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ANTI-AVOIDANCE LEGISLATIONS: ISSUES & DOUBTS IN THE APPLICATION OF TAX RULES IN NIGERIA

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Abstract

For close to what seems a millennium, tax avoidance activities have plagued global tax jurisprudence especially in Nigeria where legislative and judicial solutions to it have remained illusory. This paper represents an attempt to analyse issues and doubts that trail the application of anti-avoidance provisions in Nigeria.

Keywords: tax avoidance, anti-avoidance provisions, fictitious transactions, characterization of facts, preplanned events, substance over form

1 Introduction

It is fit and proper in the course of the millennium to take stock of an issue that has plagued tax jurisprudence since 1936 and Nigerian tax law since 1961 when the Income Tax Management Act was promulgated[3]. The purpose of this work therefore is to attempt a comparative analysis of anti-avoidance legislations and its application in the light of the present nature of tax law in Nigeria.[4]

2 Anti-Avoidance Legislations

Anti-avoidance legislations are statutory provisions which seek to prevent an escape from liability to tax payer using artificial or fictitious transactions to dodge tax. The escape of liability usually involves no criminality.[5]

Anti-avoidance legislations are fairly common in most countries and the following are examples of countries where they are applicable.[6]

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[3] See section 14 of the 1961 (ITMA)

[4] *See generally Abdulrazaq M.T. (1991) Legislation Against Tax Avoidance: The Nigeria Experience Justice: Journal of Contemporary Legal Problems Vol.2 No.9 pp.33-46 (Federal Ministry of Justice).*

[5] *Abdulrazaq M.T. (1992) The Legal Nature of Tax Evasion and Avoidance, Nigerian Financial Review Vol.4. No.3 pp.65-74 (Infodata Publication).*

[6] *See Tax Law in the Melting Pot (1985) Appendix 1 (The law Society of England and Wales).*

2.1 *Australia*

(a) Fiscal Background

Australia is a federation comprising six states and two federal territories, plus, external territories. Tax is imposed at both state and federal level.

Domestic federal taxation is imposed on income; the government has introduced an indexed capital gains tax in respect of capital gains on assets acquired after 19 September 1985, at normal personal and corporate income tax rates (death will not constitute a deemed disposal); there is no wealth tax or tax on estates, inheritances or gifts. There is no stamp duty at the federal level on transfers of property; customs duty and sales tax are charged at federal level.

(b) Anti-Avoidance Legislation

A general anti-avoidance provision has been comprised in the income tax legislation since the last century. Its scope has largely been determined by judicial interpretation; and judicial attitudes, as exemplified by judicial interpretation have varied over the years. However, the existence of such a provision has meant that it has not been necessary for the judiciary to incorporate into Australian tax law without statutory justification the equivalent of a general, anti-avoidance provision, by the adoption of any general doctrine such as *bona fide* business purpose test, abuse of rights, substance versus form or similar. No such general concept has as such been imposed by the courts and the anti-avoidance provisions contained in statute are not drafted is such terms nor, until recently, have the tax authorities sought to have such a general concept imposed. In the last few authorities sought to have such a general concept imposed. In the last few years, however, inspired by *Ramsay* and other UK cases, the Commissioner has argued f\or similar principles to be applied in Australia, so far without success. Nevertheless the interpretation over the years of the general anti-avoidance provisions has resulted in an approach not dissimilar to a "Business purpose" test being hitherto adopted in many cases in determining whether such provisions were applicable.

2.2 Canada

(a) Fiscal Background

Canada is a federation comprising provinces. Tax is imposed at both provincial and federal taxation level. The dominant tax in Canada is income tax. Capital gains tax (which is levied on emigration, gifts and death as well as on sales) is in effect levied as income tax by the inclusion of half the gain in the taxpayer's income, other half being exempt. Corporations are taxed to income tax and not to a separate corporation tax. Tax levied on non-residents of Canada in respect of Canadian income is notionally a separate tax but it is based on income tax principles. There is no wealth tax, and the estate duty and gifts tax have been abolished.

Other than Quebec, the provinces have legal systems largely based on that of the UK. Many of the concepts of UK law have been transposed into Canadian law. Quebec, with its French origins, has a civil law system including the concept of abuse of rights. Canadian revenue law has however been dominated by federal legislation and nothing has shown that the law of Quebec has been of any significant contribution to Canadian jurisprudence in strictly fiscal matters.

(b) Anti-Avoidance Legislation

Canadian law has a general provision nullifying artificial transactions, there being no statutory definition of "artificial". Section 245 (1) of the Income Tax Act, set out below is however, by no means universally invoked by Revenue Canada:

> In computing income for the purpose of this Act, no deduction may be made in respect of a disbursement or expense made or incurred in respect of a transaction or operation that, if allowed, would unduly or artificially reduce the income.

2.3 New Zealand

(a) Fiscal Background

New Zealand is a non-federal country and therefore domestic taxation (properly so-called) is imposed on a national basis only. Domestic taxation is imposed on income, but not on capital gains, although various provisions in the tax legislation effectively imposed income tax on what could be regarded as capital gains. There is no wealth tax, but there is a tax on estates, inheritances and gifts. There is also stamp duty calculated by references to the value of property transferred.

(b) Anti-Avoidance Legislation

There is a general anti-avoidance provision in the New Zealand Income Tax Legislation; currently section 99 Income Tax 1976. A similar provision dates back to the early part of the last century. In addition, there are what may be called specific anti-avoidance provisions in the legislations: For example, the provision permitting relief corresponding to UK group relief contain provisions intended to prevent tax avoidance schemes designed to enable that relief to be claimed.

Section 99 Income Tax Act 1976 was first enacted in its present form in 1974, replacing the former section 108 of the Land & Income Tax Act 1954. It provides (section 99 (2)) that:

> Every arrangement made or entered into… shall be absolutely void as against the Commissioner for income tax purposes if and to the extent that, directly or indirectly:
>
> a. its purpose or effect is tax avoidance a defined term in section 99 (1); or
>
> b. where it has two or more purposes or effects, one of its purposes (not being a merely incidental purpose or effect) is tax avoidance, whether or not any other or others of its purposes or effect relate to or are referable to ordinary business or family dealings…

It also provides that the assessable income of any person affected by an arrangement avoided under Section 99(2) shall be adjusted "in such manner as the Commissioner considers appropriate so as to counteract any tax advantage obtained by that person from or under that arrangement….." (Section 99 (3)).

The replaced section 108 provided more simply that a contract, agreement or arrangement was void as against the commissioner "so far as, directly or indirectly, it has or purports to have the purpose or effect of in any way altering the incidence of income tax or relieving any person from his liability to pay income tax"

2.4 United States

(a) Fiscal Background

The United States is a federation comprising fifty states and the federal District of Colombia plus external possessions. Tax is imposed at both state and federal level, and also by some municipalities.

Domestic federal taxation is imposed on income and capital gains, on estates and generation skipping transfers, and no gifts. There is no wealth tax. There are federal excise taxes on sales of certain commodities. At federal level there are no stamp duties.

(b) Anti-Avoidance Legislation

There are numerous anti-avoidance provisions in the Tax Code. For example, the Secretary of the Treasury or his delegate may (i) under section 482 of the Code reallocate income and deductions among related parties in order to prevent evasion or clearly to reflect the income of the parties and (ii) under section 845 (b) may make proper adjustment", in calculating the income of an insurance, company, for any reinsurance contract having "a significant tax avoidance effect". Extensive regulations have been issued under section 482, which provide safe-harbours and other forms of protection against the exercise of unfettered

discretion. The Congressional Joint Committee on Taxation has described factors that should be taken into account in making the determination whether a significant tax avoidance effect exists, and those factors are incorporated regulations.

3 Applying the Anti-Avoidance Legislation

The traditional analysis of the legal function, and especially the judicial function, is in three parts –finding the facts, interpreting the law and applying the law as determined to the facts as discovered. In the Nigerian tax appeal system the first layer are the Appeal Commissioners, who do all three things , and the courts to which appeals lie, which can intervene only where threw is error of law and which therefore have no role in the determination of the facts. Of these three parts the third is perhaps the most interesting and certainly the least consciously analysed. What the courts are doing is determining the tax characterization of the facts with which they have been presented[7].

A major issue in the characterization of the facts is the extent to which the courts can take account of tax avoidance purposes. Related to this is the primary question of authority, that is the legal justification, for may particular anti-avoidance approach. Tax avoidance, which is lawful, must be distinguished from tax evasion, which is illegal. If a person marries in order to reduce his tax burden he is practicing tax avoidance; if he tells the tax authorities that he is married when he is not, he guilty of tax evasion, and may well be prosecuted. There is also an important distinction between a scheme under which no liability to tax arises – tax avoidance- and one under which a charge arises but the tax cannot be collected[8].

The distinction between avoidance and evasion in Nigerian was first raised in the case of *Akinsete Syindicate v. Senior Inspector of Taxes.*[9] The case contains no analysis of the true tax effect of the transactions complained of: No evidence seems to have been put before the court as to this important distinction between avoidance and evasion or the doctrine of the sham transaction. Instead matters seem to have been dealt with on a very broad basis. This thoroughly unsatisfactory state of affairs is to be regretted. [10]

Tax avoidance has now been distinguished from tax mitigation but primarily for the purpose of interpreting a general anti-avoidance provision in New Zealand law,[11] the distinction is that a tax avoidance plan does not affect the financial position of the taxpayer other than for the cost of the plan and the taxpayer is seeking to obtain a tax advantage without suffering the expense which Parliament intended should be suffered to quality for the advantage. Tax mitigation occurs when the expense is suffered.

