure of environment report and conditions for issuing the environmental permit for plans and programs, are established by a government decision, at the proposal of central public authorities for environment protection – approvement of plans and programs, at every hierarchical level being conditioned by the existence of an environment permit for the above-mentioned plan or program.

Moreover, the urbanism plans and programs are also submitted to environment evaluation, which, due to the possible effects, affects the Special Bird Protection Areas or the special areas

[1] The Emergency Ordonance no. 195/2005 regarding environment protection, published in the Official Gazette no. 1196 from the 30th of December 2005.

of preservation regulated by the Government Emergency Ordonance no 236/2000 regarding the regime of protected natural areas, preserving natural habitats, flora and savage fauna, approved with amendments and additions by the Law no. 462/2001.

After performing the environment evaluation and the environment report for certain plans and programs, the competent authorities issue an environment permit, which has the same availability as the program or plan for which it was issued.

An important domain for ensuring a healthy environment within the human settlements is maintaining, sustaining and developing green spaces[2] whose administration is regulated by the Law no. 24/2007.

Regardless of the nature of the property (public or private) these spaces are submitted to a common protection and preservation regime, based on acknowledging the right of every natural person to a healthy environment , free access to recreation in the green spaces which represent public property etc., in the conditions of complying with legal dispositions in force.

In view of complying with rules and protection and preservation measures, the law stipulates a series of obligations for the natural and legal persons, and for the control and coordination of the activities developed, an inventory conducted by the National Register of green spaces and green local registers was established.

In conformity with the sixth Program of action for the environment performed by the European union, adopted by the decision of the European Parliament and Council no. 1600/2002/EC, our country initiated the *National Program of air quality improvement by establishing green spaces in localities*[3], document by which the increase in the surfaces of green spaces from localities is targeted, in order to reach the standard European sizes, by establishing green spaces in localities and building new parks, squares, alignments planted or the rehabilitation of the ones existent.

Conclusions

By studying the vast problem of environment protection in human settlements, we can detach a multitude of aspects related to this domain, as well as measures imposed for ensuring an adequate environment, which must contribute to the improvement of the quality of life and to the health of the population.

Thus, the health and people's lives, as well as the quality of the environment, may be affected not only by emissions resulted from industrial activities, but also the quality of products and services offered.

In view of ensuring the protection of people health and life, as well as environment, domestic animals and property protection, competent authorities elaborate technical regulations, by respecting international and community principles and regarding the free circulation of goods in the domestic and international commerce.

For new non-food or reconditioned products and for the services which threaten life, health, work security and environment protection, non-regulated by specific normative acts, referring to the marketing conditions[4] of products and respectively, services, the dispositions of the Government Decision no. 1022/2002 is applied, in conformity to which the service supplier or his authorized representatives guarantee that these products are not threatening to life, health, work security and environment protection, in the conditions in which they are installed, used,

[2] Art. 1 from Law no. 24/2007 considers that these activities represent a public interest objective, as to ensure the quality of environment factors and the population's health state.

[3] The Emergency Government Agency no. 59 from 20 June 2007 regarding the establishment of the *National improvement program of the quality of the environment by creating green spaces in localities*, published in the Official Gazette no. 441 from 29.VI.2007.

[4] In accordance with the Government Decision no. 1022/10.IX.2002 regarding the regime of products and services which endanger health, work security and environment protection, published in the Official Monitor no. 711/30.IX.2002, by "placing on market" the action of making available is understood, either for cost or free of charge, a new non-food item, used or reconditioned or a service, as to distribute, utilise or provide.

maintained or performed, after each case, in conformity with their destination and normative documents defined in conformity with the law.

Invading the market with poor quality products and the alarming increase of cases of sickness, as well as producing other damages, have determined the regulation of product general security[5], in conformity with community regulations, as well as civil liability for the damages generated by these products, as well as the procedure of repairing them[6].

By the Law no 150/2004 regarding food and feed safety for animals with the subsequent amendments and additions, a unitary legal framework was established referring to the production, packaging, storage, transportation and marketing of food, the liabilities of food producers and traders and the sanctions applicable in the domain.

In order to supply the consumer with the necessary, sufficient, verifiable and easy to compare information, as to permit them to choose a product that corresponds with the requirements from the point of view of financial needs and possibilities, as well as acknowledging the possible risks to which they may be submitted, the methodological rules[7] that regulate the manner of labelling the products delivered to the final consumer or restaurants, hospitals, cantines and other economic agents that manufacture and supply food for the population were adopted.

Activities that concern the deliberate introduction in the environment and on the market of genetically modified organisms, as well as using them in conditions of isolation of genetically modified micro-organisms or that were submitted to a *special regulation, authorization and administration regime*, in conformity with the dispositions of the national and community legislation[8], and of the international legal acts In which Romania is included.

In the present, the enhancement of preoccupations from the public authorities for environment protection is generally expected, but especially in human settlements, as *guides for the implementation of the procedure for risks evaluation* is being established, this being in conformity with the European Union policy and the international regulations in the domain.

Bibliography

M. Duțu, *Dreptul mediului*, 3rd Edition, "C.H. Beck" Press, Bucharest, 2010;

Marinescu Daniela, *Tratat de dreptul mediului*, Third edition, reviewed and completed, "Universul Juridic" Press, Bucharest, 2008;

M. Duțu, *Tratat de dreptul mediului*, 3rd Edition, "C.H. Beck" Press, Bucharest, 2007;

S. Godeanu, M. Godeanu, M. Popescu, *Ecodezvoltare sau dezvoltare durabilă?*, in *Ecologie şi protecţia mediului*, Coresi Press, 1992.

[5] Law no. 245/9 June 2004 regarding general product security, published in the Official Gazette no. 565/25.VI.2004. The Law transposes Directive no. 2001/95/CE of the European Parliament and the Council of Europe from the 3rd of December 2001, referring to general product security, published in the Official Gazette of the European Communities L.11 from 15.I.2002.

[6] See Law no. 240/7 June 2004 regarding producers liabilities for damages generated by products with defects, published in the Official Gazette no. 555/22.VI.2004.

[7] See Government Decision no 106/7.II.2002 regarding food labeling, published in the Official Gazette no. 147/27.II.2002.

[8] This regime was established by the Goverment Ordonance no. 49/30.I.2000 regarding the regime of obtaining, testing, utilization and marketing of genetically modified organisms by means of modern biotechnological techniques, as well as the products resulted from it, published in the Official Gazette no. 48/31.I.2000, approved with amendments by the Law no. 214/3.V.2002, published in the Official Gazette no.316/14.V.2002.

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THE ROLE OF RELIGION IN PREVENTING CRIME IN RISK SOCIETY SPECIFIC TO GLOBALIZATION

R. G. Paraschiv

Ramona-Gabriela Paraschiv
Faculty of Law,
"Dimitrie Cantemir" Christian University, Bucharest, Romania
*Correspondence: Ramona-Gabriela Paraschiv, 30 General Magheru St., Râmnicu Vâlcea, Vâlcea, Romania
E-mail: ramonaparaschiv@rocketmail.com

Abstract

In the current context of increasing transnational organized crime, in a risk society favored by certain phenomena of individualism and globalization, it is necessary to investigate what role the Church may have in preventing deeds dangerous to human values.

In this respect, the Romanian Orthodox Church, which has a well-defined place in the new European construction, aims to substantially contribute to educating people in the spirit of Christian morality, so that they cannot commit antisocial acts injurious to others and for other values of humanity.

Keywords: *rules of conduct, religion, crime, prevention, morality*

Introduction

Based on the research of statistics and facts of reality, we conclude that, once Romania entered the European Union, globalization in general, cross-border crime numbers increased, but also the seriousness of the offenses committed, which requires enhancing legislative measures and organization of judicial institutions of the state and finding the most effective action methods of preventing crime.

Along with the guarantees provided by state laws, which are intended to establish the rule of law, spiritual warranty is felt more strongly, arising from faith, with hope that the future of humanity will be enlightened by a new Christian humanism[1].

The Church's role in educating people to prevent anti-social acts in the context of European integration

At the beginning of the third millennium, the development of social phenomena is constantly accelerating, causing great changes in science and material progress, but also in the sphere of philosophical concepts, morality and faith, which generates new patterns of behavior and other scales of values in a human society dominated by individualism risks, with all its negative consequences, but also globalization risks, which facilitates the unprecedented development of various forms of transnational crime, with particularly high risks for human safety, which is likely to lead to the establishment of feelings of fear, hopelessness and mistrust in the future - all leading to human alienation.

Scientific progress, in the context of cross-border freedom of movement, allows not only to improve quality of life physically and spiritually, but also involves the risk of using

[1] W. Dancă, *Dialog Teologic*, in the magazine "*Mitropolia Olteniei*", Year LVIII no. 5-8/2006, "Editura Mitropolia Olteniei" Publishing House, Craiova, 2006, p. 134, showing that the future will remain a period of people who are beginning to rediscover the depth of the spiritual life and the greatness of the universe, but must continue pleading for an ideal and a constitutive reference for a moral guidance, because, if that did not exist, the world would turn to chaos of desires and a worrying manifestation of lack of love.

this development results in a negative, harmful way to humans, from this benefiting organized crime, terrorism, drugs, human trafficking and exploitation of children, fraud and corruption, currency counterfeiting, money laundering, cyber-crime, environmental degradation, racism and xenophobia, genocide, crimes against humanity and war crimes[2].

Law states, with a consolidated democracy, try to promote the best legislative measures to effectively fight against those who commit such acts, and the European Union has promptly developed numerous rules and regulations against these criminal phenomena affecting human values, mobilizing the efforts of Member States in order to effectively fight against crime and perseverance[3].

Despite all legislative measures taken to streamline the activity of repressive judicial bodies, crime is still growing, registering ever more victims, and on the other hand, many people with criminal records, which is a major risk for the development of society in terms of morality, so if there are no other solutions to reduce crime, it is possible that life and other values of future generations will become more threatened.

The state, through its bodies, edicts laws and sanctions those who violate them, but due to objective or subjective factors, many of the antisocial acts that contravene not only the laws but also religious norms, which in many cases are the source of legal norms, remain unsanctioned, their authors being encouraged to continue the same criminal behavior.

But the purpose of any civilized society would be, first, not to commit antisocial acts, not to be happy that there are more people convicted and thus a correlative number of victims. As a result, the solution would be, mainly, educating people to respect the others, the social and human values accepted both by religion, as well as societies with a genuine democracy.

How states that have many concerns in terms of improving people's behavior, which they exercise through their bodies, do not put special emphasis on educating people to respect the rules of conduct, but is organized primarily for taking action against those who violate them, we consider that the church's role in guiding people towards a moral behavior must be growing stronger. Therefore, first we must act against the individualism that is the enemy, increasing the distances between people, which it divides, and promotes human focus exclusively on his own person, thus giving birth to monsters[4].

With reference to the current situation in Romania, it is noted that, if before the fall of communism in December 1989, the rule of law was referred to, generally by repressive means, the population having a sense of fear, nowadays freedom has been misunderstood by most people who have a retrograde conscience and who have not acquired a deep healthy morality, therefore trying to stand out by fraudulent activities that lead to their unjustified enrichment, or by acts of violence, promoting anarchic attitude. All these are likely to affect the morality and the operation of the fragile rule of law, questionable people being promoted often as role models, lacking culture and virtue, which makes young people to be confused in choosing their way of life, from lack of valuable criteria and authentic models.

In such circumstances, the Church, religious morality should play an important role in bringing people towards good and what is right, thus contributing to the restoration of genuine valuable criteria and convincing the young generation to follow real valuable models.

The fall of the communist regime created the possibility of church administrative restoration, among them, the reorganization, re-establishment and creation of 14 dioceses in the Romanian Patriarchate and the introduction of religious education in schools, the reintegration of theological education into the state university etc.

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[2] G. Paraschiv, *Drept penal al Uniunii Europene*, "C.H. Beck" Publishing House, Bucharest, 2008, p. 26.

[3] G. Antoniu, *Activitatea normativă penală a Uniunii Europene*, in "Revista de drept penal" Review, Year XIV No. 3/2007, pp. 1-2.

[4] V. Citirigă, *Rădăcinile individualismului şi implicaţiile lui din punct de vedere ortodox*, in "*Ortodoxia*" Review, magazine of the Romanian Patriarchy, Series II, Year I, no. 11, Bucharest, April-June 2009, pp. 160-162.

These measures provide a stronger church presence in social life, thus contributing to educating people in the sense of moral compliance, to ensure normal relations of coexistence, without the need to commit antisocial acts.

Many Romanian Orthodox people, especially the new generation, look to the European Union with hope as being *a chance for a better future for their country as normal for a continent too often divided religiously and politically*[5], integration having the following reasons:

- To overcome the economic crisis facing the country, we need external support;
- Fast implementation of democracy and social development requires cooperation with developed countries of Europe;
- National security, scientific, spiritual and material progress also require cooperation with advanced countries in the European area;
- National culture should not be isolated but to enter the continental and universal circuit;
- Common Christian witness and contribution of religious communities to human life, nationally and internationally, are more likely to succeed in a united Europe than in a divided Europe.

Together with the Orthodox-majority countries: Greece and Cyprus, which together include about 11 million Orthodox people, in 2007 Romania joined the European Union (18800 Orthodox people of the total population of 21700) and Bulgaria (6 200 Orthodox people of the total population of 7450) therefore over 25 million Orthodox people were added to the existing 11 million in the Union[6].

Romania's EU integration also raises the question whether our country's Orthodox theology is compatible with the Christian community and whether it can actually help to maintain social order.

The Romanian Orthodox Church has supported and helped by specific means the integration of Romania into the European Union in order to achieve the goal of a better collaboration with advanced European countries, for the purpose of the economic development of the country, with the consequence of increasing living standards, but also able to establish a genuine rule of law, where people's rights and freedoms are guaranteed and protected, states being able to better defend themselves against antisocial acts.

European unity cannot be achieved, actually, only on economic basis, but it must rediscover common spiritual dimension, and in this field Romanian Orthodox people can bring, in a dialogue without complexes and without aggression, its experience of people crucified and risen from the dead ten times in its history, by placing it among the most religious people of Europe[7].

Over time, it was found that, in addition to the political-economic dimension of EU states, there is a focus on the cultural and spiritual component, which led the European Parliament to adopt, in December 1997, with a budget reference "A Soul for Europe" for the development of this social foundation, in which religion plays an important role in establishing a common European identity and to educate people in the spirit of defending the values of humanity, against antisocial acts.