The Nigerian tax system has a general anti-avoidance provision.[12] And the legal basis for the judges' attitude towards avoidance schemes has to be found in interpreting the statutes and when applying the law to the facts.

The present position is that it is the duty of the courts to apply the legislation to the facts as determined.[13] The court has power to strike down a transaction because it is motivated by tax avoidance although the question is always what is the true effect in law of the real transaction?[14]

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[7] *Tiley and Collision 1997-1998 U.K. Tay Guide (Butterworths). Pp. 13-31.*

[8] *See Roome v. Edwards [1979] BTC 546 at 661-565, [1979] BTR 261.1 Nigerian Tax Cases (NTC) 109*

[9] *See Variables, The Offshare Taxation Review 1997, p.1*

[10] Per *Lord Templeman in IRC, Challenge Corpn Ltd. [1986] STC 658 at 555. The New Zealand Provision was Income Tax Act 1976, 99 renders void for tax purposes arrangementsentered into for purpose of tax avoidance.*

[11] *See Section 21 GGTA; Section 18 CITA Section 17 PITD; Section 13 PPTA.*

[12] *The task is one statutory construction of more accurately, statutory application, e.g.Nourse IJ in Fitzwilliam v. IRC [1992] STC 185 at 198) CA*

[13] E.g. Lord Templeman in Ensing Tankers (Leasing) Ltd v. Stokes (1992) STC at 229a, HI.

[14] *Fitzwillam v. IRC [1993]STC 502, HL*

In seeking the true legal effect the courts may treat a series of transactions as being one single transaction but only where it is possible realistically and intellectually to do so.[15] The conditions for this power were laid down by Lord Oliver in the English case of *Craven v. White:*[16]

(1) that the series of transactions was, at the time when the intermediate transaction was entered into, preordained in order to produce a given result;
(2) that transaction had no other purpose than tax mitigation;
(3) that there was at that time no practical likelihood that the preplanned events would not take place in the order ordained, so that the intermediate transaction was not even contemplated practically as having an independent life; and
(4) that the preordained events did in fact take place. In these circumstances the court can be justified in linking the beginning with the end so as to make a single composite whole to which the fiscal results of the single composite whole are to be applied.

It could be said that the basic approach of the Nigerian tax system is still that laid down by Lord Tomlin in IRC v. Duke of Westminster[17] that:

> Every man is entitled if he can to arrange his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure that result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.

It followed that a transaction which on its true construction was of a kind that would escape tax was not taxable on the ground that the same result could have been brought about by a transaction in another form which would have attracted tax.

3.1 The Duke of Westminster Case

In *IRC v. Westminster* the Duke covenanted to pay an employee a sum of £ 1:90 per week; the covenant was to last seven years whether or not he remained in the Duke's service. "The employee had a wage of £3 a week and he was told that while he would be legally entitled to the full £3 it was expected that in practice he would take only the balance of £1.10. The purpose of the scheme was to enable the Duke to deduct the payment in computing his total income for surtax.[18] The scheme succeeded; the true construction of the document showed that these sums were income of the employee not under PAYE as an employee but as an annuitant, a charitable disposition.

In reaching this conclusion the courts were entitled to look at all the circumstances of this case, including the fact that the taxpayer had received a letter containing the expectations of the Duke already referred to. However, the court was also entitled to look at the fact that the legal right to payment would continue even though the employment ceased.

The majority of the court was not entitled to conclude that because this was a way in which money passed from employer to employee therefore it must be employment income if it was, in law, income under a charity. Lord Atkin, dissenting, thought this amounted to a contractual term and not just an expectation.[19]

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15 [1988] STC 476 at 507.
16 [1936] AC 1, 19 TC 490
17 *Sec payments are not now effective.*
18 Sec Ensign Tankers (Leasing) Ltd v. Stokes [1992] STC 226 at 235, HL
19 LT (1996) STC 285

The doctrine emerging from the *Westminster* case is that taxpayers and the tax authorities are bound by the legal results, which the parties have achieved even though this may be inconvenient for the tax authorities. This doctrine is still the formal position of tax law; the real question is what those legal results are. The court cannot disregard those facts just because of the tax avoidance purpose, which may have led the parties to create those facts in the first place. Sometimes those legal facts may be decisive of the fiscal consequences, as in the cases on the boundary between the contract of service and contract for services. Sometimes, as in *Westminster*, these legal facts while not in them self conclusive may point decisively in the direction of one particular tax consequence or characterization. Hence in *Westminster* the fact that, if the gardener had been dismissed or had left the Duke's employment he would still have been entitled to the sums under the covenant for the balance of the seven years period, swayed the majority to their conclusion. A more recent example is *Reed v. Young*[20] in which the House Lords held that as the parties had created a limited partnership the courts were bound to give effect to a tax saving scheme based upon that legal structure.

The *Westminster* doctrine was sometimes expressed in the form that the court must look to the form of the transaction and not its substance. This formulation is, however misleading in that it tends to suggest that the form of a transaction, a matter which may be within the control of the taxpayer, will be conclusive for tax purposes. Often, however, the legal form used by the parties is not conclusive and here it is accepted that the court must look at the substance of the matter in order to determine the true tax consequence of the transaction in the legal form adopted by the parties.

Thus by looking at the substance it could conclude that this form attracted tax just as much as another. In these instances the court was not putting upon the transaction a legal character which it did not posses but was trying to discover the true character in tax law of the transaction entered into.[21]

So the court might hold that a that trade is carried on by a partnership even though the only document states that there was none,[22] that a trader is still trading even though he says he is not,[23] or that the person claiming to trade is simply the means by which he trade is carried on by someone else.[24]

In such contexts the documents cannot be used to deny proven facts. Where, however, both the facts and the legal arrangements point in the same direction, the court might not disregard them.[25]

It follows that the name given to a transaction by the parties concerned did not necessarily decide the nature of the transaction.[26] So a description of a series of payments as an annuity or a rent charge does not determine their character.[27]

The *Westminster* doctrine was highly regarded by the United Kingdom Inland Revenue, not least because it was applied in their favour when the taxpayer has carried out a transaction in manner less than wholly tax-efficient.[28] However, the doctrine was always subject to limitations. First the court might conclude that the transaction was a sham, that the acts done were intended to give the appearance of creating legal rights different from those which were actually created. Such schemes still fail for the simple reason that the tax falls to be levied on

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20 Goerge MR in IRC v.

21 Fenson v. Johnstone (1940) 23 TC 29

22 I and R O' Kane & Co. Ltd. v. IRC (1922) 12 TC 303

23 Firestone Tyre and Rubber Co. Ltd. v. Lewlin [1957] 1 AII ER 561, 37 TC 111

24 Ransom v. Higgs (1974) 3 AII ER 949, 1197 STC 539,

25 Secretary of State in Counsil of India v. Scoble (1903) AC 299, 4 TC 618.

26 IRC v. Land Securities Investment Trust (1969) 2 AH ER 430, 45 TC 495.

27 E.g. IRC v. Fleming & Co. (Machiners) Ltd (1951) 33 TC 57 at 62.

28 (1984) STC 153, [1984] 1 AII ER 50

the basis of the actual legal rights created. This argument although frequently advanced by there venue did not meet with great success.

However, the new approach based on the decision of the House of Lords *in Furniss v. Dawson*[29] **e**ncouraged the courts to give the Revenue occasional glimpses of success. So in *Sherdley v. Sherdley,*[30] Sir John Donaldson MR thought that an order to pay school fees to a school on behalf of a child and made at the suit of the parent against whom the order would have been made would be a sham.

This use of the sham argument is highly questionable and probably erroneous. The decision was later reversed by the House of Lords, but withour discussion of this point.[31] Since then the orthodox narrow definition of a sham transaction has prevailed.[32]

Second, Parliament has created exceptions; it has passed a number of measures enabling the Revenue to tax transactions, which are widely defined unless the taxpayer can show that there was no tax avoidance motive.

Third it is probably right to distinguish the *Westminster* doctrine just outlined from a *Westminster* approach which tended to look not too unfavourably on attempts to avoid tax. This approach has wavered in recent years as the courts have been presented with highly artificial schemes such as that in *Ramsay* and only slightly less artificial ones such as *Furniss v. Dawson*. The courts have, however, been willing to uphold even highly artificial schemes as can be seen in *Fitzwilliam v. IRC.*

Finally, although the courts have long recognized that tax avoidance is lawful, it is not yet a virtue and so in *Re Weston's Settlement* [33] the English Court of Appeal declined to approve a variation of trust where the only advantages accruing to the beneficiaries on whose behalf they were being asked to approve the variation were financial, stemming almost exclusively from the saving of tax. Similarly in *Sherdley v. Sherdley* the Court of Appeal declined to make an order for financial provision of a child when the only reason for that order would have been the tax saving; this was reversed by the House of Lords but is an indication of a general attitude.[34]

4 The Nigerian Position

The basic approach of the Nigerian tax system which follows the principle laid down in the Duke of Westminster case was stated by Bairamian JSC in the case of *Akinsete Syndicate v. Senior Inspector of Taxes*[35] that:

> It is trite that a person may use lawful means to avoid tax; what he may not do is to try to evade it. What he does should be genuine… not merely a verluo hide or dissemble the reality of things.

In the case, an agreement was signed between one Chief G.M. Akinsete**,** the licensee of certain timber extraction rights and another company, Coast timber Company Limited, for the extraction, management and sale of the timber of the land over which the licensee had concession. The agreement permitted the sharing of profits between the two parties and it was signed in June, 1953.