Since in our country, in communist times, duplicity and form without substance have been promoted in excess, influencing people to deal with shallowness social and Christian moral values , which led many to the commission of many antisocial acts, it is necessary that the church, through its representatives, to bring the consciousness of all genuine values, to make them deepen into the social and ethical phenomena, because even towards religious morality some people show only a formal interest, seeing religion only as "something" that

[5] M. Răduț Selişte, *The Romanian Orthodox Church and the New Europe,* on http://www.rostonline.org/rost/ian2006/bor.shtml (accessed on September 6, 2011).
[6] M. Răduț Selişte, *op. cit.*
[7] A. Gabor, R. P. Mureşan, *Biserica Ortodoxă în UE,* "Editura Universității din Bucureşti" Publishing House, Bucharest, 2006, p. 119.

must solve their material problems, without making efforts in good faith. Also, there is still a damaging opinion that those who commit antisocial acts can be forgiven of all sins, no matter how bad they are, even when the acts committed are identified with serious crimes provided by criminal law, therefore not having any serious concern to correct their conduct for meeting social order, hoping that they can escape from divine judgment and the judicial courts of the state.

European unity cannot be achieved, actually, only on economic basis, but it must rediscover common spiritual dimension, and in this field Romanian Orthodox people can bring, in a dialogue without complexes and without aggression, its experience of people crucified and risen from the dead ten times in its history, by placing it among the most religious people of Europe[8].

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Conclusions

The integration process of the Church in the European Union is not a goal in itself but is meant to contribute to the cultural and spiritual development of people, to the enrichment of the knowledge about life and how it should be lived. The Church representatives are opinion makers who can contribute directly to increasing public awareness regarding the advantages and disadvantages, costs and benefits of accession, while also having an important role in training people to meet human values and not to commit antisocial acts of harmful nature.

Romanian Orthodox spirituality will be required in the great family of European states, with a specific identity, which professes Eastern faith in a language of Western origin and which may constitute a bridge between East and West, as Orthodoxy has developed a Church as a means to maintain a balance between the spiritual and social element[9] of Christian life, contributing substantially to educate people in order to respect the rules of conduct imposed by society and religion.

Bibliography

V. Citirigă, *Rădăcinile individualismului şi implicaţiile lui din punct de vedere ortodox* in "Ortodoxia" Review, magazine of the Romanian Patriarchy, Series II, Year I, no. 11, Bucharest, April-June 2009;

G. Paraschiv, *Drept penal al Uniunii Europene*, "C.H. Beck" Publishing House, Bucharest, 2008;

G. Antoniu, *Activitatea normativă penală a Uniunii Europene*, in "Revista de drept penal" Review, Year XIV Nr. 3/2007;

W. Dancă, *Dialog Teologic,* in the "Mitropolia Olteniei" Review, Year LVIII no. 5-8/2006, Metropolitan Church of Oltenia Publishing House, Craiova, 2006;

A. Gabor, R. P. Mureşan, *Biserica Ortodoxă în Uniunea Europeană*, "Editura Universităţii din Bucureşti" Publishing House, Bucharest, 2006;

A. Plămădeală, Antonie, *Biserica slujitoare*, Sibiu, 1986;

http://www.rostonline.org/rost/ian2006/bor.shtml.

[8] A. Gabor, R. P. Mureşan, *Biserica Ortodoxă in Uniunea Europeană,* "Editura Universităţii din Bucureşti" Publishing House, Bucharest, 2006, p. 117.

[9] A. Plămădeală, Antonie, *Biserica slujitoare*, Sibiu, 1986, p. 204.

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STUDY ON EXPERT STATUS IN THE EUROPEAN JUDICIAL SYSTEM

Gh. Popa, I. Necula

Gheorghe Popa
Romanian-American University, Bucharest, Romania,
*Correspondence: Popa Gheorghe, 1B Expoztiei Blvd., Sector 1, Bucharest, Romania
E-mail: popa_gheorghe1959@yahoo.com

Ionel Necula
National Forensic Science Institute, Bucharest, Romania,
*Correspondence: Ionel Necula, National Forensic Science Institute, 13-15 Ştefan cel Mare St., Sector 2, Bucharest, Romania

Abstract

In some European countries, expert status is defined by the legislation, whereas, in others, by the membership of a professional group or specialized institution under the Ministry of Justice and Police, this subordination being of a financial nature, without affecting the expertise itself.

This article contain a point of view regarding the European judicial system, the term expert's different meanings and the criteria that define an expert's status and which are different from one state to another.

Keywords*: expert, status, system, European juridical system*

Introduction

Previously, in 1959 the European Convention on Mutual Assistance in Criminal Matters had dealt with this matter quite summarily and only in relation to criminal matters (letter rogatory requests for expert examination, summoning experts).

The issue of forensic experts is currently being considered at the level of the European Network of Forensic Science Institutes (ENFSI) with a view to setting up a European expert status, governed by a process of accreditation and validation in accordance with ethical standards and rules of conduct[1].

I. In some European countries, expert status is defined by the legislation, whereas, in others, by the membership of a professional group or specialized institution under the Ministry of Justice and Police, this subordination being of a financial nature, without affecting the expertise itself.

Thus, there are several types of experts involved in solving cases. Some of them belong to specialized laboratories, others are independent experts enrolled or not on national lists who are subject to regular assessments or they are only qualified people, not experts in the strict sense.

In some European countries (France, Romania, United Kingdom, etc.), the expert status is granted by an independent institution, either through recognition by the judiciary, by meeting certain criteria, or through inclusion on an official list/nominal table. For example, in

[1] Code of Conduct for forensic practitioners developed at the level of ENFSI, *"CODE of CONDUCT"* (BRD-GEN-003/16.6/2005).

France experts are included on a list displayed in each court of justice and a national list on the website of the Court of Cassation, and here accreditation refers to the laboratories' methodology and management, whereas certification refers to the individual expert.

In *Latvia* there are two categories of experts, one including those who have specialized knowledge in a field and the other including experts who pass a series of tests given by a commission of representatives of the Ministry of Justice, Ministry of Interior, Public Ministry, the Police and experts in the field.

Regarding the *issue of experts' independence*, there are a number of rules specific to the prosecution stage and the trial stage.

In *France*, there are limitations with regard to the number of experts summoned for a particular field, as well as with regard to the expert working in the same professional field as the trial subjects. The expert report may be subject to examination by another expert as a guarantee of the former's correctness.

In *Austria*, if there are any doubts about an expert's independence, the Austrian Federal Court will decide whether or not the expert in question should participate in the criminal proceedings in that case. The list of qualified experts is available on the Internet. Sometimes, on basis of the judge's free evaluation, German experts, either of public or private institutions, are resorted to, at the expense of the convict, as the amounts to be paid are not excessive.

In *Germany*, the judge decides on the experts to be consulted and their number controls the expert's activity and presents the scientific rationale behind his/her decisions. Experts are mentioned on a list established at local level.

In the *United Kingdom*, expert independence has to do with scientific objectivity, there is a list of several thousand experts accredited by special Councils for expert accreditation in observance of strict professional rules and who can exercise their profession without any geographical limitations, expert independence being related to the judge's control and to the case file.

In *Luxembourg*, the law allows the judge to order the performance of the expertise by foreign experts if they are recognized in the State of origin.

In terms of expertise costs, when the analysis of scientific evidence is required, in less serious cases such costs may be high, especially if the expertise is done in private institutions instead of public institutions, therefore the financial restrictions that may limit the access of the defence to expertise services should be taken into consideration. In *France*, the cost of conducting an expertise is reported to the budget of the Ministry of Justice and in special cases it may be supplemented from the budget.

Sometimes the cost price can be a factor in the competition between expertise suppliers, thus it has been shown that the DNA analysis can be performed in less serious cases at a cost price lower than the cost of using investigative technologies such as telephone interception. An eloquent example is the expertise service in the *United Kingdom of Great Britain*, where 90% of the expertise consists in DNA analysis, which has led to the setting up under the aegis of the Home Office of a regulatory unit called "*Forensic Regulator*" which advises magistrates on expertise services and sets the rules for the operation of these services.

In *Finland* experts are selected from among police officers who have undergone a training programme of about six months with no duties in the crime scene research, the expert function being incompatible with that of investigator at the crime scene.

In *Poland*, there are forensic experts involved as consultants for gathering evidence at the crime scene, which is also the case in *the Netherlands*, for DNA or biological evidence collection, and in *Denmark*, where the presence of a private expert is sometimes required in cases of fire.

The experts' judicial training is aimed at having them know the place and role of expertise in the criminal proceedings, consisting in knowledge of the general rules of conduct of the criminal proceedings and specialized knowledge in their field of expertise.

In the specialized literature there are various views on the capacity of expert[2]:

- Gaining experience as an expert does not grant jurisdiction to act as an expert in other cases. Experience as an expert witness, standing alone, does not qualify someone as an expert in later cases. For example in Bogosian v. Mercedes-Benz of N.Am., Inc., 104F.3d 472, 477 (1st Cir.1997), the court rejected an opinion of a witness who had testified as an expert 126 times.

- The Court held that "it is absurd to conclude that one can become an expert through the experience accumulated by conducting expertises". One court even noted "it would be absurd to conclude that one can become an expert by accumulating experience in testifying" – Thomas J. Kline, Inc. v. Lenillard, Inc., 878F.2d 791, 800 (4th Cir. 1989).

- Even the most experienced expert should have his first day as an expert before the court. In United States v. Locascio, 6 F.3d 924, 937 (2nd Cir. 1993), the court concluded that "…even the most qualified expert must have his first day in court".

The European Commission for the Efficiency of Justice, a body established by the Council of Ministers of the Council of Europe in September 2002 to assess the effeciency of judicial systems, drafted in 2012, on basis of data provided by the EU Member States (in 2010), a document on *"European Judicial Systems: Efficiency and Quality of Justice"*[3].

In preparing this document a total of 47 states were involved that responded to this assessment process: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Republic of Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, The Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine and the United Kingdom[4].

The document states that **"there is no consensus, no European Standards regarding judicial witnesses".** Chapter 15 of this document entitled *Judicial Experts* highlights the role of judicial experts in improving judicial efficiency by providing judges with clear and reasoned responses regarding the specific and complex problems they face.

There are different kinds of judicial experts in the Member States of the Council of Europe, namely:

- *Technical experts:* those who provide the court with scientific and technical knowledge on matters of fact.

- *Expert witnesses:* those who are required by the parties to come up with their expertise in support of their argument.

- *Court experts:* those who can be consulted by judges in specific legal issues or are required to assist the judge in conducting the judicial work (but do not take part in the judgment).

It is noted that the **concept of forensic expert is not included in this classification**, the notion of *judicial technical expert* or *forensic expert* in the European legal space being treated rather like that of a witness or scientific witness[5], a capacity granted by the parties or the judicial bodies, usually found in the form of a court expert (forensic expert). The missions of judicial experts may be different in certain countries, such as the Russian Federation, where

[2] Cătălin Grigoraş, Judicial Expertise in Europe and the ECHR Practice, Communication Symposium, "Novelties in the Field of Forensic Science, Criminal Law and Criminal Procedure", organized by the Romanian Forensic Association, Bucharest, 2009.

[3] www.coe.int/cepej

[4] www.coe.int/cepej. European Comission for the Efficiency of Justice, Systèmes judiciaires européens, Efficacité et qualité de la justice, Les études de la CEPEJ no.18, Editions du Conseil de l'Europe, Publishing Editions 2012.

[5] Cătălin Grigoraş, Judicial Expertise in Europe and the ECHR Practice, Communication Symposium, "Novelties in the Field of Forensic Science, Criminal Law and Criminal Procedure", organized by the Romanian Forensic Association, Bucharest, 2009.

a distinction is made between experts (who perform "expertises" and draw "expert reports"') and specialists (who assist in the performance of procedural activities and provide written or oral consultation).

In *Switzerland* the technical expert is used in the 26 cantons, the expert witness in 6 cantons and the court expert in 3 cantons.

Great Britain and Northern Ireland use *expert witnesses*. *Liechtenstein* and *Great Britain - Scotland* do not use judicial experts.

Technical expertise is used in 46 states. Liechtenstein, Great Britain - Northern Ireland and Great Britain - Scotland do not use it. Expertise by *expert witnesses* is used in 32 countries with common law systems and is found in the countries of northern Europe.

ECHR case-law on 11 December 2008 in the case Mirilashvili v. Russia (no. 6293/4) the Court in Strasbourg: reiterated that the judge is free to decide on the competence of an expert witness appointed by a party and found that the expert of the party was only allowed to express views on the conclusions drawn by the expert appointed by the prosecutor to conduct an audio expertise, not to participate effectively in its carrying out.

Judicial expertise is used in 8 states: Estonia, Germany, Ireland, Malta, Netherlands, Norway, Poland and the Russian Federation.

Courts have the freedom granted by law to choose the right experts. The Lisbon Treaty, Article 25 of Protocol 3, provides that *"the Court of Justice may at any time entrust any individual, body, authority, committee or other organisation it chooses with the task of giving an expert opinion"*. There is a similar provision in Article 50 of the Statute of the International Court of Justice.

As regards the selection of judicial experts: they are appointed by the court (34 countries), the selection is performed directly by the Ministry of Justice or one of its components (12 countries: *Azerbaijan, Hungary, Serbia, Slovenia*, etc.), they are selected directly by the parties (*Denmark, Ireland, Great Britain - England and Wales*), they are appointed by the National Bureau of Judicial Expertise or private authorized legal entities (*Georgia*).

ECHR case-law on 16 February 2010 in the case V.D. v. Romania (no. 7078/02) the Court in Strasbourg: condemned Romania for breach of Art.6.3.d of the Convention. In this case the judicial bodies in Romania, including the courts, denied the party the right to perform forensic dactyloscopic and DNA analyses.

According to the requirements of the given procedure, the courts select experts from the official list at the Ministry of Justice (*Bosnia and Herzegovina, Luxembourg, Slovakia, Sweden*) or from a list of individuals recognized for their competence (*Portugal*) or by consent of the parties (*Luxembourg, Portugal*).

In *Moldova*, in judicial practice, through the judge's decision a specialized institution is identified which will decide on the appropriately qualified expert available at the time or any person may be summoned who possesses the knowledge needed to draw conclusions on the circumstances incurred in relation to a criminal case and which may have probative importance for the criminal case. (CPC, Art. 142 (3).

In the case of *expert witnesses*, before appointing them, the parties are heard in relation to the appointment.

In *France (CPC, Art.157), Slovakia, Spain* and *Turkey*, natural as well as legal persons included on the national list or of the Court of Cassation or on the lists of the Courts of Appeal can be registered as experts. As an exception, judicial bodies may also appoint experts from among people who are not on these lists.

In *Germany*, the expert is appointed according to his/her practical knowledge and experience in commenting on the facts and presenting expert opinions based on analyses and evaluation of the evidence presented in a fair, independent and objective manner, so that his/her views may be accepted by both parties.

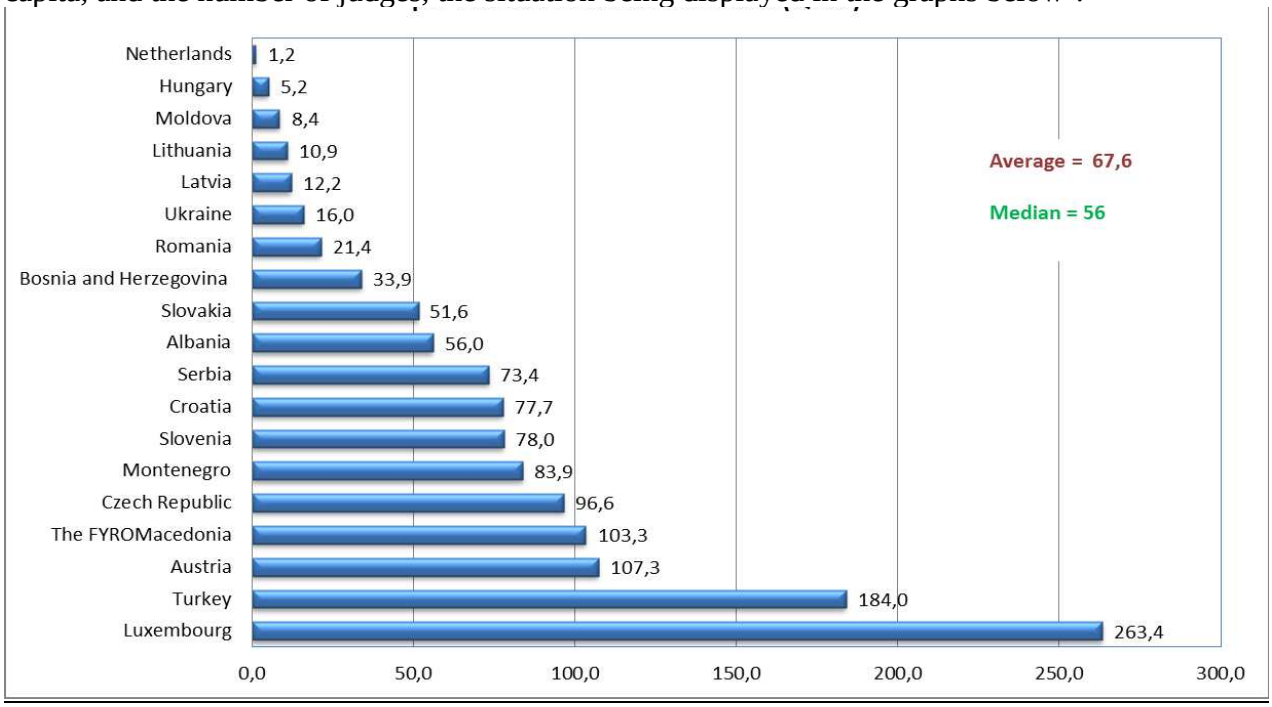
In *the United Kingdom*, the expert is a person who has knowledge or competence in a practical field[6].

In *Albania*, the expert is designated from among specialists included in special lists or from among persons who have specific knowledge in a field, in *Bulgaria*, the act of expert appointment contains the objectives of the expertise, materials provided, name, education, academic rank, specialty, academic title and position of the expert or the institution in which the expert is employed, in *Poland* there are permanent experts of the Courts and persons known to have sufficient knowledge in a particular field may also be required to act as experts.

In *Estonia*, the authority in charge of selecting the expert depends on the matter, whatever the expert's mission may be. The judiciary may choose a judicial expert or an officially certified expert or any person who possesses the necessary knowledge, in *Lithuania* any person who has the necessary knowledge to express a conclusion can be appointed as an expert, in *Finland*, the court requires a declaration to this effect from an agency, a public official or another person known to be honest and competent.

In *Montenegro*, the experts are selected by a Commission established by the President of the Supreme Court, which is composed of five members (two judges, two representatives of the Association of Judicial Experts, one from the Ministry of Justice), in the *Russian Federation*, judges appoint individual experts and specialists or choose expert institutions based on views of the parties. In *Switzerland*, there is only one canton where the experts are not appointed *ad hoc* by the court in a case, but for a specified period.

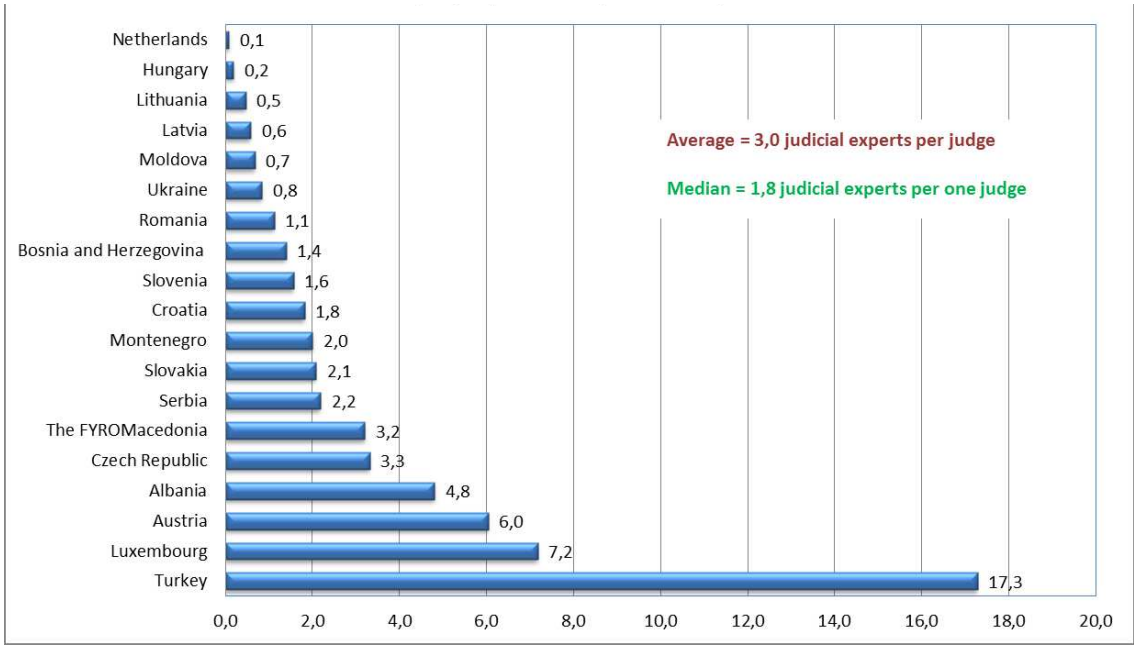
In 2013 the European Commission for the Efficiency of Justice presented the results of the only study conducted in Europe, in 2010, regarding the number of experts per 100,000 capita, and the number of judges, the situation being displayed in the graphs below[7]:



Number of experts per 100,000 capita

[6] Cătălin Grigoraş, Judicial Expertise in Europe and the ECHR Practice, Communication Symposium, "Novelties in the Field of Forensic Science, Criminal Law and Criminal Procedure", organized by the Romanian Forensic Association, Bucharest, 2009.

[7] European Comission for the Efficiency of Justice, "*European Judicial Systems: Efficiency and Quality of Justice*", 2012, www.coe.int/cepej.



Number of technical experts in proportion to the number of judges in 2010

It is stated that, for the first time, in this study, mandatory criteria for exercising the position of a judicial expert as well as the protection of the judicial expert title and position were taken into consideration.

Thus, 36 states presented mandatory criteria for the capacity of judicial experts as regulated by their national law (Albania, Georgia, Germany, Greece, Iceland, Lithuania, Montenegro, Netherlands, Norway, Portugal, Romania, Russian Federation, Slovakia, Spain, "the former Yugoslav Republic of Macedonia", Turkey).

In some states, time limits for the performance of examinations by experts are provided (Albania, Austria, Bosnia and Herzegovina, Bulgaria, Finland, Greece, Hungary, Iceland, Ireland, Italy, Montenegro, Netherlands, Norway, Portugal, Serbia, Slovenia, Spain, "the former Yugoslav Republic of Macedonia", Great Britain - England and Wales), which in the Russian Federation and Ukraine are determined by judges.

Thus, three main options are highlighted:

- *the time limit may be set by law* to a maximum: in Albania, the maximum time varies between 16 days and 6 months; in Italy, the maximum is 60 days; in Portugal, 30 days; in "the former Yugoslav Republic of Macedonia", between 45 and 60 days; in Turkey between 3 and 6 months;

- *the time limit may be set by the judge* if the law allows it, the judge being the one to decide the maximum time limit (the Russian Federation, Serbia, Slovakia, Great Britain - England and Wales);

- *the time limit may result from an agreement permitted by law*, as in the Netherlands, where the Commissioner and the expert agree on the time period.

The new Romanian Criminal Procedure Code, Article 173, par. (7), provides the obligation of the expert "to produce an expert report in compliance with the deadline set in the order of the criminal prosecution body or in the court's ruling. The deadline mentioned in the order or the court's ruling may be extended at the request of the expert, for well-grounded reasons, without having the full extension granted exceed *six months*" and, in paragraph (8): "*Unduly delay or refusal to perform the expertise entails the civil liability of the expert or the institution designated to perform it, for the damages caused*". However, Art. 174, par. 1, provides that: "The expert can be replaced if he/she unduly fails to complete the expert report until the deadline, or if he/she manifests disinterest in the task entrusted to him/her" and, in par. 2, it is stated that, "*the replacement is ordered, with summoning the expert, by order of*

the criminal prosecution body or by ruling of the court, which is communicated to the association or professional body to which the expert belongs. The expert replaced may be fined by the prosecutor or judge with a judicial fine of 500 to 5000 lei".

There are regulations regarding the non-observance of the time limit for performing the expertise, the expert being punished with a fine of up to 1,000 euros (Montenegro), in other cases there are binding provisions on the need for an agreement regarding the DNA expertise (Belgium), further training (Slovakia), certain incompatibilities (Finland, Spain), expert's ethics (Great Britain - Northern Ireland), the requirements for registration as an expert (Slovakia).

In 28 states the judicial expert's title is protected and, in order to be appointed, he/she has to meet certain pre-conditions regarding his/her skills and moral behavior, the expert's work being followed by the judicial authorities.

In some states, there are associations/colleges of experts, some of them placed under the authority of the courts.

In 35 states, the experts guide themselves, in their expertise work, by national and international standards in the field.

Conclusions

The European Commission for the Efficiency of Justice, a body established by the Council of Ministers of the Council of Europe in September 2002 to assess the effeciency of judicial systems, drafted in 2012, on basis of data provided by the EU Member States (in 2010), a document on *"European Judicial Systems: Efficiency and Quality of Justice"*.

The document states that **"there is no consensus, no European Standards regarding judicial witnesses".**

There are different kinds of judicial experts in the Member States of the Council of Europe, namely: technical experts, those who provide the court with scientific and technical knowledge on matters of fact; expert witnesses, those who are required by the parties to come up with their expertise in support of their argument; court experts, those who can be consulted by judges in specific legal issues or are required to assist the judge in conducting the judicial work (but do not take part in the judgment).

It is noted that the **concept of forensic expert is not included in this classification**, the notion of *judicial technical expert* or *forensic expert* in the European legal space being treated rather like that of a witness or scientific witness, a capacity granted by the parties or the judicial bodies, usually found in the form of a court expert (forensic expert).

Bibliography

C. Grigoraș, *Judicial Expertise in Europe and the ECHR Practice*, Communication Symposium, "Novelties in the Field of Forensic Science, Criminal Law and Criminal Procedure", organized by the Romanian Forensic Association, Bucharest, 2009.

Code of Conduct for forensic practitioners developed at the level of ENFSI, *"CODE of CONDUCT"* (BRD-GEN-003/16.6/2005);

Council Framework Decision no. 2009/905/JAI on accreditation of forensic service providers;

Government Ordinance no. 10 of 25 July 2012 by which the legal framework for the automated search of reference data in relation to the European Union Member States was created and which provides the recognition of laboratory activities regarding dactyloscopic data;

Law no.135/2010 on the New Criminal Procedure Code, published in the Official Journal of Romania, Part I, no. 486 of 15 July 2010;

Law nr.156/2011 amending and supplementing Art. 1 of Government Ordinance no. 75/2000 on the authorization of forensic experts. Published in the Official Journal of Romania, Part I, no. 519 of 22 July 2011;

The European Commission for the Efficiency of Justice, "*European judicial systems, efficiency and quality of justice*", 2012, www.coe.int / cepej.

The Romanian Criminal Procedure Code;

www.coe.int/cepej. European Comission for the Efficiency of Justice, Systèmes judiciaires européens, Efficacité et qualité de la justice, Les études de la CEPEJ no.18, Editions du Conseil de l'Europe, Publishing Editions 2012.

www.csm 1909.ro

www.enfsi.eu;

www.eur-lex.europa.eu;

www.european-accreditation.org;

www.inec.ro;

www.just.ro;

www.noema.crifst.ro

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THE CONCEPT OF OFFENSE IN THE NEW CRIMINAL CODE

E. G. Simionescu

Elena-Giorgiana Simionescu
Faculty of Juridical Sciences,
"Constantin Brâncuşi" University of Târgu-Jiu, Romania
*Correspondence: Elena Giorgiana Simionescu**,** Faculty of Juridical Sciences,
"Constantin Brâncuşi" University of Târgu-Jiu, Victoria Street, no. 24, Târgu - Jiu, Gorj, Romania
Email: giorgiana_simionescu@yahoo.com

Abstract
As an important part of the general theory of crime, the concept of "crime" and generates continuously generated controversial discussions in the literature reflected differently in criminal law. The new Romanian Criminal Code, although deemed necessary legal definition of the offense by listing its essential features, devotes a formally defined, giving the idea that crime is the fact that social threat.