Another supplemental agreement was signed between the licensee **(**Chief Akinsete**),** the company and a joint licensee made up of four individuals in January, 1959. The supplemental agreement which created a partnership between the licensee and the joint licensee and merged the interest of the licensee and the joint licensee into one, provided that the interests and

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29 (1986) STC 266 at 273. Balcombe, LJ disagreed (at 278) and Neill, LJ made no comment.
30 (1987) STC 217.
31 See e.g Lord Goff in Ensign Tankers (leasing) Ltd. V. Stokes (1992) STC 226 at 245h, HL.
32 (1969) 1 Ch 223, (1968) 1 All ER 720.
33 1987 STC 217.
34 1 NTC 110.
35 (1976) NTC 109.

benefit of the licensee under the first agreement "now belongs" to the joint licensee called "G.M. Akinsete Syndicate"**.**

The respondent assessed Chief Akinsete to tax for the income accruing to him out of the timber business for the accounts of the year ended 1958. The appellant contended that because of the words "now belongs" in the second agreement, the income and other benefits accruing to Chief Akinsete had reverted to the joint partnership since the date of the first agreement in 1953 and that for that reason Chief Akinsete could not be taxed on the income of the timber business accruing in 1958.

It was also argued by the appellant that the partnership had existed as a matter of fact since the signing of the first agreement although the partnership agreement itself was signed only in 1959. The respondent contended that there was no partnership in fact and in law by the year 1958, on which the assessment was based, and that if there was any, the transaction was artificial and fictitious and should be disregarded in accordance with section 15 of the Income Tax Law of Western Nigeria, 1959.

It was found on evidence that the share of profits of the partnership was paid into the account of Chief Akinsete who withdrew as he pleased and handed out money as he pleased. It was held that:

1. The existence of the syndicate before 1959 was not proved. The supplemental agreement of 1959 only created the partnership on that date.
2. The taxpayer was rightly assessed as the bona fide owner of the income accruing to him from the venture in 1958.
3. Appeal dismissed.

4.1 Anti-Avoidance Legislation in Nigeria

The status of the ***Akinsete*** principle was thrown into some doubt by a series of anti-avoidance legislations beginning with the now repealed section 14 Income Tax Management Act (ITMA) 1961 which provides that:

> Where a tax authority is of the opinion that any disposition is not in fact given effect to or that, any transaction which reduces or would reduce the amount of any tax payable is artificial or fictitious, the tax authority may disregard the disposition or direct that such adjustments shall be made as respects the income of an individual, an executor or a trustee, as the tax authority considers appropriate so as to counteract the reduction of liability to tax effected, or reduction which would otherwise be effected by the transaction.

and reaching its high water mark in the provisions of Section 22 of Company Income Tax Act 2004,[36] Section 20 Capital Gains Tax Act 2004[37] and section 17 of Personal Income Tax Act 2004[38] which simply restated and re-enacted the repealed section variously. The Supreme Court of Nigeria has so far refused to give a judicial interpretation to the meaning of "artificial or fictitious transaction", first, the case of *Federal Board of Inland Revenue v. Nasr*[39] the Supreme Court stated that:

> At one stage in the High Court, the Board wished to submit that the transaction should be disregarded as an artificial one within the Income Tax Management Act but as this point has not been raised before the commissioners, the High Court refused to allow it to be raised on the further

[36] See Cap C. 21, Laws of the Federation of Nigeria, 2004
[37] See Cap C. 1, Laws of the Federation of Nigeria, 2004
[38] See Cap P. 8, Laws of the Federation of Nigeria, 2004
[39] 1 NTC 115, 116.

> appeal and no evidence was called which could have justified such a finding.

Secondly, in the case of *Aboud v. Regional Tax Board,*[40]the appellant brought an action in the High Court of Western Nigeria, asking for a declaration (i) that he was not liable to pay tax for the year of assessment 1962/1963 on property at No. 61A Lebanon Street, Ibadan on the ground that the property was not his property from which he derived an income and (ii) that the assessment notice served on him was null and void.

His statement of claim made it clear that what he was objecting to was the decision of the Board to treat his action in conveying the property concerned to his wife as an artificial or fictitious transaction or disposition in accordance with Section 15 of the Income Tax Law (cap. 48), and the pleading concluded by saying that this decision was wrong in law and therefore null and void.

The Supreme Court was urged that it was desirable to have an authoritative interpretation of Section 15 of the Income Tax Law (cap.48), the court stated that the appeals provided for by the law itself afford the means of securing such an interpretation and there is no reason for departing from the ordinary practice of the courts as regards declaratory judgments. The Supreme Court further held that, as regards the first part of the declaration sought in this case, if the court were to hold that the Board had been right it would add nothing to an assessment which has already become final and conclusive; if the court were to declare that the Board had been wrong it would take nothing from the assessment and would merely lead to confusion.

On the pleadings, the court held that the second part of the declaration sought is consequential on the first and if the court declines to consider one it cannot consider the other.

However, while emphasizing the significance of the anti-avoidance legislation it must be carefully stressed that the *Akinsete* principle was still law and had not been over-ruled. It may be distinguished like the Duke of Westminster's case on the grounds that it:

> was about a simple transaction entered into between real persons, each with a mind of his own…. The kinds of tax avoidance schemes that have occupied the attention of the courts in recent years, however, involve inter-connected transactions between artificial persons, limited companies without minds of their own but directed by a single master mind.[41]

The importance of this approach is, first, that it enables one to explain the existence of commercial reality and secondly that it is much wider and more flexible than the simple-almost mechanistic- excision approach of the anti-avoidance provisions.[42]

4.2 Judicial Reluctance in Interpreting the Anti-Avoidance Legislations

It is important for three reasons. First, it establishes that there is no mechanistic time period after which transactions cannot be linked.

The second is that the cases underline the point that while the effect of the legislation being applied is to make the whole matter one transaction for tax purposes, that does not mean that the tax authorities can defeat it; the court still has to see whether the government position is realistically and intellectually defensible. The third reason is that it shows some signs of going back to the enduring effect argument used in the *Duke of Westminster's* case and stated in *Akinsete* case that the courts will not disregard the enduring effects of what the parties have done when applying the anti-avoidance legislation.

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40 1 NTC 125.

41 Ramsay v. IRC [1982] STC 30 at 32. Sec Gammic, Strategic Tax Planning, Part D, p.17.s

42 For a general account of US doctrine see Bittker Federal Taxation of Income Estates and Gifts, especially Chapter 4. For example of skepticism see Rice, 51 Mich I.R at p. 1021; see also Tiley [1987] BTR 180 and 220, [1988] BTR and 108. For examinations of the UK cases from a US perspective see Popkin [1991] BTR and Kolb Hastings International and Comparative Law, Review Vol. 15, p. 159.

These cases show an ebb and flow of judicial opinion in determining the fiscal consequences of the facts which the parties have created – the problems of characterization – and underline how difficult that task can be especially when the courts are presented with highly artificial schemes. Faced with such problems the courts frequently like to emphasise the need to have regard to the reality of the situation or, less frequently, its substance.

An example of this is the decision of the English House of Lords in *Ensign Tankers (Leasing) Ltd. v. Stokes,* which embodies a matter of approach rather than a rule. This approach allows (and probably requires) the courts to examine the reality of the situation reaching the correct tax characterisation of the facts. This may mark the reconciliation, at least at the formal level, of the New Approach with the *Westminster* doctrine since, of course, under that doctrine the labels given by parties did not matter and the court have long been required to determine the true legal character of the transactions. What may matter just as much is the emphasis given by Lord Templeman to the obligation of the courts to ensure that the taxpayer does not pay too much tax, not just too little.[43] Neither the taxpayer nor the state should be deprived of the fiscal consequences of the taxpayers' activities properly analysed.

In the *Ensign* case the question was whether the taxpayer was entitled to capital allowances for expenditure incurred on the introduction of a film. The taxpayer company, E, which as may be surmised from its full name had little to do with world of films, formed a limited partnership, V, with some other companies to provide finance for a film to be directed by John Huston and starring Michael Caine. The film was also to feature such soccer legends as Bobby Moore and Pele and was called "Escape to Victory". V put up 25 percent of the estimated cost of the film ($3.2m out of $13m) the balance being provided by a non-recourse loan made to the general partner by the film company, L, a part of the Lorimar group with whom the partnership had no other connection. The partners, including E, had no personal liability. The film company was also to be responsible (on similar terms) for any cost overrun. The receipts from the film would be divided 25 percent to the limited partnership and 75 percent to the film company until the loan was paid off and then to paying off the loan to cover the cost of the overrun of costs ($1m) and any interest on such loans.

What V, and therefore E, hoped to achieve was that in return for putting up less than[44] 25 percent of the cost, they would be able to receive capital allowances on the total cost of production since at that time the rate of corporation tax was 50 percent and the rate of the relevant allowances was 100 percent of the expenditure. The Crown attack was not less extreme: this was not a trading transaction and therefore was not entitled to any allowance at all, not even the expenditure of $3.25m which had been incurred.

The commissioners held that this was not trading transaction since V's paramount object of the transaction was to obtain a fiscal advantage. This was reversed by Millett J who held inter alia that the taxpayer was trading and that the correct test was an objective one; the full allowance was therefore due.[45] The Court of Appeal reversed Millet J.[46]

The House of Lords, reversing the Court of Appeal, produced a new solution. This was a trading transaction. V and therefore E were entitled to capital allowance on the expenditure actually incurred. However, the expenditure which had been incurred was $3.2m not $14m. This conclusion involved a close analysis of the fact to determine their true legal effect. The scheme would not be allowed to have the apparently magical effect of creating expenditure for tax purpose of $ 14m while incurring real expenditure of only $3.25m. The expenditure of the remaining $10.75m was really incurring by L. The House of Lords proceeded to penalize

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43 [1992] STC 226 at 236

44 After taking account of the overrun which was also financed by non-recourse loan.

45 [1989] STC 705

46 [1991] STC 136

the taxpayers for attempting a scheme which brought no credit on their advisers[47] by making them pay all the costs of the appeal.[48]

The importance of this case lies in its return to the true legal nature of the transaction and the emphasis on ensuring that the taxpayer did not end up paying too much tax: The presence of a tax avoidance purpose does not means that a scheme can simply be disregarded. One must, as *Young v. Phillips* [49] shows, find the real transaction.