Keywords: *offense, provision crime by criminal law, criminal culpability, unjustified, imputable character*

Introduction

The term comes from the Latin word crime "infractio,-onis" = to break, to break through French Connection "infraction" = offense[1]. In common parlance, the word has the meaning of "deviation", "breach of an order" and that the "violation of a law that deserves to be punished by criminal punishment," "socially dangerous offense consisting in breach of a criminal law, the commission, is guilty of a deviation from the criminal law and is punishable by law"[2] (in English, "infraction", "offense"[3]). This latter understanding of crime is common in criminal law designating as "socially dangerous act that, if committed with guilt, under the criminal law"[4], the new "offense under the criminal law committed with guilt, unjustified and imputable to the person who committed"[5] a crime and legal institution that, along with two other fundamental institutions of criminal and criminal penalties, the skeleton, the "pillars" of criminal law[6]. Within and around them revolve all applicable criminal law.

Definition of the offense

New legislator Romanian Criminal Code (2009) defines in a new offense, giving the idea that crime is the fact that social threat, so that the provisions of art. 15 para. 1, Romanian Penal Code (RPC) provides that the offense "under the criminal law act committed with guilt, unjustified and imputable to the person who committed it."

[1] V. Paşca, *Drept penal. Partea generală*, Worldteach Publishing House, Timişoara, 2005, p. 219.
[2] Details: http://dexonline.ro/definitie/infractiune.
[3] Mirabela Rely Odette Curelar, *Dicţionar juridic Român-Englez, "*Academica Brâncuşi" Publishing House, Târgu-Jiu, 2011, p. 93.
[4] Art. 17 para. 1 Penal Code (*Law no. 15 of 21.06.1968 – Romanian Penal Code*, republished in *Official Gazette of Romania*, Part. I, No. 65 of 16.04.1997, with subsequent amendments).
[5] Art. 15 para. 1 Penal Code – *Law no. 286 of 17.07.2009 Romanian Penal Code*, published in *Official Gazette of Romania*, Part. I, no. 510 of 24.07.2009, with subsequent amendments (in force since 01.02.2014).
[6] Ioan Oancea, in V. Dongoroz and collaborators, *Explicaţii teoretice ale Codului penal român*, volume I, *Partea generală*, "Editura Academiei" Press, Bucharest, 1969, p. 99.

Specialized Romanian literature, he expressed the view that the concept of social danger not only to complete the provision provided the offense in the criminal law, because only the legislature criminalizes threatening social facts which affect the values protected by criminal law.[7] Indeed, the legislature is held to choose between the amounts recognized at some point, those who, because of their importance can not be effectively protected by means of other branches of law, associating them criminal protection. Also, the actions likely to affect these values should not attract criminal than the rules of those events that harm the highest degree protected value[8]. Therefore, we can say with reason that the requirement that the offense under the criminal law to express the idea that she share the default risk[9].

The legal definition of the crime is a legal instrument of absolute necessity for the theory of criminal law, but also for legal practice as competent authorities to enforce the law, reporting their data to the hard facts from the legal concept of crime solving will determine whether they realize it or not features essentials of the offense, whether or not they fell within criminal illicit. This definition should be seen not only as an outline of the fundamental category of criminal law[10], but as a rule of law which limits the scope of illicit criminal circumscribing it, under this legal basis, the scope of criminal offenses covered by other facts regulation of other categories of legal rules[11] (administrative, disciplinary, etc.)[12].

If features will coincide with the facts described in the rule of criminality, it means that he violated the will of the legislature, and the deed will be an offense and shall be liable to the penalty provided by law.

Adoption of such legislation to the general concept of crime is important for the following reasons:

- Using this you can easily know the general concepts and facts characterize the field as crimes and at the same time, it can easily delineate and separate field field offenses considered misdemeanors or willful acts causing injury to civilians;

- All other provisions relating to offenses, in part, are subject to the provisions of the general notion of crime because all crimes must meet specific criteria and features of the general notion of crime;

- The definition of the offense is a legal regulation in the sense that it is normative and contains a rule of law that is binding on the judge and the citizen.

Examination of the concept of crime within the meaning of the definition of art. 15 para. 1 RPC, by stating its essential traits, that any of the offenses under the penal law to be treated as such, must meet the following essential features: the act or under the criminal law, the offense is committed with guilt, the act be unwarranted act is attributable to the person who committed it.

Analysis of the essential features

1. Providing criminal offense by law is the first condition of existence of any crime. It follows from the principle of legality of criminal offenses (art. 1 para. 1 RPC) so that in the absence of this condition, the act does not constitute infringement.

It should be emphasized, however, that the concepts of crime and, respectively, offense under the criminal law are not synonymous. If any offense must be an offense under the criminal law, not every act is an offense under the criminal law. For this offense under the criminal law must meet the other conditions: namely, to be committed with guilt is unjustified, be attributed to the person who committed it.

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[7] G. Antoniu, *Tipicitate şi antijuridicitate*, "Revista de Drept Penal" Review, no. 4/1997, p. 23.

[8] In international criminal law are international criminalize those acts affecting particularly important values of the international community assembly (Laura Magdalena Trocan, *Curtea Penală Internațională*, published in conference volume, conference with international participation "Gorjeanul în mileniul trei", organized by "Constantin Brancuşi" University of Târgu-Jiu, "Gorjeanul" Publishing House, Târgu-Jiu, 2005).

[9] F. Streteanu, *Drept penal. Partea generală*, "Rosetti" Publishing House, Bucharest, 2003, p. 290.

[10] Ioan Oancea, *Explicații teoretice*, vol. I, *op. cit.*, p. 104.

[11] For the definition of international crime, see Laura Magdalena Trocan, *op. cit.*, 2005.

[12] Maria Zolyneak, *Drept penal*, volume II, "Fundația Chemarea" Publishing House, Iaşi, 1993, p. 142.

Offense of criminal law provision expresses the existence of three realities[13]:

a) the existence of facts (action or inaction) by the respective result;

b) the existence of a legal model of criminality;

c) specific offense characteristics coincide with the legal model of criminality.

a) Under the first aspect, it is understood that the offense can not be considered only as an outward manifestation of man, whether it acts directly on the world around us, whether set in motion a foreign power, which connects to achieve certain effects, or use of inanimate objects as an extension of his own making in this way states objectives[14]. Mere mental processes (simple thoughts) that occur in the person's mind may not be criminal[15], as the reaction of animals, natural phenomena.

The outward manifestation to human bias, should express his free will, the subject having an accurate representation of the action (inaction) and its consequences. Action involves energy consumption and can take the form of acts or gestures (hitting, destruction, threat) may consist of written words or acts (forgery of documents, false allegations). Failure involves staying in passive agent relative to its obligation to act.

b) Under the second aspect, the crime involves the pre-existence of a rule of criminality that is described in the deed that the legislature intends to prohibit or order it[16]. Incrimination rule includes not only elements of the offense describing objectives and subjective. Otherwise, the offense charged, without subjective element has no legal relevance. For example, killing a person has legal significance only if the act was committed with guilt[17] otherwise suppressing a person's life would not differ from that caused by natural events (epidemics, floods, earthquakes, landslides, flood, lightning, tornadoes, heat, frost, etc.).

Offense of criminal law provision applies not only to the fait accompli, but attempt, as the offense committed venture (the act as co-author, instigator, accomplice). Incrimination rule established in the special part of the Criminal Code make not only with the general rule, but it can be completed with a rule in another branch of law: family law[18], administrative law[19], labor law.

Also providing offense of criminal law must be verified as having an objective existence, legal model should be effective in practice, not in the mind of the perpetrator (putative character).

c) Under the third part, the offense involves a full line of concrete features of the scene with the rule of criminality[20]. This line (typical[21]) may appear in a form typical perfect (the consummated crime), atypical imperfect (tentative contribution instigator, accomplice) or past perfect (actually crimes exhausted).

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[13] G. Antoniu (coordinator), C. Bulai, C. Duvac, I. Griga, Gh. Ivan, C. Mitrache, I. Molnar, V. Paşca, O. Predescu, *Explicații preliminare ale noului Cod penal*, volume I, "Universul Juridic" Publishing House, Bucharest, 2010, p. 140.

[14] George Antoniu (coordinator), *op. cit.*, p. 140.

[15] No one can be punished for merely thinking, according to the Latin maxim "Cogitationis poenam nemo patitur" (Ulpian).

[16] G. Antoniu (coordinating) and associates, *op. cit.*, 2010, p. 141.

[17] Art. 16 para. 1 Romanian Penal Code: "The act is an offense only if committed with guilt as required by the criminal law". Art. 16 para. 2 Romanian Penal Code: "Guilt is when the offense is committed with intent, negligence or intentionally exceeded".

[18] For example, criminalize *family abandon* (art. 378 Romanian Penal Code) refers to the rules of family law. For details, see P. Dungan, *Comentariu privind unele infracțiuni din Codul penal*, Worldteach Publishing House, Timişoara, 2007, pp. 102-105; A. Gh. Gavrilescu, *Drepturile şi obligațiile părinteşti*, "Universul Juridic" Publishing House, Bucharest, 2011, p. 282.

[19] The incrimination rule on *abuse of office* (Art. 297 Romanian Penal Code), and the incrimination rule *misconduct in service* (art. 298 Romanian Penal Code), referring to the powers of public officials, make the provisions of administrative law. For details, see P. Dungan, T. Medeanu, V. Paşca, *Manual de drept penal. Partea specială*, "Universul Juridic" Publishing House, Bucharest, 2011, pp. 219-226; I. C. Rujan, *Drept penal. Partea specială I*, "Didactică şi Pedagogică" Publishing House, Bucharest, 2007, pp. 121-129.

[20] G. Antoniu (coordinating) and associates, *op. cit.*, 2010, p. 143.

[21] G. Antoniu, *Tipicitate şi antijuridicitate*, "Revista de Drept Penal" Review, no. 4/1997, p. 23.

In modern criminal doctrine term "typical" is used to express the idea that facts which meets all standard features of criminality abstract model (type) describes an act determined that the offense, as an offense[22].

Typicality is achieved only as a result of comparing the content objective facts that the rule of criminality, as in content topics operates with the notion of guilt as an essential feature of the offense. Typicality not be confused with criminality rule because typicality is an assimilation of facts (it is typical that its features correspond to the facts described), while the legal model only serves as a comparison with reality.

This line should be objective, not imagining perpetrator (putative act has no criminal relevance).

In this respect, the legislature develop legal model based on observation of reality-legislative acts that evaluates and substantially reduce certain traits with which formulates incrimination rule. This reality suggests, requires the development of rule and give, while concrete material which arises interdiction or included in the standard order of criminality. The facts is criminal only insofar as it is reflected in the content of a rule of criminality, ie only to the extent determined by the legislature corresponding features in the model in criminal norm. For example, criminalizing theft (art. 228 RPC) Romanian legislator lays down that a deed must meet to qualify as such: to consist in making an action to have a movable object, that good to be in possession or detention of a person.

In criminal law enforcement activity, the judiciary will have to compare a specific act committed by a person described in the standard model act of criminality, to see if it meets all the requirements imposed by the legislature. The facts of the defendant X to Y enters his house and steal some money there corresponds entirely the offense described in art. 228 RPC Instead, the act of Z, taking, the purpose of acquiring a good find on the street, does not meet the legal model, as the goods are not in possession of someone else at the time, being a good lost.

Although incrimination rule contains the description of both the objective elements of the offense charged and of the subjective norm conformity with facts criminality is understood by only a typical expression according to objective, factual features concrete objective requirements of the standard wording of indictments. Regarding subjective features facts and compliance with the requirements of subjective criminality rule they are analyzed in the framework of the two essential features of the offense, namely guilt, which is a distinctive feature of the offense.

2. Guilt is the second essential feature of the offense. The doctrine of limited criminal culpability to those psychological processes that arouse the idea of the subject criminal, drives the action, directs and controls the physical activity itself[23].

This implies that the act is an expression of the subject's mental attitudes regarding willingness to commit the act and its consequences character and conscience.

Crime as any act of human conduct, is not only a natural material side, and an internal side, mental, made up of all psychic phenomena and processes that precede and accompany the administration of Conduct. As a mental attitude of the perpetrator of the crime committed and its consequences[24] to guilt is the result of interaction of two factors: consciousness or intellect factor will or volitional factor.

Criminal law defines not guilty, but the provisions of art. 16 RPC, Consecrating forms of guilt, states that "(1) The act is an offense only if committed with guilt as required by the criminal law. (2) Guilt is when the offense is committed with intent, recklessly or intentionally exceeded. (3) The offense is committed when the perpetrator intentionally: a)

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[22] *Idem*, p. 15.

[23] I. Mircea, *Vinovăția în dreptul penal român*, Lumina Lex Publishing House, Bucharest, 1998, p. 27.

[24] Elena Giorgiana Simionescu, *Distincție între vinovăție ca trăsătură esențială a infracțiunii și vinovăție ca element al conținutului constitutiv al unei infracțiuni*, *"Drept și societate"Review*, no. 2/2003, "Academica Brâncuşi" Publishing House, Târgu-Jiu, 2003, pp. 178-188.

states the result of his act, following its production by committing that act, b) states the result of his act and, although it seeks to accept the possibility. (4) The offense is committed by negligence, the perpetrator: a) states the result of his act, but do not accept it, believing without reason that he will not produce, b) does not require the result of his act, although it should be able to provide. (5) There intentionally exceeded the act consisting of a deliberate action or inaction produces a more serious fault is due to the perpetrator. (6) The act consisting of an act or omission constitutes an offense when committed intentionally. Negligent act committed an offense only when expressly provided by law. "

It may be noted that the scope of acts committed with guilt are introduced not only the intentional or negligent, but also intentional exceeded.

The literature has defined guilt as "the mental attitude of the perpetrator which consists in an act of conscience and will to the offense committed and its consequences, an attitude that manifests as intent or negligence"[25] or "attitude of conscious will offender to act and follow synthesized with the intention or fault that commits an act dangerous to society"[26].

Since no account was taken of the relationship between guilt and other key features of the offense (as were regulated by Romanian Criminal Code of 1968, republished in 1997, with subsequent amendments) and the specificity of the two factors in the above definition required to complete the definition of guilt in criminal doctrine, designating, the mental attitude of the person who committed an act which will unconstrained social threat, under the criminal law, had, in carrying out the representation of socially dangerous act and its consequences or, although not had representation act and its consequences, had the real possibility of that representation"[27].

The concept of criminal law current Romanian (Romanian Criminal Code of 2009, as amended and supplemented), guilt is seen as a process of consciousness composed of two factors: the intellectual process and a volitional process. Thus, guilt is not a mere possibility of representation or representation act and therefore it reflects the attitude subject to social values protected by law.

For there to be guilty, the person who committed the crime should be responsible for his actions meaning and values that can master them and direct responsibility of assuming the existence of two factors, the intellectual and volitional.