Before turning to some of the detailed issue emerging from these cases it is time to face the problem of authority- what is the basis for what the courts have been doing? If the matter is one of statutory interpretation in cases involving tax avoidance schemes then the courts have to explain where the authority for such a rule comes from. If, on the other hand, it is simply one of determining the correct tax characterization of the facts with which the courts have to deal then the problem of authority is solved but at the cost of opening up a very different form of rule. In the new form the rule is not one concerned exclusively with tax avoidance. In the *Furniss v. Dawson* [50] and *Craven v. White*[51] cases the issue is not one of countering avoidance schemes but one of defining the circumstances under which a transfer from **A** to **B** followed by one from **B** to **C** could be treated as a single transfer from **A** to **C** or as an artificial transaction.

At one time it appeared that the nature of the quest might be resolved by new litigation. In *Whittles v. Uniholdings Ltd.*[52] The taxpayers had taken out a dollar bank loan to finance a sterling acquisition. In order to reduce their exposure to currency exchange risks the taxpayer also took out a forward contract with the same bank to buy the same number of dollars at the end of the period of the loan at a fixed sterling price. The issue was whether this will be treated as one single transaction or as two; in the latter some absurd but well known fiscal consequence accrue. The Revenue argued that the transactions should be taxed separately; the taxpayer that they constituted a single composite agreement between it and the bank under which it could not deal with forward contract without the consent of the bank.

Sir John Vinelott held that there was a single composite transaction because that was the true contractual effect of the arrangement. In the court of appeal the Crown argued that there were two transactions whether or not there was a contractual nexus. Aldous LJ would have dismissed the appeal but was outvoted by Nourse LJ and Sir John Balcombe**.**

For Nourse LJ what mattered was that but for the Ramsay case which he persisted in calling "the fiscal nullity doctrine", he would have attached great weight to the House of Lords decision in Aberdeen Construction Group Ltd. V. IRC.[53] He then said:

> If that would have been the position in the present case before the emergence of the Ramsay principle, has it now changed in any way? Clearly, it has not. At this point it is necessary to assure that there was no contractual link between the loan and forward contracts, that being the only footing on which the principle would have a part to play. Decision subsequent to Ramsay, itself, especially Craven v. White (1988) STC 476, (1986) AC 398, have shown that the principle is still in a process of development. Differences of opinion amongst their Lordship in Countess Fitzwilliam **v.** IRC (1993) STC 502, (1993) I WLR 1189 have shown that it is still uncertain where it has got to and to where it may go next. One thing

[47] [1992] STC 266 at 234
[48] [1992] STC 266 at 244
[49] [1984] STC 520
[50] [1984] LAII ER 530
[51] [1989] A.C. 398
[52] [1993] STC 671, 767
[53] *(1978) STC 127*

> may, however, be asserted without fear of contradiction. While… the principle, … one of statutory construction, is capable of being invoked by a taxpayer in certain circumstances, it is clear that if it had never before been thought of, it would not have been invented to enable the company to succeed in this case. More decisively still, it could not attributed to two transactions with no contractual link between them fiscal consequences different from those resulting from two transactions between which there was such a link

Almost every sentence of this paragraph is worthy of close study. The oddity is that the English Court of Appeal then refused leave to appeal to the House of Lords. If ever a case demanded that their lordships resolve the problems they have created, it is this one. With a major unresolved issue as indicated by Nourse LJ and the lower judges split 2-2, the present impasses is unfortunate[54].

5 Issues and Doubts – Elements of the Anti- Avoidance Legislation

A number of questions arise:

1. Will the Nigerian course accept that the presence of any commercial motive, however slight, will exclude the application of the legislation? An affirmative answer is suggested by lord Brightman's formulation and Nigeria case law does not yet suggest that the legislation will be excluded only if the commercial motive is the main one. This issue was raised in Craven v. White [55] where it was held that where there was two courses of action genuinely open to the taxpayer and actively being considered by him, one of which would have entitled him to use the deferral under what is now TCGA 1992, s136 despite Furniss v. Dawson,**[56]** and the other of which would not, the revenue could not use Furniss v Dawson to deprive him of the deferral as there was a sufficient commercial motive at the time of the disposal: this aspect of the case was not developed in the House of Lord.[57] However in the speeches there are many references to transactions which have no commercial purpose other than the avoidance of tax.

In *Ensign Tanker* (*Leasing*) *Ltd*. *vs. Stokes* in the Chancery Division millet J held that the court could not disregard the existence of a limited partnership where it was commercially essential to have some structure to regulate the relationship of the parties.[58]

2. What is meant by a commercial motive? Is "commercial" simply a synonym for "non-tax" so that, for example, a wish to protect the family wealth by the creation of a protective trust will be effective even though some tax sheltering will result? Likewise, is a wish to use a tax shelter company so as to be subject to external company law, which permits loans to directors, a sufficient "commercial" purpose?

There may be major difficulties about a case which two partners go in for the same transaction where one is motivated purely by the thought of saving tax but the other has no raise money to pay maintenance to an ex- spouse or is motivated by some wish to preserve the business. In *Shephered* v. *Lyntress* Ltd. a need to avoid a pre–emption agreement over shares was held to be a sufficient commercial justification.[59]

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[54] .*Whittles* v. Uniholdings Ltd (No.3) (1996) STC 614, CA, reversing (1995) STC 185.
(1985) STC 531 followed in Baylis v. Gregory (1986) STC 22, (1986) 1 All ER 289, and IRC v. Bowater property development ltd. (1985) STC 783.

[56] (1984) 1 All ER 530, (1984) STC 153.

[57] However Lord Oliver said that was a bona fide commercial; purpose (1988) STC at 510). (1989) STC 705 at 770; he also said that it was logically impossible to conclude that the partnership was trading and that the transaction entered into had no commercial purpose (at 771) however Lord Brightman's text talks of no commercial effect, not no commercial purpose the revenue did not a appeal against this part of the judgment; (1991) STC 136 at 149.

[58] [1992] STC 226.

[59] [1989] STC 617 at 650

3. What taxes are affected by this legislation? So far the Nigerian cases have involved income tax or their corporate equivalent. It could be argued that stamp duties are not affected since those are taxes on instruments not transactions; however it can be countered that the legislation is ideally designed to counter avoidance schemes because it requires a broad view of the transaction which is being carried out by the instrument[60] if the doctrine is simply one of characterisation of the facts all taxes are open to its applications.

4. What is the role of the anti-avoidance legislation? Following precedents in other countries which have had to wrestle with general anti-avoidance provision it can be argued that the courts should not allow the use of the legislation if the taxpayer has simply carried out a straightforward transaction, falling exactly within the purpose and ambit of a provision of the tax legislation.[61]

Cases such as this may fall to be dealt with as having a sufficient commercial motive or as single step transactions. However, in relation to transactions within a group of companies, it has been held that the purpose of the express provision is to allow assets to be moved within the ring fence without any fiscal consequence and that this purpose should not be defeated.[62]

More difficulty will be met where the taxpayer can bring himself within an express statutory defence. Will this exclude the legislation? It is though that it should.[63]

5. Who can invoke the anti-avoidance legislation? This problem is now the fundamental one awaiting solution. Can the courts use it to undo statutory absurdities?[64] There is a suggestion in *Pattison v. Marine Midlord Ltd.* that the courts can invoke it to counter an attempt by the Government to "invent an artificial accounting scheme which serves no purpose and is designed solely to create a liability to tax.[65]

If, as in the current democracy, the matter is simply one of statutory application, there seems to be no logical reason why the Nigerian Courts should not be able to invoke the anti-avoidance legislation *suo motu*

6. Can the anti-avoidance legislation be invoked to change the timing or the location of a transaction?[66] Thus suppose that I am about to emigrate (1st January) and wish to postpone a CGT disposal until after I have ceased to be resident in the Nigeria – so avoiding CGT- and yet require the certainty of the sale. I therefore agree that my purchaser shall have an option to buy on any day in January and I have the right to insist on a sale during February. This agreement is made in November but CGT timing rule will make the date of the disposal that where the contract become unconditional.

One may also note the view of one judge that when a disposal by A to B is followed by one from B to C and this disposal is one preordained transaction that transaction should be treated as taking place at the time of the first step.[67]

7. How do you identify an artificial or fictitious transaction? English Cases have reiterated the strict test laid down.[68] In *Hatton v. IRC*[69] Chadwick J said that a preordained series of transactions meant nothing more than a series transactions which had been pre-planned to take place in a specific order in circumstances in which there was, at time the first

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60 See Simon's Weekly Tax Intelligence 1997, p. 1057. The principle that liability to stamp duty follows the true legal effect of the document is not contradicted.

61 As was stated by Walton J in Reed v. Nova Securities Ltd. At first instances [1962] STC 724.

62 Vinclott J in News International Plc v. Shepherd [1982] STC 724.

63 [1985] STC 584 at 647.

64 [1980] STC 341, 53 TC 304, Ang v. Parrish.

65 [1983] STC 269 at 276, CA See also vinclott J in Bird v. IRC [1985] STC 584 at 647

66 See the discussion by Gammie in Strategic Tax Planning Part D, p. D35

67 See Vinclott J in Shephered v. Lyntress (1989) STC 617 at 650

68 E.g Fitzwillam v. IRC [1993] STC 502, HL and Hatton v. IRC [1992] 64. STC 140 ,both dealing with IHT and shephered v. Lyntress [1989] STC 617.

69 [1992] STC 140

transaction was entered into, no practical likelihood that the remaining transactions would not take place in that order. There was, he said, no requirement of control over the decision to take the subsequent steps. Similarly in Fitzwilliam v. IRC there was a preordained scheme despite the fact that the clients were kept in dark as to totality of the scheme and that one of them was separately advised after step 3.[70] Is a conclusion by the tax authorities that a series of transactions constitutes an artificial or fictitious transaction a question of fact or of law?

In such cases…. the Commissioners should find the facts and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction, or a number of independent transactions….[71]

" ... the correct approach in this type of case, where inferences have to be drawn, is for the commissioners to determine (infer) from their findings of primary fact, the further fact whether there was a single composite transaction in the sense in which I have used that expression, and whether that transaction contains steps which were inserted without any commercial or business purpose apart from a tax advantage; and for the appellate court to interfere with that inference of fact only in a case where it is insupportable on the basis of the primary facts so found[72]

In effect the question is essentially one of law.[73]

6 Conclusion

Conclusions may now be firmer as a result of the Akinsete principle and the guidance of the English Courts. For the moment we have a test based on "no practical certainty" or "no real likelihood" that the second step will not follow the first.[74] It is, moreover, consistent with the Nigerian notions of the interpretations, and application of tax statutes.

Second, anti-avoidance legislation is not to allow the tax authorities to under, transactions simply because they have a tax avoidance motive. The courts are overtly fearful of creating a situation which would allow the tax authorities to strike down any transaction entered into for the avoidance of tax.[75]

Third, it is hard to resist the conclusion perhaps a little cynically, that the tax authorities cannot tolerate judicial interference in this matter and may feel the need for more legislation, as has occurred most recently in Canada or, alternatively, retaliate with even more and more detailed legislation and regulations replete with anti-avoidance clause. Hopefully, a clearer picture on this should emerge before the year 3000.

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[70] Lord Browne-Wilkson[1993] STC 502, HL, at 536

[71] Ramsay v. IRC [1981] STC 174 at 180, [1982] AC 324.

[72] Furniss v IRC [1984] STC 153, [1984] AC 474.

[73] Fitzwilliam v. IRC [1993] STC 502, HL, at 515.

[74] This test was applied in shepherd v. Lyntress Ltd. [1989] STC 617. There Vinelott rejected a "frontal assault on the ability of a group to hive down loses into a subsidiary and to sell the subsidiary to another willing to purchase it so that it can set its own gains against the losses." (at 650).

[75] See e.g. Piggot v. Stainless investment Co Ltd. [1995] STC 114.

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AN OVERVIEW OF THE ANTI CORRUPTION LAWS IN ROMANIA. ELEMENTS OF COMPARED LAW

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Abstract:*In the introduction of this paper, we will discuss the general aspects of the phenomenon of corruption in contemporary society. Furthermore, the article aims to briefly analyze the anti corruption laws in Romania, but also to to discuss the corruption crimes as regulated by the Criminal Code and other special laws. We will also present important aspects of the anti corruption laws in countries such as Belgium, Germany, Spain, France by directly referring to the corruption crimes as regulated in the laws of those countries.*

Key words: *corruption, public office, crime, Criminal Code, bribery.*

Introduction

The history of human society shows that the criminal phenomenon of corruption has existed from the oldest times and started to manifest under different forms, thus becoming a scourge of contemporary society. We can appreciate that the phenomenon of corruption is of the same age as humanity, as it manifested in any human society; the possibility of removing it is rather hard to achieve. This criminal phenomenon manifests in the present times in all the states of the world and in all social structures, regardless of the social system or the level of economical development, with times of calm and recrudescence, depending on the social-political, economical changes as well as the way this phenomenon was approached by the state power organisms. Each country has its own history and culture, its own political system and set of social values and each is found in a different stage of evolution from all points of view. Keeping these facts in mind, it is possible that an anti corruption solution applied in one country may not work in another country. However, the experience of a general solution can offer solutions which will apply in other countries.

The laws on corruption are likely to create confusion, given the speedy development of the ways in which corruption crimes can be committed. Thus, changing the laws on corruption became more and more necessary. In a world characterized by the extreme mobility of structures, the lawmaker must take into account the needs of society and he must continuously adapt the laws to the current stage of development. Given the defective laws and the continuous change of society, from an economical, social-political point of view, Law no 78/2000 for preventing, investigating and sanctioning corruption[1] was passed, a law meant to incriminate the crimes of corruption in a modern manner and to provide greater attention to the corruption phenomenon on all levels.

The national law regulates in the Criminal Code, title V “Corruption crimes” the crimes of receiving bribe, offering bribe, influence peddling and acquisition of influence. Law no 78/2000 completes the Criminal Code and incriminates a series of crimes assimilated to corruption crimes and crimes against the financial interests of the European Union (art.10-18^5), but these are not the object of out analysis, as we will discuss the corruption crimes regulated in the Criminal Code (articles 289-292 of the Criminal Code).

[1]*Law 78/2000* for preventing, investigating and sanctioning corruption, published in the Official Bulletin, part I, no 219 of May 18th, 2000, with subsequent changes and additions.

The crime of receiving bribe has existed for many centuries. There is no specific definition, but the next points are generally accepted as the equivalent of a definition: (i) claiming, receiving or accepting; (ii) an undue reward (money or other advantages); (iii) by a public officer; (iv) in order to influence the professional behavior or in order to determine that person to act contrary to the rules (fulfilling, not fulfilling, the speeding or delaying of an act which represents a professional duty or in regard to performing an act contrary to his duties).

The action or inaction which forms the material element of the crimes of *receiving bribe* must meet the all of following conditions:

1. The object of the deed must be money or other patrimonial or non patrimonial advantages which the perpetrator is not legally entitled to, advantages which must be claimed, received or accepted for himself or for others.

2. The money or advantages which are claimed or accepted are not legally owed to that person

3. The act for which the money or advantages are claimed, received or accepted represents a professional duty for the public officer, thus it must be an act regarding his duties or an act contrary to those duties.

4. The money or advantages are claimed, received or accepted for himself or for others.

The crime of *offering bribe* can only exist if the all of the following conditions are met:

1. The promising, offering or giving bribe consists of money or other advantages.
2. The money or advantages which are promised, offered or given are undue.
3. The money or advantages are given or promised are meant for that specific person or for a third person.
4. The act for which the active subject promises, offers or gives money or other advantage is an act regarding the professional duties of the public officer or an act contrary to those duties.

In order to be in the presence of *influence peddling* the following conditions must be met:

1. The active subject must have influence or he must lead people to believes he has influence over the public officer.
2. The active subject must promise to intervene on behalf of the subject in order to determine a public officer or a person which performs a duty in a company to determine him to fulfill, to not fulfill, to speed or delay the fulfilling of an act which represents his professional duties or to perform an act which is contrary to those duties[2].
3. The action which represents the material element of the crime must be accomplished before the public officer performed the act which is the object of the intervention or, at the latest, while the act is being performed.

In order to complete the objective side of the crime of *acquisition of influence*, the following conditions must be met:

1. Any way in which this crime is committed (offering, promising, giving) must be committed as a result of the influence the seller claims to have over a public officer or over a person of those stated in article 308 of the Criminal Code.
2. The action which forms the material element must be committed by the author for the intervention of the seller over a public officer or the person stated in article 308 of the Criminal Code, thus causing him to fulfill, not fulfill, speed

[2] http:www.just.ro/Portals/0/Coduri/dezbateri/cuprins%20si%20partea%20de%20penal.doc

or delay the performing of an act which is his professional duty or to perform an act contrary to his duties.

3. The action which forms the material element of the crime must be achieved before the public officer or the person regulated by article 308 of the Criminal Code performs the act which represents his professional duty or, at the latest, while performing the act.

In continuing with our work, we will discuss the corruption crimes regulated in the laws of other European countries, such as: Belgium, France, Germany, the Netherlands and Spain.

In the Belgian Criminal Code, the bribing of a public officer is illegal, namely offering, promising, whether direct or indirect, an advantage of any kind to a public officer to his benefit or to the benefit of another person, in order to influence the behavior of that public officer. To request or accept bribe, whether direct or indirect, is also illegal. Bribe offered to people in the private sector is also illegal. This consist of offering or promising an advantage of any kind, directly or indirectly, to a person who is the manager or representative of a company in order to influence that person to perform an action or not to perform an action in regard to his work, an action which is not known or authorized by his superiors.

The French Criminal Code forbids any action of suggesting, implying, directly or indirectly, offering, promising or giving an advantage of any kind to a public officer or to a person who holds a public office or is the winner of an election, in a foreign country or within an international organization, for himself or for another person, so as the relevant person abstains from performing an act according to his duties. It is also forbidden for any person to offer consent in committing a crime of corruption or to solicit or accept bribe. Also, in France it is forbidden to peddle influence in order to obtain contracts of favorable decisions from public institutions.