Lack of either nonexistent crime, the lack of guilt. For the existence of the offense, the act of consciousness and free will shall be expressed, uncorrupted and unaltered, if, however, the conscience and the offender will have been vitiated by error constraint is not guilty and therefore crime.

As an essential feature of the crime, guilt takes three main forms: intent, negligence and intent expired. In turn, the first forms are liable individually different ways: direct and indirect intent, fault with the provision and simple fault.

The intention is that form of knowledge provided in article. 16 para 3 RPC, which is when the person who commits an offense, provided the time of the offense, the result of its socially dangerous and follows its production, or, although it seeks, accepts, however, the event's occurrence.

Direct intention is characterized in that the perpetrator provides the result and its aims by committing to production. It is the most serious form of criminal conduct awareness by the perpetrator assumes the moral act. Example: person shoot a gun into the victim of a few centimeters[28], the person hitting the victim several times in the head with a blunt object, causing his death, the person who applied the victim more hits in a vital area etc..

[25] Maria Zolyneak, *op. cit*., p. 20.
[26] Ioan Oancea, *op. cit.*, p. 183.
[27] C. Bulai, B. N. Bulai, *Manual de drept penal. Partea generală*, "Universul Juridic" Publishing House, Bucharest, 2007, p. 118.
[28] C.S.J., Criminal decision, no. 505/1999.

There is the way of the intention when the perpetrator is action or inaction, the way of making the result of the leading socially dangerous act in these circumstances he desired to produce that result. The finding that the perpetrator of the offense and that he deliberately set out its dangerous outcome is evidence that he intended producing that result. Direct intention of two components as follows: provision outcome and follow-up of its production.

Provision outcome is not possible without a previous representation shift action, the whole anti-social behavior and its consequences provision. It also requires a conscious involvement in the criminal opt for deliberation and under a previous motivations for decision making and conscious shift from a criminal offense, the offender represents the entire conduct of the action or inaction and its consequences it, both from the physical, material, and as social relation, criminal. Representation and make provision therefore essential meaning of the phenomenon of intentional moral understanding and ownership of the offense.

Tracking result highlights separately subjective attitude of active engagement and persistent offender to the consequences of his act, the harmful consequences resulting there from. The perpetrator acts with intent not only when the result is producing the very purpose of his action or inaction, but also when its production is seen by him as a necessary or inevitable as a caregiver intended result. Therefore, when the result set as inevitable, and the perpetrator acts to produce it , there are direct intent , even if the consequences were not all he desired. There are crimes that, in terms of guilt, can only appear in the form of direct intent. For example, the crime of embezzlement is committed with direct intent only because the law (art. 295 RPC) shows that ownership, use or trafficking are in the interest of officer or manager or to another. The same situation encountered in theft, robbery etc.

Indirect intention (possibly willful) is characterized in that the perpetrator, though provide the result of not following him, but accepts the possibility of production. Example: hitting the victim in the stomach with his fist and feet, with deadly consequences for this[29]; instigating dogs on the victim, causing serious injuries due to biting and tearing the limbs etc.

As a form of guilt, indirect intention to commit the crime occurs that can produce at least two results. To a result of the offender 's mental position tracking of the realization that (direct intention) , this result can be both licit or illicit. Compared to the second result, the position of the offender 's psychological acceptance of the possibility of (indirect intention).

Because the second result may occur, is called indirect intention possible. Compared to this result possibly offender has an indifferent attitude, acceptance of his generation, but if the result prescribed by the offender appears inevitable intention that commits such an act is direct, although not all results are tracked deed. Provide all the facts, which are part of the offenses in question, refers to the development of the causal connection between the offense committed and the result dangerous product. For the provision of intent is sufficient causal link to exist only in general features of principle.

Direct and indirect intention Between intention there are some differences. Thus, there is an intention to direct that the offender needed to be pursued occurrence consequences of his act, which has provided. The result is either the sole aim pursued by the defendant, is an indispensable means to achieve another goal. Unlike direct intent, indirect intent that the offender need not follow the result of its occurrence, but to accept, consciously, the possibility of occurrence. Lack of desire in terms of consequences of acts committed occurrence can occur either through indifference to those consequences, or even the lack of desire as they appear, they actually occurring due to action or inaction perpetrator[30].

Specialized legal literature[31], in addition to the normative ways of intent (direct and indirect) are distinguished: general intent (simple) special intention (qualified) positive intention and intention negative original intention and ultimate intention, intention determined undetermined intent intention and the intention of threatening damage; intention spontaneous

[29] C.S.J., Criminal decision, no. 101/2002.
[30] A. Boroi, *Drept penal Partea generală*, "C.H. Beck" Publishing House, Bucharest, 2009, pp. 91-93.
[31] V. Dongoroz, *op. cit.*, pp. 194-196; G. Antoniu (coord.) and associates, *op. cit.*, 2010, pp. 153-154.

and premeditated intent (deliberate) single intention and complex intention, intention, etc. incidental primary intention. These arrangements contribute to judicial individualization of punishment, highlighting the outstanding degree of fault affecting the dangerousness of the offender.

The fault is that form of guilt under the provisions of art. 16 para. 4, RPC, which exists when the person committing an offense, provided the result of socially dangerous, but has not sought and did not accept the event of his, thinking, without reason, that it will not happen, or did not foresee the outcome, although should be able to provide.

Fault with the provision (easily, fears)[32] is the offender provision of the dangerous consequences of his action or inaction, we do not accept, believing without reason but that they will not occur.

Fault with the provision is characterized by two factors: the existence of the person of the consequences of his criminal provision and existence expectancy, groundless, not to produce or to prevent their own actions or the support of other people.

Negligent acts committed with provision meet very often in judicial practice in road traffic. For example, the act does not reduce speed driver that you pass groups of people, with the possibility of an accident, a result that does not accept and believe, wrongly, that it can not occur, but the result still occurs. In this situation, the driver has committed the offense of breach of provision.

The offender provision of the dangerous consequences of his act makes ease to resemble direct or indirect intent. If fault with provision (ease), but there is a desire to produce the track and no acceptance of the possibility of their occurrence, elements characterizing intention. For ease, providing follow-up actions or inactions offender may be only a provision of the possibility of their occurrence, as only in this case can be no hope, no reason, however, to prevent such consequences. If provision inevitability consequences occurred, there can be no hope that they will produce, we hope to prevent or avoid the situation in which it was assessed that the person acts with direct intent. What distinguishes fault with indirect intent is no provision in the first admission of dangerous consequences occurred conscious set. When the offender deliberately hopes it can prevent the consequences of his act, watch you provided, there can be no conscious admission occurrence of these consequences. Hoping to prevent the consequences provided by the perpetrator employs certain circumstances; unfounded opinion of the person must remove the possibility of their occurrence in reality.

Since the distinction between intention and negligence indirectly with the only provision in terms of subjective mental position, acceptance or rejection of the result, it requires analysis of objective issues may result in the form of guilt[33]. The criminal doctrine showed that if indirect intent, the offender has an indifferent attitude of acceptance towards the outcome that it provides, as it does nothing to prevent the outcome, remain passive and with provision for fault result set is not supported accepting attitude resulting from the perpetrator who hope to prevent, based on objective factors related to the circumstances in which the activity takes place, the properties of the instrument with which it acts and subjective factors.

Nevertheless prove insufficient misjudged as dangerous outcome occurs. Offense is committed negligently with foresight, as the perpetrator of misjudged, superficial, prevention possibilities of negative outcome.

Simple fault (without provision, error, and negligence) is the position of the person who has provided psychological dangerous consequences of his act, although in all circumstances of the case and on the basis of its ability to be able to provide for them.

In case of an offense of criminal negligence is consciously disregards rules of conduct, precautions to be taken in different situations without providing dangerous consequences of his actions. Therefore, in the event of negligence, there is no question the person's attitude

[32] C. Bulai, *op. cit.*, p. 120.
[33] A. Boroi, *op. cit.*, p. 95.

towards the consequences of his actions, the willingness to produce or accepting aware of the possibility of their occurrence, consequences that have not provided, although it was able to provide for them. For example, a pharmacist shall, inadvertently, a different medicine than shown or incorrectly prepared a harmful drug, a technician works on a construction site and not from neglect, labor protection measures was required, in which case they grieve someone's injury or death.

One who has committed a crime of negligence in this context, rejects binding rules of conduct in that case, so is not necessary to think about these rules and the consequences they can produce deeds. This disregard of the rules of conduct and the consequences of not providing needed and could be provided, as a basis for establishing criminal liability in case of negligence. Negligence, as a form of guilt, can be characterized based on two elements: a negative element, which refers to the lack of provision of dangerous consequences of acts committed by the subject of the offense and a positive, indicating the existence of conditions which enable to believe that the offender should be able to foresee harmful consequences of his action or inaction.

The report negative element, negligence differs from direct and indirect intent and guilt of provision. The report positive element, negligence differs from fortuitous because the subject must be able to foresee the consequences of his actions, which is not required in case of fortuitous case eliminating the criminal nature of the act.

To establish guilt in the form of simple fault using two criteria: an objective criterion by which user seeks to determine whether the offender should provide socially dangerous outcome and subjective criteria, which aims to determine whether the offender, who had to provide the result of his act, had in fact can provide this result, if it can provide the time of the offense[34]. Objective criterion is to verify the circumstances of the offense are committed, to see if any normal human being careful perpetrator category, provide the result of his action or inaction. If it is determined that the result was predictable, so the offender does not have to provide is not considered to be committed with guilt (simple negligence) but fortuitous. If, however, it is established that the outcome was predictable, then the offender must provide, check if the situation could have foreseen. Concrete possibility of provision of the perpetrator is judged on his personality, life experience, training, intellectual development and other elements necessary for the correct situation. If after observing this subjective criterion establishes that the perpetrator could foresee the result, then guilt is as simple negligence. If the result of observation, subjective criterion is negative, meaning that the perpetrator could not predict the outcome, guilt guilt form can not be accepted, due to inability of the offender to provide subjective.

In the theory of criminal law are known and other ways of negligence[35]: carelessness (recklessness), ignorance (imperitive), negligence, nonchalance, indifference (indifference) and so on, whose knowledge contributes to more accurate characterization of guilt and the sentence. It also is distinct from guilt in fault in agendo and omittendo, fault and fault specific generic[36].

Intention exceeded is set out in article. 16 para. 5, RPC, a mixed form of guilt arising from the union's intention to fault, characterized in that the subject of the offense requires and wants or accepts producing dangerous consequences, but the products are actually more serious, and that they provided, but reckoned without reason that it will not or has not provided, but could and should have foreseen.

What characterizes Intention exceeded is the fact that, following the occurrence of a particular outcome, the offender commits an act which constitutes the material element of an offense, but produces a more severe or further characterizing a more serious offense or an aggravated form of the same offense.

[34] A. Boroi, *op. cit.*, p. 95.
[35] V. Dongoroz, *op. cit.*, p. 201-202.
[36] A. Boroi, *op. cit.*, p. 96.

Romanian Criminal Code provides for such situations, criminalizing the offense of its own, for example, crash causing death or injury (art. 195, RPC)[37] follow facts or aggravated versions of offenses in the contents of which were complex set such situations such as rape that resulted in the death of the victim (art. 218 par., 4 RPC)[38], robbery or piracy that resulted in the death of the victim (art. 236 par. 1, RPC), etc.

In all these cases, the initial action is an intentional and the result of extensive or further beyond the perpetrator's intention, leading to a more serious offense is committed negligently. If exceeded intent, the perpetrator acts with direct intent to produce a particular result, and the result of serious misconduct occurs.

The existence of this form of guilt, fault in producing different intention worst result exceeded the indirect intention because if the offender provided as a possible result of serious yet acted more serious offense can be committed only done intentionally indirect.

In conclusion, in terms of the offender's attitude towards the result of his act, we retain the following: if the result of direct intent is clear, if indirect intent result is possibly the fault to predict the outcome is unlikely or impossible, the result is unexpectedly simple negligence, and the result is seriously outdated intention or one more.

As an essential feature of the crime, guilt can exist in any of its modalities, the subjective aspect of the content of a specified offense; it can not exist only in the manner specifically provided by law. Guilt as a constitutive element content, there will be only when the material element of the offense was committed with guilt as required by law[39]. According to art. 16 paragraph 6 RPC "The act consisting of an act or omission constitutes an offense when committed intentionally. Negligent act committed an offense only when expressly provided by law. "In other words, all the incriminating facts described rule, actions or inactions, are committed only intentionally. Criminal liability for such offenses could be drawn and if the author has acted negligently, unless it is expressly provided by law.

3. Another essential feature is the unfair nature of the crime scene, an innovation of the Romanian legislature[40], on the understanding that none of the grounds[41] supporting constitute an essential feature of crime expressed, however, by negation. The solution leaves room for interpretation, because the value of "unjustified" is not equivalent to the value of the expression "lack supporting causes." The concept of "unjustified" has several meanings than the institution "lack of evidence causes" clearly defined reality that can eliminate the existence of a crime. In her opinion[42], it was argued that these ways: self-defense, necessity[43], exercise of any right or performance of an obligation, the injured person's consent may be expressed by the concept of "illicit".

The term "illicit" is used to express facts inconsistency with the requirements of the legal system as a whole. Typical "illicit" assessment of facts expressed by a negative condition, namely, that there should not be a cause supporting. Usually "illicit" facts is typical, that is at odds with the law in her ensemble. Only exception is not typical of "illicit" when higher requirements of the legal system removes its illegal nature, giving it a legitimate

[37] T. Toader, *Drept penal român. Partea specială*, "Hamangiu" Publishing House, Bucharest, 2009, p. 74.
[38] *Idem*, pp. 124-125.
[39] Gh. Nistoreanu, A. Boroi, *Drept penal.Curs selectiv pentru licență*, "All Beck" Publishing House, Bucharest, 2002, p. 34.
[40] *Law no. 286 of 17.07.2009 Romanian Penal Code*, published in *Official Gazette of Romania*, Part. I, no. 510 of 24.07.2009, with subsequent amendments (in force since 01.02.2014).
[41] Art. 18 para 1 Romanian Penal Code "An act under the criminal law, if any of the causes provided by law supporting self-defense, necessity, exercise of any right or performance of an obligation, consent of the victim".
[42] G. Antoniu (coord.) and associates, *op. cit.*, 2010, p. 146.
[43] And public international law self-defense can occur as a cause for the removal of the unlawful nature of the fact of violation of international obligations (see, to that effect Laura Magdalena Trocan, *Sanctions in Public International Law*, Dny práva – 2009 – Days of Law: the Conference Proceedings, 1. Edition, Faculty of Law, Masaryk University, Brno, 2009http://www.law.muni.cz/sborniky/dny_prava_2009/files/prispevky/mezin_soud/Trocan_Laura_Magdalena.pdf).

purpose (permitted), operating as supporting a cause that expresses precisely these requirements.