The corruption of a public officer is illegal, according to the provisions of the German Criminal Code. A person who offers, promises or gives an advantage to a public officer in order to fulfill an act contrary to his professional duties is punished (giving bribe, section 334 of the Criminal Code: the person who offers, promises or gives a public officer, a person especially empowered or a member of the federal army, an advantage, for himself or for another person, as a counter favor for an act he performed or will perform as a result of the position he is in and for which he will violate his professional duties, is punished. If a person offers, promises or gives a judge or an arbiter an advantage, for himself or for another person, as a counter favor, for a legal action: 1. Which he fulfilled, thus violating his professional duties or 2. An action which he will fulfill and for which he might violate his professional duties, that person is punished with imprisonment from 3 months to 5 years). Also, providing an advantage is punished, according to section 333 of the Criminal Code: the deed of the person who offers, promises or gives a public officer, a person especially empowered by a public body or a member of the federal army, an advantage, for himself or for another person, in order to fulfill an act which is possible given the position of that person.

The court will punish a person who offers, promises or gives a judge or an arbiter an advantage, for himself or for another person, as a counter favor for a legal action which he fulfilled or will fulfill, with a fine or imprisonment for up to 5 years. The public officer is criminally liable in case he accepts the promised or offered advantages (sections 331 and 332 of the Criminal Code).

Article 331 of the German Criminal Code sanctions the receiving of undue advantages, a crime with the following content: the deed of the public officer or the person especially empowered by a public body who claims, accepts or receives an advantage, for himself or for another person, in order to fulfill an act which is possible given his position,

with imprisonment for up to 3 years of a fine[3].

The judge or the arbiter who claims, accepts or receives an advantage, for himself or for another person, as a counter favor, for a legal action which he undertook or will undertake, is punished with a fine or imprisonment of up to 5 years. The attempt is also punished.

Article 332 incriminates receiving bribe as the deed of the public officer or the person especially empowered by a public body, who claims, accepts or receives an advantage, for himself or for another person, as a counter favor for the fact that he fulfilled or will fulfill an act made possible by his position and which would cause him to violate his professional duties; this deed is punished with imprisonment for up to 3 years or a fine[4]. The attempt is also punished.

The judge or arbiter who claims, accepts or receives an advantage, for himself or for another person, as a counter favor for a legal action he undertook or will undertake, thus causing him to violate his professional duties, will be punished with imprisonment between 1 year and 10 years. In cases with less severe consequences, the punishment is imprisonment from 6 months to 5 years[5].

According to the Dutch Criminal Code, it is forbidden to offer a gift or to perform a favor for a public office, including a person who is about to become a public officer, in order to determine him to perform an action or abstain from performing an action (past, present or future) regarding his professional duties. The same provisions apply in case a gift is offered as a reward for an action of the public officer in regard to his professional duties, regardless of whether these actions represent a violation of his duties or not. Furthermore, it is forbidden for another person, except the public officer ("a person from the private sector"), whether employed of acting based on a special empowering, to accept a gift or the promise of a gift as a reward for his actions or inactions, as well as the action of concealing the acceptance of a gift or the promise of a gift from his employer, in bad faith.

Article 419 of the Spanish Criminal Code regulates corruption which involves public officers:

- it is illegal to corrupt or attempt to corrupt a Spanish public officer by promising gifts and/or by offering goods in order to obtain the execution of an incorrect act or the omission to perform an act in relation to that public officer's duties; it is also illegal to accept the promise of a gift in order to achieve the above mentioned purposes.

Article 445 of the Spanish Criminal Code regulates the deeds of corruption which involve foreign authorities or foreign public officers. It is illegal to corrupt or attempt to corrupt a foreign authority or a foreign public officer by promising gifts, presents or offering other goods in order to obtain a contract or any other unjust benefit in the context of an international economical activity or to accept the promise of a foreign public authority or foreign public officer in order to obtain the above mentioned purposes.

Thus, offering gifts or promises to a foreign public authority or to public officers will be considered a crime only if the purpose of the bribe is to obtain or maintain a contract or any other benefit in the context of an international economical activity.

Any other type of bribe is considered a crime, according to Spanish law.

Conclusion:

The key of the anti corruption fight is to combine prevention measures with repressive measures, as repression without prevention does not reach the final goal, while prevention

[3] www.cristidanilet.ro/continut/carti-monografii/2009-coruptia-in -sistemul-juridic/137-05-politici-anticoruptie-pentru-sistemul-juridic

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without repression is not efficient. Corruption, regardless of how we would define it, can't be removed from society. It will resist, as it is motivated by two essential aspects of human nature: need and greed. However, it can be reduced and maintained at a certain level in order to not affect society. Also, corruption can't be fought unless the general population becomes aware that the leaders are truly willing to fight corruption and officials from the highest levels prove they are honest and sincere and that economical development is in the benefit of the lower categories of society. In order to draw a conclusion, we can state that the need for corrupt activities in a society can be removed. With the help of the community, greed can be fought and kept under control.

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CONSIDERATIONS ON THE DEVELOPMENT OF MEDIATION IN ROMANIA
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Abstract

Taking into consideration that our society faces a continuous development, it would be good that the principles and the methodes of managing the society would develope, because these seems to be overwhelmed.

Also, regarding the mediation, it takes time to implement it into the society's structure, in the social, economical and political sistem.

Keywords: *transition, law, mediation, measures, justice*

Introduction

The transition period in any society which encountered radical changes of the Government or the Political regime had multiple relativities and complications.

In Romania, the transition period seems to have no end and on the contrary it seems more and more complciated. The mediation is also in a transition period, that is also endless, after so many years, the concept is still very little known, very little understood and asimilated by the society and even by some mediators. This fact is not surprising because of the big number of mediators and the easy way of becoming a mediator. A mediator becomes a professional only by practising this job seriously, with perseverance and with vocation.

When we express our doubts regarding this situation, the explanation is that "it is a new system which has to model itself on the level of maturity of the Romanian society."

„The fact of being of the law is to achieve its goal of protecting the social values necessary for the rule of law state"[1].

The first initiations for promoting the mediation were in 1996 when the Foundation for the Democratic Changes together with the Canadian International Institute for Applied Negociation started the first project in the mediation field. In this project were involved representatives of the legal system and representatives of the Ministry of Justice.

In 2000 The Ministry of Justice initiated the first project of law regarding the mediation. The project encountered a strong feeling of opposition, especially from the parliamentary who were also lawyers. The mediation, as an efficient solution for solving the legal cases and the conflicts between parties was not seen as one of the solutions for increasing the quality of the legal act and the relief of the Courts, even if it was included in the engagement of the Romanian's adhering to European Union.

At May 22nd, 2006 was published the Law no.192/2006 regarding the mediation and the profession of mediator which established that the mediation is part of the system for solving the conflicts, the duties of the mediator within the mediation procedure, the duties of

[1] L. R. Popoviciu, *Criminal Law. General part (Drept penal. Partea generală)*, Bucharest, Pro Universitaria Publishing House, 2011, page 36

the Mediation Council, etc.

According to the Romanian law the civil, commercial, family, criminal conflicts can be subject of mediation and also the conflicts of the labour law. The mediation in the civil cases, when the case already started, the solving of the case by mediation may take part as the result of the parties' wish or as a recommendation of the Court, accepted by the parties.

In order to comply with the European norms and in order to respect the principle of primordial of the European law towards the law of the Member States, principle which had been based by the Court of Justice by the global interpretation of the legal norms it was necessary to make some changes of the Law no.192/2006.

In order to be able to respect the Directive 2008/52/CE of the European Parliament and of the Council regarding some aspects of mediation in civil and commercial field, Law no. 192/2006 was changed by Law no. 370/2009 and by OG no.13/2010 being included expressed disposals regarding the way in which the parties may execute the mediation act through the Public Notary or the Court.

The Directive 2008/52/CE of the European Parliament and the Council regarding some aspects of mediation in civil and commercial field reflects the objective established by the Community, that is the maintaining and development of the free space, security and justice within it, which assured the free movement of the persons. For the accomplish of this objective must have been adopted measures in the field of legal cooperation in the civil field, necessary for the good function of the inner market.

In order to facilitate the access to justice and according to the principle of the access to justice, the fundamental principle, the European Council requested to the member states, within the reunion from 15-16 October 1999 from Tampere, the creation of an alternative procedure, extra-judicial, and in April 2002, the Committee presented a green Book regarding the alternative methods for solving the cases in the civil and commercial field. After examining the situation at that moment, it had initiated a vast consultation with the member states and with the interested parties regarding the possible measures of encouraging the mediation.

The European Union had constantly promoted and encouraged the mediation as a way of alternative solution for the conflicts or trials, and by Directive 2008/52/CE it is requested the promotion and the use of mediation and to offer a clear frame of the justice to the parties who use mediation and also explains the necessity of including a legislation which deals especially with the essential aspects of the civil procedure. The Directive 2008/52/CE aimed the application of the mediation procedure in the over-border trials but it also showed that the member states should apply these disposals to the inner procedures, as well.[2]

The Directive 2008/52/CE explains that, mediation is a structured process, no matter how it is called or how it is related to, in which the parties try to get to an agreement, try to conclude an agreement, being assisted by an mediator. The process of mediation may take place at the initiative of the parties, may be recommended or imposed by the court or mentioned in the law of a member state.[3]

The Directive shows that the mediation should not be considered as an inferior solution to the judicial procedure because of the fact that the result depends exclusively on the parties. As a result, the member states should give an enforceable force to the parties' agreement.

If the agreement includes obligations which, by their nature, can't have a compulsory character or its clauses are against the law of one member stat, including the international private law, the member state must have the posibility to reject the acknowledgement of the

[2] Directive 2008/52/CE of the European Parliament and Council shows that: „ no one shall prevent the member state to apply these provisions equally to the inner procedure of mediation.";

[3] Art. 3 of the Directive 2008/52/CE of the European Parliament and Council regarding some aspects of mediation in the civil and commercial fields.

executory character of that agreement.

In the art. 12 of the Directive 2008/52/CE „ The Transposition", the member states had the duty to assure the entry into force of the law and of the administrative acts in order to comply to the disposals from the Directive until May 21, 2011, except of the art. 10, acording to which the compliance had to take place until November 21, 2010.

Article 10 from the Directive 2008/52/CE reffers to the authorities and competent Courts and shows that „ Committee will make public by any means the informations regarding the competente courts or authorities according to art. 6 alin.3" [4]; article that mentiones that, „ The member states inform the Committee the name of the courts or of the competent authorities to receive the requests according to al.1 and 2"[5].

In art. 6 alin 1 and 2 it is confirmed to the parties or to one of the parties the posibility to request the executory character of the content of the written ageement that resulted from the mediation, except of the case in which the content of the agreement is against the law of the member state in which the request is made or the law of that state doesn't show the posibility of offering a compulsory character. [6] According to our law, there are two ways in which the mediation agreement receives the executory character, that is, by the means of the public notary or of the court.

This aspect results from the five main norms of the european act, such as: a) it impose to the member states the duty to encourage the preparation and training of the mediators so that in this way it is assured a mediation of good quality, b) gives to the judges the rights to recommend to the parties, when it is possible, to use first the mediation, c) it provides that, when the parties want, they may give their agreement an executory title, by the means of the court or the public notary, d) it is assured the privacy of the procedure; if there is a trial between the parties the mediator cannot give information regarding the mediation procedure, e) guarantees the freedom to access the Court after the mediation's procedure, the Court's deadline are suspended in the meantime.

The Law no. 202/2010 regarding the measures for accelerating the solving of the trials, the Little Reforme of Justice, [7] establishes that the judge will try to reconcile the parties, giving them the necessary advices, according to law, so the judge will ask the parties to be present in front of the court, even if they are represented. Those cases which, according the law, can be the subject of mediation, the judge can invite the parties to take part to an informing meeting regarding the advantages of using this procedure. When he considers as necessary, taking into account the nature of the case, the judge will recommend to the parties to use mediation in order to solve their case, in any phase of the trial. The mediation is not compulsory for the parties.

If, according to al.1 and 2, the parties reconcile, the judge will include their reconciliation in the decision he will give[8].

The Law no.115/2012 about the modification and the completion of Law no. 192/2006 regarding the mediation and the organisation of the profession of the mediator brings someting new at art.1 alin 1, that is, the obligation for the parties to participat at the informing meeting for solving through this way the conflicts in the civil, family fields and others. [9]

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[4] Art. 10 of the Directive 2008/52/CE of the European Parliament and Council regarding some aspects of mediation i the civil and commercial fields

[5] Art. 6, alin 3 from the Directive 2008/52/CE

[6] Art. 6, alin 1 from the Directive 2008/52/CE: „ The Agreement may take the executory title by means of a decision from the Court ot he competent authority according to the memeber state's law in which the agreement was made."

[7] Published in the Official Gazette of Romania, Part I, no. 714 from October 26th, 2010;

[8] Art. 131 from Law 202/2010 regarding some measures for accelerating the solving of the trials. The littel reform of Justice: „ If, according to alin. 1 or 2, the parties reconcile, the judge will include their reconciliation into the final decision."

[9] Art. 2 (1) from Law no. 115/2012 for the modification and completion of Law no. 192/2006 regarding the mediation and the profession of mediator: „ If law doesn't provede in other way, the persons or the companies, are obligated to participate to the meeting about the advantages of mediation, even after the registration of the request at the Courts, in order to solve the civil, family, criminal conflicts in this way.";

During that meeting, it was presented to the parties the advantages and benefits that this way of solving the conflicts offers to them.

According to this law, the parties- persons or companies- were obliged to take part to the meeting of informing about the advatages pf the mediation procedure, even if the trial was opened, in order to solve in this way the conflicts in the civil, family and criminal fields and others, according to the law.

Article 2 alin.1 from the Law are contrary to the previous provisions which showed that the persons and the companies should use the mediation procedure *voluntarily,* without imposing to anyone the way in which they should solve the cases and it is contrary to the provisions of art. 21 from the Romanian Constitution which says that none shall be prevented to go to Court when he/she considers that his/her right was broken and that anyone may go to Court in order to protect his/her rights, freedom and legal interests. Also, the fundamental law assures us that there shouldn't be any law that may limit this right.[10] The free access to justice is recognised and guaranteed to each person and each one is free to go the the Courts to protect the rights that were broken or to accomplish their legal interests. The limitation of the access to justice has to be well-grounded.

In the European Court of the Human Rights' jurisprudence it is shown that: „*The access to justice has to be provided effectively and efficiently."*

Also, the Directive 2008/52/CE shows that mediation is a voluntary procedure and not an imposed one, the parties may initiate, organize or close it as they want at any moment.[11]

Art.3 lit.a) from the Directive defines the mediation as being an optional procedure, a trial in which the parties want to get to an agreement, [12] that is the mediation is a possibility and not an obligation for the parties, not even regarding to the previous meeting for informing about the advantages of the mediation procedure.

The Directive 2008/52/CE shows at art. 5 „The use of mediation" that the judge has the possibility, after analysing the nature of the case, to reccomend to the parties to solve their case by using the mediation procedure. The Court may even invite the parties to take part to a meeting of informing about the advantages of the mediation.[13]

The Directive 2008/52/CE at art. 5 pct. 2[14] is not contrary to the national law so far as the legal provisions which are going to be adopted, the parties will not be limited to access the justice and will not be punished or limited in any way in respect to this right.

Art. 2 from Law of mediation says that the Court will consider as inadmisible the request of the parties and it will be rejected, if the complainant didn't participat to the meeting of informing about the advantages of mediation, before recording the request or after opening the trial, before the first hearing.[15]

On May 2014 The Constitutional Court of Romania declared these provisions as unconstitutional, by Decision no.266/2014 regarding the exception of unconstitutionality of

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[10] Art. 21 from the Constitution of Romania:
(1) „Any person may go to Court in order to save his/her rights and freedoms or the legal interests.
(2) No other law shall limit this right;
(3) The parties have to right to an equal trial and to have their trial solved in a proper time."

[11] The Preamble of the Directive 2008/52/CE of the European Parliament and Council from May 21st 2008 regarding the aspects of mediation in the civil and commercial fields, pulished in the Official Journal of the European Union series L no. 136 from May 24th 2008: *"mediation shall be a voluntary procedure, that is the parties are themselves responsable for the procedure and may organise it as they want and close it in any moment.."*

[12] Art. 3 lit. a from the Directive 2008/52/CE: defines the mediation as being a process *" in which two or more parties try, from theri own will, to get to an agreement regarding the solving of the trial between them (...)",*

[13] Art. 5 alin (1) „ Getting to mediation" Directive 2008/52/CE: „ a Court may, when it is necessary and taking into oconsideration the nature of the case, invite the parties to get to mediation in order to solve their case. The Court may, as well, invite the parties to take part to the meetings about the advantages of mediation , if that kind of meetings are organized and accesible.".

[14] Art. 5 pct. 2 from the Directive 2008/52/CE: „ This Directive doesn't brake the national legislation according to which mediation, before or after the beginning of the trial in the Court, is compulsory or it is subject of some penalties, as long as such a law doesn't limit the right of the parties to access the Court*"*

[15] Art. 2 from the Law of mediation: „ The Court will reject the request as inadmisible if the complainant didn't go the the meeting about the advantages of mediation before registring the request or after that moment but before the first hearing. (...)"

art. 200 from the Civil Code pf Procedure and art. 2 alin.1 and 1.2. and art. 60 from Law no.192/2006 regarding the mediation and the profession of mediator.[16]

The obligation of the parties to participate to the meetings about the avantages of mediation is an abuse, is a limitation of the freedom to justice, because none can impose to the parties the way in each they should solve their conflict, and by such a punishment- that of considering as inadmisible the request- the free access to justice is not only limited but forbidden.

Therefore, according to this legal act the session of informing about the advantages of mediation, before the registration of the request to the court, is no more compolsury, which means that the courts could no more reject the requests of those who didn't participate to those sessions. In conclusion, the participation at the session of informing becoms an *voluntary option* of the parties who are interested to use this procedure for solving the conflicts.

Although, mediation is a real way for realising the courts, unfortunately, the mediation and its principles are not assimilated by mediators, the mediation is not promoted as an independent multidisciplinary profession neither by the mediators nor by the Council of mediation which is independent identity with legal personality, of public interest and which actually has this duty. The mediation should be promoted also amoung the students from some Universities.

Besides, it is really neccesary that all the institutions and authorities, all those interested, to take serious measures in order to implement the mediation, starting with the information of the individuals and not only, continuing with their determination of using this way, this procedure of solving the conflicts.

Conclusions

This pioneer period of mediation's development in Romania, as it is called by many, should not be an excuse for non professional behaviour nad the legislative stuttering which I have presented above.

Also, I consider that it is necessary to bring into discution also the wrong understanding of some lawers who, by fear of „losing the market" have a negativ reaction both against the mediation and the mediators.

I consider that, when we feel that things go wrong we should say the truth by all means, we should not fe afraid of showing the minus and the inconsistency that slow the development of this beautiful profession, especially within an organised frame, that of the professional sessions.