4. The second innovation that the definition of the offense is attributable to the character of the offense, and he attributes that leaves room for interpretation. The Romanian criminal doctrine notion of "imputation" expresses the idea that an act has been attributed to objective and subjective author it belongs[44].

A person accused of a crime is to find that factor has influenced the will and conscience through it on the fact, that the guilt of his action. Therefore witnessing a repeat offense features because guilt has already been listed among them, the more so as, a connection between the material element and the immediate consequence, cause and effect, required by law for the offense there is causation that impose or to prove existing cases, and an element of the actus reus of the offense constituent content.

Conclusions

Romanian Penal Code 2009 defines new offense as "offense under the criminal law committed with guilt, unjustified and imputable to the person who committed it" features listed in order of priority has actually providing criminal law, and guilt, following two other key features, unjustified and imputable to the scene[45].

Bibliography

I. Pascu, T. Dima, C. Păun, Mirela Gorunescu, V. Dobrinoiu, M. A. Hotca, I. Chiş, M. Dobrinoiu, *Noul Cod Penal comentat, Partea generală*, vol. I, "Universul Juridic" Publishing House, Bucharest, 2012;

Elena Giorgiana Simionescu, *The intention, form of guilt in the romanian and foreign penal legislation*, in Annals of "Constantin Brancusi" University of Târgu-Jiu, Legal Sciences Series, no. 3/2012;

Mirabela Rely Odette Curelar, *Dicţionar juridic Român-Englez,* "Academica Brâncuşi" Publishing House, Târgu-Jiu, 2011;

P. Dungan, T. Medeanu, V. Paşca, *Manual de drept penal. Partea specială*, "Universul Juridic" Publishing House, Bucharest, 2011;

A. Gh. Gavrilescu, *Drepturile şi obligaţiile părinteşti*, "Universul Juridic" Publishing House, Bucharest, 2011;

G. Antoniu (coord.), C. Bulai, C. Duvac, I. Griga, Gh. Ivan, C. Mitrache, I. Molnar, V. Paşca, O. Predescu, *Explicaţii preliminare ale noului Cod penal*, vol. I, "Universul Juridic" Publishing House, Bucharest, 2010;

A. Boroi, *Drept penal Partea generală*, "C.H.Beck" Publishing House, 2009;

T. Toader, *Drept penal român. Partea specială*, " Hamangiu" Publishing House, Bucharest, 2009;

C. Bulai, B. N. Bulai, *Manual de drept penal. Partea generală*, "Universul Juridic" Publishig House, Bucharest, 2007;

P. Dungan, *Comentariu privind unele infracţiuni din Codul penal*, Worldteach Publishing House, Timişoara, 2007;

I. C. Rujan, *Drept penal. Partea specială I*, "Didactică şi Pedagogică" Publishing House, Bucharest, 2007;

V. Paşca, *Drept penal. Partea generală*, "Worldteach" Publishing House, Timişoara, 2005;

[44] V. Dongoroz, *Explicaţii teoretice*, volume I, Romanian Academy Publishing House, Bucharest, 1970, p. 104.

[45] In appreciation of facts as the crime it is considered a person presumed innocent until there is a final judgment. (See, in this regard, L. M. Trocan, *Garantarea dreptului la apărare în lumina dispoziţiilor tratatelor internaţionale specializate în materia drepturilor omului şi jurisprudenţei CEDO*, in Annals of "Constantin Brancusi" University of Târgu-Jiu, Legal Sciences Series, no. 4/2010, p.115).

G. Antoniu, *Cauze justificative în proiectul noului Cod penal*, "Revista de Drept Penal" Review, no. 2/2004;

Elena Giorgiana Simionescu, *Distincţie între vinovăţie ca trăsătură esenţială a infracţiunii şi vinovăţie ca element al conţinutului constitutiv al unei infracţiuni*, *"Drept şi societate" Review*, no. 2/2003, "Academica Brâncuşi" Publishing House, Târgu-Jiu, 2003;

F. Streteanu, *Drept penal. Partea generală*, "Rosetti" Publishing House, Bucharest, 2003;

Gh. Nistoreanu, A. Boroi, *Drept penal.Curs selectiv pentru licenţă*, "All Beck" Publishing House, Bucharest, 2002;

I. Mircea, *Vinovăţia în dreptul penal român*, "Lumina Lex" Publishing House, Bucharest, 1998;

Maria Zolyneak, *Drept penal*, vol. II, "Fundaţia Chemarea" Publishing House, Iaşi, 1993;

G. Antoniu, *Tipicitate şi antijuridicitate*, "Revista de Drept Penal" Review, no. 4/1997;

Ioana Oancea, in V. Dongoroz (and collaborators), *Explicaţii teoretice ale Codului penal roman*, volume I, "Partea generală", "Academiei" Publishing House, Bucharest, 1969;

Law no. 15 of 21.06.1968 - Codul penal al României, republished in *Monitorul Oficial al României*, Part. I, No. 65 of 16.04.1997, with subsequent amendments.

Pop, T., *Drept penal comparat. Partea generală*, volume II, Cluj, 1923.

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MULTIDISCIPLINARY VALENCES OF INTERNATIONAL TRADE LAW

L. M. Trocan

Laura-Magdalena Trocan
Faculty of Juridical Sciences,
"Constantin Brâncuşi" University of Târgu-Jiu, Târgu-Jiu, Romania
Associated scientific researcher – Romanian Academy, Institute of Juridical Researches "Andrei Rădulescu Academician"
*Correspondence: Laura Magdalena Trocan**,** Faculty of Juridical Sciences,
"Constantin Brâncuşi" University of Târgu-Jiu, 24 Victoria Street, Târgu - Jiu, Gorj, Romania
Email: laura.trocan@gmail.com

Abstract
International Trade Law is a juridical subject presenting certain particularities since the analysis of the institutions of international trade law cannot be separated from the economical, political, social, geostrategic aspects, from the ones related to the sustainable development, even to the declaration of certain spaces as the common patrimony of humanity, as it is, at the same time, a subject having a continuous and ample evolution. International trade constitutes the object of this juridical matter containing norms of intern law, by organizing and regulating the foreign trade of every state, conflict norms applicable to the juridical reports of foreign trade and norms of international public law applicable to the commercial relations between the states. In this light, international trade law is an interdisciplinary juridical subject with different regulations. This paper wants to present the multidisciplinary valences of international trade law, in report to the juridical norms constituting the content of this subject.

Keywords*: International Trade Law, international trade, trade, juridical norms, conflict norms*

Introduction

Even if international trade was present everywhere in the history, its economical, social and political importance has increased during the last centuries and industrialisation, transport, globalisation and the multinational corporations had a major impact. The importance of this activity had determined actual concerns of regulation of the international commercial relations since the first years of the economical trades, following to decide some principles regarding the way of accomplishing these trades which are at first common, belonging to some peoples, regions or cities to the multitude of codified, national legislations of nowadays which are more and more completed by treaties, conventions and bilateral and multilateral agreements.

Therefore, the economy globalisation, the multiplication and the liberalisation of the international trades, the diversification of the economical actors have led, in time, to the consecration of a real international trade law[1]*. International trade law is a juridical subject having certain particularities since the analysis of the institutions of international trade law*

[1] V. Gomez-Bassac, *Commerce international*, Editions Foucher, Paris, 2009, p. 8.

cannot be separated from the economical, political, social geostrategic aspects[2]*, the ones related to the sustainable development, even to the declaration of certain spaces as common patrimony of humanity*[3]*, as it is, at the same time, a subject having a continuous and ample evolution*[4].

Delimitation of the international trade notion

An analysis of the multidisciplinary valences of international trade law should start with the conceptual delimitation of the international trade notion. Thus, etymologically, the trade notion comes from the Latin *commercium,* which, by juxtaposing the words *cum* = with and *merx =merchandise (*meaning *with merchandise),* also offers the explication of the term expressing the idea of operations with merchandise[5]. Economically, trade is that activity whose purpose is the voluntary exchange of goods and services, whose main function consists of providing to the consumer the goods and the services they need[6]. The evolution of humanity and of the political-social structure has added new acceptations to the trade notion[7]. Therefore, the emergence of the national states has created the need to define the relations of commercial exchange between them. As a consequence of the emergence of the nation term, there is the international term coming from the association of the words *inter* and *național,* meaning between nations. This word, associated to the trading activity, defines the ensemble of the commercial exchanges accomplished by the nation states, namely every trade outside the sovereign states[8].

Stricto sensu international trade means the operations of importing and exporting merchandises and services, developed by the natural persons and the juridical entities of a state or on foreign markets. *Lato sensu* international trade means the operations mentioned above, and also the operations of international economical and technical-scientific cooperation[9].

In the conditions of multiplying and diversifying the international reports established in the sphere of international trade, it is imperative for their development to be accomplished in an organised and systematized framework. Correspondingly, the norms of international trade law offer the necessary instruments and means, providing the stability of the juridical reports[10].

Definition of International Trade Law

International trade law is the science containing the law norms regulating the institutions and the juridical reports appearing in the sphere of the relations of exchange and international economical cooperation. This science is differently named in the specialty literature, namely: Commercial International Private Law, International Commercial Law. We

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[2] V. Neagoe, I. R. Tomescu, *Geopolitică şi strategii de securitate*, National Defense University Press, Bucharest, 2005, p.175-185.

[3]The common patrimony of humanity concept specified in the Resolution of UNO General Assembly no. 2749 (XXV) from December 1970 represented the basis of the negotiations of the third UNO Conference on Sea Law and it was subsequently taken over to the spatial law, considering the declaration of the Moon and of the other celestial bodies as a common patrimony of humanity (the Agreement governing the activity of the states on the Moon and the other celestial bodies from December 5th, 1979) and consecrated regarding the submarine territories beyond the limit of the national jurisdiction in the United Nations Convention on Sea Law from 1982. (L. M. Trocan, *Regimul juridic al teritoriilor submarine*, "C.H. Beck" Press, Bucharest, 2008, p. 91).

[4]http://www.scribd.com/doc/49947611/Cours-de-droit-du-commerce-international

[5]A. Giurgiu, *Comerțul intraeuropean – O nouă perspectivă asupra comerțului exterior al României*, Economical Press, Bucharest, 2008, p. 43.

[6]Ibidem, p. 44.

[7]In the occidental literature, there is the term of *foreign trade* (M. R. O. Curelar, *Dicționar juridic englez-român*, Academica Brâncuşi Press, Târgu-Jiu, 2011, p.116) which if it initially had the acceptation of distance trade, as it was associated to the commercial exchanges of a human collectivity with another one, it currently considers the commercial exchanges of only one country or of an economical area such as the ones of free exchange or such as a custom union. (A. Giurgiu, op. cit., p. 45).

[8]A. Giurgiu, op. cit., p. 44-45.

[9]I. Macovei, *Dreptul comerțului internațional*, vol. I, "C.H. Beck" Press, Bucharest, 2006, p. 3.

[10]*Ibidem*, p. XI.

join the opinions considering that none of the names answers exactly to the juridical matter it regulates. This is why the most adequate name expressing the specific of the matter it regulates is International Trade Law[11].

Considering the particularities of this subject, the specialty literature expressed several viewpoints regarding the definition of International Trade Law. Thus, according to Professor T. R. Popescu, International Trade Law contains the norms governing the commercial relations overdrawing the intern or national framework of a state and having international adherences, with two or several national law systems[12]. M. Costin and S. Deleanu define International Trade Law as an ensemble of conflict norms, civil law norms, commercial law and norms of uniform material law and, within certain limits, norms of international public law regulating the reports of international trade and economical and technical-scientific cooperation established between the participants to the world circuit of values and knowledge[13]. Professor Ioan Macovei shows that International Trade Law contains norms applicable to the patrimonial and personal-non patrimonial relations featured by commerciality and internationality, by means of which they emerge in the sphere of international trade, between the natural persons and the juridical entities, based on the equality of rights[14].

Daniel Mihail Şandru defines International Trade Law as that law branch regulating the patrimonial reports between the subjects of international trade and having a commercial and international feature[15]. Professor D. Al. Sitaru defines International Trade Law as an interdisciplinary juridical subject, as it is constituted of the ensemble of the norms regulating the patrimonial reports, having a commercial feature, contracted between Romanian and foreign natural persons and juridical entities which are subjects of international trade law, inclusively between such persons or entities and the state – if the state acts *jure gestionis* – reports where the parties are judicially equal[16].

Professor D. Mazilu appreciates that International Trade Law represents the ensemble of juridical norms regulating the international commercial relations and the ones of economical and technical-scientific cooperation[17].

International Trade Law - an interdisciplinary juridical matter

By analysing the definitions presented above, we find the following aspect: the juridical reports established in the framework of the international trade activity constitute the object of this juridical matter containing norms of intern law, by organizing and regulating the foreign trade of every state, conflict norms applicable to the juridical reports of foreign trade and norms of international public law applicable to the commercial relations between the states. In this light, International Trade Law is an interdisciplinary juridical matter with different regulations[18]. The juridical norms mainly composing the International Trade Law are material norms of commercial law, of civil law and norms of civil processual law reunited in the framework of this juridical matter by their common object of regulation, namely the reports emerging in the framework of international trade and of international economical cooperation[19]. Therefore, the norms regulating the complex field of the international

[11]*** Lexicon Promovarea şi derularea exportului, Supplement to Economical Magazine, Bucharest, 1986, p. 238.
[12]T. R. Popescu, *Dreptul comerţului internaţional*, University of Bucharest, 1975, p. 15.
[13]M. Costin, S. Deleanu, *Dreptul comerţului internaţional – partea generală*, vol I, Lumina Lex Press, Bucharest, 1997, p. 13.
[14]I. Macovei, op. cit., p. XI.
[15]D. M. Şandru, *Dreptul comerţului internaţional*, the 3rd edition, University Press, Bucharest, 2012, p. 10.
[16]D. A. Sitaru, *Dreptul comerţului internaţional – tratat*, "Universul Juridic" Press, Bucharest, 2008, p. 86.
[17]D. Mazilu, *Dreptul comerţului internaţional – partea generală*, "Lumina Lex" Press, Bucharest, 1999, p. 73.
[18]*** Lexicon Promovarea şi derularea exportului, p. 238.
[19]D. A. Sitaru, op. cit., p. 87.

commercial contracts – the main juridical institution of International Trade Law[20] - are norms of material law, and the norms regulating the possibilities to solve the commercial litigations are norms of processual law[21]. The norms of International Trade Law are placed at the limit of the national juridical order with the international juridical order[22] considering the fact that these norms are either contained in intern law sources, or they are uniform material norms contained in international conventions. In the specialty literature, there were different opinions regarding the inclusion or not of the conflict norms in the content of international trade law[23], applicable to international trade. There are authors stating that these norms enter the content of international private law and there are authors[24] appreciating that international trade law also includes the conflict norms in matter, meaning that the application sphere of the material norms is determined by the conflict norms applicable to international trade[25], a fact determining this law to appear as a material and conflict law at the same time[26]. At the same time, next to these norms, it is appreciated that, in the content of International Trade Law, there are also other juridical norms that, by their nature, belong to other law branches, but having implications on the juridical reports making the object of this matter[27]. Thus, we find such norms:

- of Constitutional Law – establishing the principles of the economical policy of the country, also having application to the international reports, and also the principle of trade liberty, of loyal competition protection (ex. art. 135, paragraph 2, letter a of the 1991 Romanian Constitution, amended by Amending Law no. 429/2003), the ones regarding the right to property of foreign citizens and of stateless persons (art. 44, paragraph 2 and 3 in the 1991 Romanian Constitution, amended by Amending Law no. 429/2003);

- of Administrative Law – regulating the system of export-import licenses and of other measures of control and surveillance of the operations of import and export, the contraventions in the field of the commercial operations abroad;

- of Financial, Currency and Custom Law – regulating the tax on the incomes of the commercial societies with foreign participation or on the ones of the foreign societies developing commercial operations on the territory of another state different from the one whose nationality belongs to the custom taxes;

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[20]Among the juridical realities of world trade, contract is undeniably the most important, complex and relevant one for this field. International commercial contract represents the main juridical instrument of accomplishing the circulation of values and knowledge at the planetary level, as it is the institution polarising and expressing the entire specific of international trade law. (Th. Mrejeru, B. C. Mrejeru, M. G. Mrejeru, *Neexecutarea contractului de comerț internațional*, "Rosetti" Press, Bucharest, 2001, p. 9).

[21]The norms of material law or the substantial norms directly regulate the juridical report, in its substance, while the norms of civil processual law – regulate the development of the civil process – they usually interfere only when the juridical report gets to a litigious phase, generates a civil process. At the same time, the norms of material law should not be mistaken by the material norms. This last syntagm assigns both the norms of material law (of civil law, of commercial law, of family law etc.), and the ones of processual law, when they are counterposed to the conflict norms, namely to those norms solving the law conflicts emerged as a consequence of establishing certain juridical reports with extraneity elements. (I. Reghini, Ș. Diaconescu, P. Vasilescu, *Introducere în dreptul civil*, Sfera Juridică Press, Cluj-Napoca, 2008, p. 9).

[22]D. Mazilu, op. cit., p. 73.

[23]The conflict norms is a juridical norm specific to international private law, solving law conflicts, namely it assigns the competent law system to govern the juridical report with an extraneity element, a report susceptible to be governed by two or several different law systems. (D. A. Sitaru, *Drept internațional privat*, Lumina Lex Press, Bucharest, 2000, p.25). The juridical report is only susceptible to be su submitted to two or several different systems because, by the mechanism of the conflict norm, it is applied only one law system, namely the one indicated by the conflict norm. The law system determined as such is called the law of cause -*lex causae*-. (D. Lupaşcu, *Drept internațional privat*, "Universul Juridic" Press, Bucharest, 2008, p. 11).

[24]Ex. T. R. Popescu, B. Ștefănescu, O. Căpățînă, D. Mazilu etc.

[25]I. Macovei, op. cit., p. 6.

[26]D. A. Sitaru, op. cit, 2008, p. 87.

[27] Ibidem, p. 88-89.

- of International Public Law – entering the content of the interstate agreements in the commercial field and in the field of international economical cooperation, and also the application of the principles of international public law on the juridical reports which the state participates to[28];

- of Work Law – regarding the system of the foreign staff of the societies having the headquarters in another state different from the one whose citizenship belongs to the staff they have;

- of the Intellectual Property Law – regarding the contracts referring to the international transfer of technology, the international protection of the brands of factory, of trade and of services etc.

- of Criminal Law – regarding the offences[29] regarding the commercial activity of societies/legal person[30], as some laws consecrated to the commercial activity also contain criminal stipulations (for ex. Law no. 31/1990 regarding the commercial societies)[31].

Conclusions

These aspects spotlight the fact that international trade law is a complex matter interfering with multiple law branches, offering thus specificity and originality[32] to this subject, considering the fact that it is the result of the combination of many juridical norms which are usually registered to the national framework but where the presence of the extraneity element offers them a different size[33]. All of these confirm the statement according to which international trade law is a multidisciplinary juridical matter in whose content there are juridical norms belonging to several law branches but mainly to branches of civil law, commercial law, civil processual law, constituting the common law applicable any time there are no special regulations in the matter. On the other hand, considering that the norms of international trade law, as they are proclaimed for regulating a category of social relations having a special specificity, consecrate certain particular solutions derogatory from commercial and civil law, which is able to offer to international trade law a certain autonomy to other law branches and justify its study in the framework of a special juridical subject[34]. Therefore, the solutions stipulated by the norms of international trade law are configured by the commercial feature but also by the international feature of the reports it regulates[35].

Bibliography

D. M. Şandru, *Dreptul comerţului internaţional*, the 3rd edition, University Press, Bucharest, 2012;

E. G. Simionescu, Fazele infracțiunii intenționate. Aspecte teoretice şi practice, Annals "Constantin Brancuşi" University, Juridical Sciences Serie, no. 4/2012;

[28]D. Mazilu, op. cit., p. 82

[29] For details regarding the offences see E. G. Simionescu, *Fazele infracțiunii intenționate. Aspecte teoretice şi practice*, Annals "Constantin Brancuşi", Juridical Sciences Serie, no. 4/2012, pp. 71-80.

[30] E. G. Simionescu, Penalties applicable to the judicial person in Romanian Criminal Law, COFOLA 2009, The Conference Proceedings, 1-st edition, Faculty of Law, Masaryk University, Brno, 2009, pp. 98-101; E. G. Simionescu, Recidiva persoanei juridice în reglementarea noului Cod Penal, Annals "Constantin Brancuşi", Juridical Sciences Serie, no. 4/2011, pp. 85-94.
(http://www.law.muni.cz/sborniky/cofola2009/files/contributions/Elena-Giorgiana%20Simionescu%20_976_.pdf)

[31]D. A. Sitaru, op. cit., 2008, p. 88-89. Also, the Romanian Criminal Code includes offenses against patrimony of legal and natural person. (For details see I. C. Rujan, *Drept penal -partea specială*, I, Didactica and Pedagogică Press, Bucharest, 2007, p. 83-109).

[32]H. Kenfack, *Droit du commerce international*, Dalloz, Paris, 2006, p. 7.

[33]http://www.guglielmi.fr/IMG/pdf/Droit_du_commerce_internationalUQAM.pdf

[34]D. A. Sitaru, *op. cit.*, 2008, p. 89. At the same time, international trade law has its own rules and specific institutions and this makes it a distinct juridical subject. (I. Macovei, *op. cit.*, p. XI).

[35]I. Macovei, *op. cit.*, p. 19.

E. G. Simionescu, *Recidiva persoanei juridice în reglementarea noului Cod Penal*, Annals "Constantin Brancuşi", Juridical Sciences Serie, no. 4/2011;

M. R. O. Curelar, *Dicționar juridic englez-român*, Academica Brâncuşi Press, Târgu-Jiu, 2011;

V. Gomez-Bassac, *Commerce international*, Editions Foucher, Paris, 2009;

E. G. Simionescu**,** *Penalties applicable to the judicial person in Romanian Criminal Law***,** COFOLA 2009, The Conference Proceedings, 1-st edition, Faculty of Law, Masaryk University, Brno, 2009 (http://www.law.muni.cz/sborniky/cofola2009/files/contributions/Elena-Giorgiana%20Simionescu%20_976_.pdf) ;

L. M. Trocan, *Regimul juridic al teritoriilor submarine*, C.H. Beck Press, Bucharest, 2008;

A. Giurgiu, *Comerțul intraeuropean – O nouă perspectivă asupra comerțului exterior al României*, Economical Press, Bucharest, 2008;

D. Lupașcu, *Drept international privat*, "Universul Juridic" Press, Bucharest, 2008;

I. Reghini, Ş. Diaconescu, P. Vasilescu, *Introducere în dreptul civil*, "Sfera Juridică" Press, Cluj-Napoca, 2008;

D. Al. Sitaru, *Dreptul comerțului internațional – tratat*, "Universul Juridic" Press, Bucharest, 2008;

I. C. Rujan, *Drept penal -partea specială*, I, "Didactică si Pedagogică" Press, Bucharest, 2007;

H. Kenfack, *Droit du commerce international*, Dalloz, Paris, 2006;

I. Macovei, *Dreptul comerțului internațional*, vol I, C. H. Beck Press, Bucharest, 2006;

V. Neagoe, I. R. Tomescu, *Geopolitică şi strategii de securitate*, National Defense University Press, Bucharest, 2005;

Th. Mrejeru, B. C. Mrejeru, M. G. Mrejeru, *Neexecutarea contractului de comerț internațional*, Rosetti Press, Bucharest, 2001;

D. Al. Sitaru, *Drept international privat*, "Lumina Lex" Press, Bucharest, 2000;

D. Mazilu, *Dreptul comerțului internațional – partea generală*, "Lumina Lex" Press, Bucharest, 1999;

M. Costin, S. Deleanu, *Dreptul comerțului internațional – partea generală*, vol I, "Lumina Lex" Press, Bucharest, 1997;

***Lexicon Export Promotion and Development, Supplement to Economical Magazine, Bucharest, 1986;

T. R. Popescu, *Dreptul comerțului internațional*, University of Bucharest, 1975;

http://www.guglielmi.fr/IMG/pdf/Droit_du_commerce_internationalUQAM.pdf;

http://www.editurauniversitara.ro/carte/drept3/dreptul_comertului_international/1003;

http://www.scribd.com/doc/49947611/Cours-de-droit-du-commerce-international.

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CONSIDERATIONS WITH RESPECT TO THE JURISDICTION AND THE STRUCTURE OF THE COURT INVESTED WITH THE APPLICATION OF SUSPENDING THE LEGAL ENFORCEMENT IN THE NEW CODE OF CIVIL PROCEDURE

N. H. Țiț

Nicolae – Horia Țiț
Faculty of Law
"Alexandru Ioan Cuza" University, Iasi, Romania
*Correspondence: Nicolae – Horia Țiț, "Alexandru Ioan Cuza" University, 11 Boulevard Carol I, Iași, Romania
E-mail: horia.tit@horiatit.com

Abstract

The new Romanian Code of civil procedure comprises a series of new legislative solutions with respect to the jurisdiction and the structure of the court invested with the request of suspending the legal enforcement. More specifically, in the case of provisional suspension of the execution, which will take effect up to the settlement of the application of enforcement suspension made in the framework of the opposition to execution, the legal provisions no longer expressly provide that it shall be settled by the chairman of the court, but only mentions that the demand shall be settled by the court. This article analyzes the implications of the new regulations with regard to the matter of jurisdiction and the structure of the court, in respect of both former and new Code. Nevertheless, we shall analyzed the general legal rules on the jurisdiction of the court in the settlement of suspension, with reference to its competence in solving the opposition to enforcement and we shall highlight the provisions relating to the application in time of the legal provisions contained in the new Code of civil procedure.

Keywords: *suspension of enforcement, provisional suspension, suspension itself (the fund), jurisdiction, incompatibility*

Introduction

The new Romanian Code of civil procedure regulates the institution of suspension of enforcement on the basis of opposition to execution in Article 718, under the provisions dedicated to the opposition to enforcement. As in the former Code, the new legal texts state that the suspension may be ordered by court at the request of the interested person in two stages: the provisional suspension, which takes effect pending the resolution of the suspension request itself or of fund and the suspension of fund, which takes effect pending the resolution of the opposition to enforcement or of any other applications on the execution.

Article 718 Civ. proc. Code provides that the request to suspend the enforcement pending the resolution of opposition to enforcement shall be settled by the competent court, without establishing therefore a special rule for this purpose. The formula is the same as the one of the former Code, the competent court being identified on the basis of the legal characters of the suspension`s application.

Taking into consideration the classification made by Article 30 Civ. proc. Code in principal, accessories, additional and incidental applications[1], we appreciate that the request of suspension falls into the last category, i.e. applications "formulated in the framework of a trial in progress". This qualification results also from the provisions of Article 718 paragraph (1) final sentence, according to which "the suspension may be required simultaneous with the opposition to enforcement or by separate application". Therefore, it is not possible to make a main request of suspension, as it can be formulated only during a trial.

The incidental nature of the application of suspension based on the provisions of Article 718 Civ. proc. Code attracts the inadmissibility of the main application of suspension, in regard also to the legal effects that the request produces, i.e. in case of the admission. Thus, in the case of provisional suspension, this will produce effects only up to the settlement of the suspension request itself and, in the case of suspension of fund, it will take effect pending the resolution of the opposition to enforcement. Therefore, the application of provisional suspension is inadmissible as long as it has not been formulated a request to suspend the enforcement until the resolution of opposition to execution, and a request for suspension of fund is inadmissible as long as it has not been made an opposition to enforcement.

The legal qualification of the application of suspension, both in the provisional suspension, as well as in the version of suspension of fund, as an incidental request has consequences relating to the determination of the competent court to settle the application. According to Article 123 paragraph (1) Civ. proc. Code, incidental applications are under the jurisdiction of the court which solves the main application, both in terms of material, as well as territorial competence. By applying this rule, the request to suspend should be settled by the court invested with the opposition to enforcement[2]. In this respect, as a general rule, the competent court to settle the opposition to enforcement is the court of execution, in accordance with Article 713 paragraph (1) Civ. proc. Code. According to Article 650 Civ. proc. Code, "the court of execution is the court in which jurisdiction is situated the office of the executor in charge of the enforcement, in addition to the cases in which the law provides otherwise." To this rule there are some exceptions, for example, in the case of real estate enforcement, the competent court shall be the one in which jurisdiction is located the real estate, according to article 819 NCPC.

In accordance with Article 713 paragraph (2) NCPC, in case of garnishment, if the residence or the headquarters of the debtor is located in the circumscription of another court of appeal than the one in which is located the court of execution, the opposition can be introduce to the court in which jurisdiction is located the debtor. This is a particular case of territorial alternative jurisdiction, in which the applicant may choose between multiple courts equally competent, according to Article 116 NCPC. Moreover, Article 713 paragraph (2) NCPC provides an alternative territorial jurisdiction also in the case of real estate enforcement, of legal fruits and general revenue of real estate, as well as in the case of forced submission of immovable property, if the real estate is located in the circumscription of another court of appeal than that where the court of execution is situated, the opposition can be introduced at the court of the place of real estate[3]. We consider that this rule can be applied only to direct enforcement of real estate, as well as in the case of enforcement of legal fruits and general revenue of real estate, because regarding the enforcement of real estate, the court of execution is, by way of derogation from the general rule, the court in which jurisdiction are the immovable assets, therefore an alternative territorial jurisdiction cannot operate.

The opposition on clarifying the meaning, the extent or application of executory titles is introduced at the court which has pronounced the decision that is being enforced, in

[1] For details, also see Mihaela Tăbârcă, *Drept procesual civil, Vol. I – Teoria generală*, Universul Juridic Publishing House, Bucharest, 2013, p. 253 ff.
[2] Evelina Oprina, Ioan Gârbuleț, *Tratat teoretic și practic de executare silită, Volumul I. Teoria generală și procedurile execuționale*, Universul Juridic Publishing House, Bucharest, 2013, p. 492.
[3] Andreea Tabacu, *Drept procesual civil*, Universul Juridic Publishing House, Bucharest, 2013, p. 463

accordance with Article 712 paragraph (3) NCPC. If such a dispute affects an executory title what does not originates from a jurisdictional body, the court of execution is competent to settle on this particular dispute, as well. Therefore, the request to suspend the enforcement up to the settlement of the opposition to a title is under the jurisdiction of the court which has delivered the judgment, whenever the title is a decision of a court, or the court of execution, in the event that the title emanates from another body.

An element of novelty is represented by the regulations applicable to the provisional suspension of enforcement. According to the former Code of civil procedure, the legal text (Article 403 paragraph (4) provided that an application of provisional suspension of the execution shall be settled by "the president of the court". In comparison, Article 718 paragraph (7) of the new Code states that "... the court may order [...] the provisional suspension of the execution pending the resolution of the application of suspension.

Therefore, the existing text no longer gives the president of the court operational competence for settling on the application of provisional suspension, which is conferred to "the court", within the meaning of judge/body of judges invested with the resolution of the opposition to enforcement and of the application of suspension brought under Article 718 paragraph (1) Civ. proc. Code. We appreciate that the difference is not coincidental, the aim pursued by the legislator being to confer operational jurisdiction in resolving the application of provisional suspension to the judge/body of judges invested with the opposition to enforcement and the request to suspend the execution itself[4]. This body becomes fully competent to settle the opposition, as well as the request to suspend the execution, regardless of its structure. In the first phase, even if the procedure of regularization has not been issued, in regard to the opposition to execution, the court decides on the application of provisional suspension without giving the parties notice to attend and, after the parties were given notice to attend and even if the procedure of regularization has not been completed, the court is called upon to decide on the request to suspend the enforcement pending the resolution of the opposition to enforcement. The closure on the provisional suspension given on the basis of Article 718 paragraph (7) Civ. proc. Code is not subject to any appeal, while the closure by which the same court settled on the suspension of enforcement until the decision on the opposition to enforcement is, according to Article 718 paragraph (6) Civ. proc. Code, subject to appeal separately, the time limit for appeal being 5 days from pronunciation for those present in court and from the communication for those who were absent[5].

The interpretation given to Article 718 paragraph (7) Civ. proc. Code regarding the functional competence of the court invested with the application of provisional suspension of the execution could be challenged on the basis of Article 99 paragraph (10) of the Regulation on Internal Organization of the Courts of Justice, approved by Decision of the Superior Council of the Magistracy No 387/2005, with subsequent amendments and additions. According to the latter, "the provisional suspension of enforcement in accordance with the conditions provided by the Civil Procedure Code will be settled after the model of specialized judge/body of judges in which composition is the chairman of the court or, as the case may be, the president of the department or their substitutes". Taking into consideration the difference of formulation regarding Article 403 paragraph (4) of the former Code of civil procedure (in force at the time of drawing up Article 99 paragraph (10) of the Regulation on Internal Organization of the Courts of Justice) and Article 718 paragraph (7) of the new Code of civil procedure, we consider along with other authors[6] that the legal text should have priority and not the text of the Regulation, any discrepancies between the two leading to the

[4] Evelina Oprina, Ioan Gârbuleț, *op. cit.*, p. 493 – 494.

[5] Dumitru Marcel Gavriș,, *Contestația la executare*, in Gabriel Boroi (coord.), *Noul Cod de procedură civilă, comentariu pe articole*, Vol. II, Hamangiu Publishing House, Bucharest, 2013, p. 718.

[6] Gabriela Cristina Frențiu, Denisa – Livia Băldean, *Noul Cod de procedură civilă, comentat şi adnotat*, Hamangiu Publishing House, Bucharest, 2013, p. 1076; Evelina Oprina, Ioan Gârbuleț, *op. cit*., p. 493.

need for amending the latter in order to be in accordance with the applicable legal provisions. The question may be one of great relevance even for the application in time of the rules of procedure: in the event that the procedure applicable to the opposition to enforcement and, by default, to the suspension request is that covered by the former Code of civil procedure, the application for provisional suspension formulated under Article 403 paragraph (4) shall be settled by the chairman of the court, the president of the department, or, as the case may be, their substitutes. If the provisions of the new Code of civil procedure are applied, the application for provisional suspension of forced execution based upon Article 718 paragraph (7) will be resolved by the court entrusted with the settlement of the opposition to enforcement and of the request for suspension on the basis of paragraph (1) of Article 718.

The provisions contained in the new Code of civil procedure relating to the opposition to enforcement, including those relating to the suspension of enforcement, are applicable only in the event that such opposition and, by default, the request to suspend affects an enforcement started after the date of its entry into force. In this respect, Article 3 paragraph (1) of Law No 76/2012 for the implementation of the Law No 134/2010 relating to the Code of civil procedure provides that its provisions shall apply only to the enforcements started after the date of its entry into force. But the opposition to enforcement, including the procedure to suspend the enforcement, must be regarded as a part of the executional procedure, not as a distinct trial started by the introduction of that particular application. Therefore, the time of reference for determining the applicable law is not the date of the introduction of the opposition to execution or of the application to suspend the enforcement, but the date of the notice addressed to the body of enforcement. This is, as a general rule, the date when the application has been formulated by the creditor and addressed to the executor. Even if the opposition and the request to suspend are introduced to the court after the date of entry into force of the new Code of civil procedure, if they concern an enforcement in progress prior to the entry into force of it or an enforcement that has been started by a claim recorded by the executor prior to the entry into force of the new Code of civil procedure, such applications are subject to, in respect of all proceedings, the regulations of the former Code of civil procedure[7].

In conclusion, if the provisional suspension of an enforcement that has started prior to the date of entry into force of the new Code of civil procedure, the application for provisional suspension will be settle by the chairman of the court, the president of the department or a replacement, in accordance with Article 403 paragraph (4) of the former Code of civil procedure and Article 99 paragraph (10) of the Regulation on Internal Organization of the Courts of Justice and, in the case the suspension regards an enforcement started after the date of entry into force of the new Code of civil procedure, the application for provisional suspension will be settle by the same body of judges who will solve the request of suspension itself and the opposition to enforcement.

Taking into consideration that the operational competence to resolve the request of provisional suspension of the enforcement, based upon the provisions of Article 718 paragraph (7) Civ. proc. Code, is that of the body of judges who was entrusted with the subsequent settlement of the application of the suspension itself and of the opposition to execution, this raises the question of the judge`s compatibility to decide, subsequently, with respect to suspension, i.e. opposition. We consider, along with other authors[8], that the judge who has settled the application of provisional suspension does not become incompatible to resolve the suspension request, in the same matter in which the judge who decides on the request to suspend the enforcement pending the resolution of the opposition does not become

[7]In this matter, see also Gheorghe Liviu Zidaru, Traian Briciu, *Observații privind unele dispoziții de drept tranzitoriu și de punere in aplicare a NCPC*, available on http://www.juridice.ro/244313/observatii-privind-unele-dispozitii-de-drept-tranzitoriu-si-de-punere-in-aplicare-a-ncpc.html.

[8] Evelina Oprina, Ioan Gârbuleț, *op. cit*., p. 494.

incompatible to settle on it afterwards. The solution is logical and corresponds to the aim of the legislator when it has regulated the reasons of incompatibility provided by Articles 41 to 42 Civ. proc. Code. Thus, the settlement of a procedural incident with prejudicial character, such as the suspension, does not attract the incompatibility of the judge, since he does not give a decision on the substance of the matter, in respect of the grounds on which the opposition to execution is based, whatever the reasons, but only with regard to the specific legal requirements relating to suspension (the payment of the security, the urgency etc.)

A particular situation might be encountered in practice in regard to the situations of mandatory suspension regulated by Article 718 paragraph (4) C. proc. Civ.[9] Therefore, if, for example, at point 1 is mentioned the situation in which "the judgment or the title that is being enforced is not, according to the law, enforceable", such a reason may be invoked by the contestator who requires the cancellation of the enforcement itself. But, under the conditions in which the judge has to decide whether or not a title is enforceable under the law, in order to give a solution with respect to the application of suspension, he can no longer settle once again the same reason when he is invested with the settlement of the opposition to enforcement, in this case becoming incident Article 42 paragraphs (1) point (13) Civ. proc. Code. Therefore, the possible decision on the suspension of the enforcement based on Article 718 paragraph (4) point (1) Civ. proc. Code attracts the incompatibility of the judge for the settlement of the opposition to execution, if it is based on the grounds relating to the enforceability of title, incompatibility that can be invoked by the interested party by means of a request for challenge, in accordance with Article 44 and 47 Civ. proc. Code, respectively of the judge who formulating a statement of abstention, in accordance with Article 43 or 48 Civ. proc. Code.

In the event the judge that has been part of the body of judges invested with the provisional suspensions of enforcement based on the provisions of Article 718 paragraph (7) Civ. proc. Code is subsequently promoted, he is incompatible to resolve the appeal declared against the dismissal by which was settled the application of suspension of enforcement based on Article 718 paragraph (1) Civ. proc. Code, as well as for the settlement of the appeal filed against the decision regarding the opposition to enforcement. This is because, according to Article 41 paragraph (1) Civ. proc. Code, the judge becomes incompatible not only when he settles the dispute, but also when he has pronounced an interlocutory closure. In regard to the definition given by Article 235, second sentence, on interlocutory closures ("interlocutory closures are those by which, without settling integrally on the dispute, are being resolved procedural exceptions, incidents or other procedural aspects"), obviously, the closure of resolving the application of suspension of the enforcement, as well as in the case of provisional suspension and in the case of the suspension itself, falls within the category of interlocutory closures, as it is an litigious incident claim. As a result, relative to the definition of the new Code of civil procedure given to incompatibility of public order, and the extension, in relation with the former regulations, to the situation of the judge who has pronounced an interlocutory closure, the judge who decided on the suspension itself, based on either paragraph (1) or (7) of article 718 Civ. proc. Code is incompatible to settle on the appeal against the decision on the suspension itself, in accordance with Article 718 paragraph (6) Civ. proc. Code or on the appeal against the decision by which was resolved the opposition to enforcement, in accordance with Article 717 Civ. proc. Code.

[9] Some authors have considered that in the cases provided for in Article 718 paragraph (4) Civ. proc. Code "We are facing a true suspension *ope legis*, that court constated rather than decide upon" (Ion Deleanu, Valentin Mitea, Sergiu Deleanu, *Noul Cod de procedură civilă, Comentarii pe articole*, Vol. II, Universul Juridic Publishing House, Bucharest, 2013, p. 136). We do not fully agree with this qualification because framing in this situation implies an analysis made by the court in order to identify the features of the title that is been enforced according to Article 632 - 640 Civ. proc. Code (See, in this respect, Dumitru Marcel Gavriș, *op. cit.*, p. 211).

Conclusions

In conclusion, the new Code of civil procedure transfers the plenitude of jurisdiction on all procedural incidents relating the suspension of enforcement to the body of judges invested with the settlement of the opposition to enforcement. In this respect, it is necessary to amend Article 99 (10) of Regulation on Internal Organization of the Courts of Justice, so that it would be in accordance with the current form of Article 718 paragraph (7) Civ. proc. Code. Nevertheless, at least as a general rule, the judge who has settle in a first stage the application of provisional suspension without giving the parties notice to attend, and then, under mandatory summoning of the parties, decides on the application to suspend the enforcement pending the resolution of the opposition to enforcement, is not incompatible. Nevertheless, in practice, the new regulations are likely to give an opportunity of formulating requests for objecting, particularly in those situations when the analysis of the suspension implies settling on aspects that may constitute also a ground for the opposition to enforcement, as is the case provided by Article 718 paragraph (4) point (1) Civ. proc. Code. *De lege ferenda,* a legislative solution partially different, for the purpose of regulating expressly a functional jurisdiction of another body of judges within one and the same court for settling applications of provisional suspension, in order to avoid incidents relating to structure of the court, could, therefore, be found.

Bibliography

Mihaela Tăbârcă, *Drept procesual civil, Vol. I – Teoria generală*, "Universul Juridic" Publishing House, Bucharest, 2013;

Evelina Oprina, Ioan Gârbuleț, *Tratat teoretic şi practic de executare silită, Volumul I. Teoria generală şi procedurile execuționale*, "Universul Juridic" Publishing House, Bucharest, 2013;

Andreea Tabacu, *Drept procesual civil*, "Universul Juridic" Publishing House, Bucharest, 2013;

D. M. Gavriş, *Contestația la executare*, în Gabriel Boroi (coord.), *Noul Cod de procedură civilă, comentariu pe articole*, Vol. II, "Hamangiu" Publishing House, Bucharest, 2013;

Gabriela Cristina Frențiu, Denisa – Livia Băldean, *Noul Cod de procedură civilă, comentat şi adnotat*, "Hamangiu" Publishing House, Bucharest, 2013;

I. Deleanu, V. Mitea, S. Deleanu, *Noul Cod de procedură civilă, Comentarii pe articole*, Vol. II, "Universul Juridic" Publishing House, Bucharest, 2013.