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RESPECTING THE DIGNITY OF THE HUMAN PERSON IN THE EXECUTION OF SENTENCES AND FREEDOM-DEPRIVING MEASURES RULED BY THE JUDICIARY BODIES DURING A CRIMINAL TRIAL

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Abstract

Through Law no. 254/2013 on the execution of punishments and custodial measures ordered by the court in criminal proceedings, continue changing the approach of the treatment of detainees. Transposition of human dignity in the prison environment involves a radical change in conceptions about prison, inmate and his treatment.

Key-words: *The dignity of the human person; punishments; conditions of detention.*

Introduction

Ensuring the respect of the dignity of the human person in the prison environment corresponds to all the which makes a person respect another one. This respect is not always automated, and laws must ensure that it is guaranteed. Whereas dignity is and intrinsic and unalienable quality of every human person, the respect thereof can be affected by the exclusion of certain persons from the human family, by seeing them unfit to be accepted as members of the society. Or, „as each man bears within himself the whole form of the human condition”[1], regardless of their deeds, characteristics and qualities, the detainee must be treated as a human person, who is part of the humain family.

1. The dignity of the human person and the penal execution law

In 1945, the United Nations Organization was created in order to maintain international peace and security, help nations develop friendly relationships, achieve international cooperation and be a centre for the member nations to harmonize their efforts in view of achieving their set objectives. The Charter of the United Nations was signed in San Francisco on the 26th of June 1945 and it came into force as of the 24th of October 1945. In its Preamble it is stated „the faith in the fundamental human rights, in the dignity and value of the human person”. The Universal Declaration of Human Rights, adopted by the U.N. General Assembly on the 10th of September 1948, is the first global statement that dignity is ”inherent to all members of the human family”. Dignity „ refers to the idea that no one can be excluded from the human community. Respecting dignity is respecting each individual for that which makes them a human, respectable being. Denying this part of humanity turns the individual into a servile human being, it degrades them and integrates them into a lower class”[2], as mentioned by J.-M. Larralde.

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[1]M. De Montaigne, *Essais, „*P.U.F.” Publishing House, Paris, 1992, p.804.

[2] J.-M. Larralde, *Placement sous écrou et dignité de la personne,* séance inaugurale du séminaire de recherche „Enfermement, Justice et Libertés”, Université Paris I Panthéon-Sorbonne, 15 septembrie 2009.

The same ideas are stated in the International Pact on Civil and Political Rights signed in New-York on the 16th of December 1966. The pact ”makes modern humanism enter the prison environment”[3]. According to art. 10.1 of the Pact, any person deprived of their liberty ”shall be treated with humanity and with respect for the inherent dignity of the human person”. Ever since 1962, the Council of Europe has introduced the principle of dignity in the prison environment: thus, the preamble to the Resolution on voting, civil and social rights of the detainee included a statement of the will “to promote a prison system in the member states of the Council of Europe, that is able to ensure society protection in the respect of human dignity”[4].

Also, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted in New York on the 10th of December 1984, explicitly admits that ”the equal and inalienable rights of all members of the human family (...) derive from the inherent dignity of the human person”. According to art.1 of the Convention, the torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The term does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The fundamental principles related to the treatment of detained persons[5] adopted by the U.N. General Assembly follow the same guideline and stipulates that detainees be treated with the respect that is owed to the dignity and inherent value of a human being and that no discrimination should arise in terms of race, colour, sex, language, religion, opinion, national or social background, wealth, birth or station. Principle number 5 stipulates that, except for the case in which restraints through incarceration are obviously necessary, all detainees must still benefit from the respect of the human rights and of the fundamental freedoms mentioned in the Universal Declaration of Human Rights, in the International Pact on Economic, Social and Cultural rights, in the International Pact on Civil and Political Rights, in the facultative protocols to the pact, as well as in the other rights stipulated in other UN pacts. In the penal execution law, penal humanism provides meaning and existence to the subjective rights of the detainees, ”unconditionally legitimized by dignity, which is an inherent quality of the human being and can therefore be attributed to any detainee”[6].

Starting from the idea that incarceration is a punishment in itself by depriving a person of their liberty, the European Prison Rules adopted by the Committee of Ministers of the member states of the Council of Europe on the 11th of January 2006, included a set of fundamental principles, respectively: all persons deprived of their liberty shall be treated with respect for their human rights; persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody; restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed; prison conditions that infringe prisoners’ human rights are not justified by lack of resources; life in prison shall approximate as closely as possible the positive aspects of life in the community; all detention shall be managed so as to facilitate the reintegration into free society of persons who have

[3] S. Tzitzis*, Humanisme, dignité de la personne et droits des détenus*, Etudes et analyses de l’Institut pour la Justice, decembrie 2009, p.13.
[4] Resolution no. 62(2) of the Ministers’ Deputies of the 1st of February 1962.
[5] Resolution no. 45/111, of the 14th of December 1990.
[6] S. Tzitzis, *work cited*, p.20.

been deprived of their liberty. There are 108 European Prison Rules and they focus on the rights of the detainees, detention conditions, health, order, prison management and staff, inspection and control. This set of rules, divided into 8 parts describes the means of making detention compatible with the respect of human dignity.

In its turn, the European Court of Human Rights has decided on several occasions that the respect of human dignity is part of the very essence of the Convention[7] and that human rights form an integrated system in view of protecting the dignity of the human being[8]. The comprehensive jurisprudence of the European institution influences internal laws, by imposing various requirements related to the respect of human dignity, indirectly by banning torture and other cruel, inhuman or degrading treatment or punishment, as stipulated in art.3. The European Court considers that freedom-depriving measures usually involve suffering or humiliation, therefore ordinary detention is not subject to art. 3 of the Convention. Starting from the ruling in the case Kudla against Poland[9], the European court has shown that art. 3 of the Convention urges states to ensure that all prisoners are detained in such conditions as to respect human dignity, that the means of executing the respective measure do not subject the person to suffering or trials the intensity of which goes beyond the inherent level of detention-related suffering and that, while taking into account the practical requirements of the prison environment, the prisoner's welfare and health are properly ensured. The European Court estimates that, regardless of the financial or logistic difficulties that the contracting states may face, they must set up a prison system that ensure that detainees are treated with respect for their human dignity.

In terms of the states' negative obligation that their agents may not inflict torture, inhuman or degrading treatments in the prison environment, the jurisprudence of the European Court has progressively moved towards the „humanization" of certain prison practices[10]. The use of force against detainees, which used to be seen as compliant with the requirements of art. 3 of the European Convention in the older jurisprudence of the Court, are currently seen as violating conventional dispositions. Torturing involves denying the detainee's humanity, or dignity appears to be a "positive counterpart of subjugation and degradation"[11], and any action meant to turn a person into an object, to instrumentalize them is condemnable. The analysis carried out by the Court is based on the idea that, when a person is deprived of their liberty, the use of physical force against them, if it proves to be unnecessary on account of the victim's behaviour, can only prove injurious of their human dignity and is basically a violation of the right provided for in art.3[12]. Moreover, the absolute nature of physical integrity results in the fact that the source of danger – translated into physical damage – is of little to no importance, as it may originate from other people who are not state agents[13]. Consequently, art.3 of the European Convention of Human Rights imposes upon the states a positive obligation to take whatever measures are necessary to prevent detainees from recurring to torture, inhuman or degrading treatments towards their fellow detainees.

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[7] Case of Pretty v. the United Kingdom, petition nr. 2346/02, §65, ECHR 2002-III; Case of Svinarenkp and Slyadnev v. Russia, petitions nr. 32541/08 and 43441/08, the Grand Chamber, ruling of the 17th of July 2014, §118.

[8] Case of Prosperity Party and others v. Turkey, petitions nr. 41340/98, 41342/98, 41343/98 and 41344/98, ruling of the 31st of July 2001, §43.

[9] Case of Kudla v. Poland, petition nr. 30210/96, ruling of the 26th of October 2000, §94.

[10] J.-M. Larralde, *Placement sous ecrou et dignité de la personne,* Séance inaugurale du séminaire du recherche "Enfermements, Justice et Libertés", Université Paris I, Panthéon-Sorbonne, the 15th of September 2009, p.15.

[11] J.-P. Duprat, *A la recherche d'une protection constitutionnelle du corps humaine,* Decision 94-343-344 DC du 27 juillet 1994, LPA, special bioéthique, the 14th of December 1994, n.149, p.34.

[12] Case of Rupa v. Romania, ruling of the 16th of December 2008, §93.

[13] K. Atilla, *România la Curtea Europeană a Drepturilor Omului,* "Wolters Kluwer" Publishing House, București, 2010, p.47.

Also, according to the practices of the Strasbourg Court, the states have a positive obligation to take whatever measures are necessary to protect the lives of suicidal detainees. Thus, the European Court of Human Rights has retained a violation of art. 2 and 3 of the conventional text in the case of Renold versus France of the 16th of October 2008, when the plaintiff, who was psychologically vulnerable, was arrested and placed into a segregation cell for 45 days. On this occasion the Court has cleared the fact that "mental vulnerability requires particular protection. This is all the more so when a detainee suffering from serious mental problems, as is the case here, is placed in isolation or in a segregation cell for a long time, which is bound to have repercussions on their physical state, given the fact that he had already tried to end his life a few days before"[14]. The treatment of a mentally disordered person can prove incompatible with art. 3 in the Convention, "in terms of the protection of human dignity, even if that person is unable to identify any specific negative effects"[15].

Moreover, another positive obligation imposed upon the state authorities in art. 3 is to initiate an effective and in-depth official investigation in view of identifying and punishing those people who have inflicted ill treatments.

Ever since the ruling in the case of Mayzit versus Russia[16] in 2005, the European Court of Human Rights has been referring to the standards of the European Committee for the Prevention of Torture and Degrading or Inhuman Punishments or Treatments (C.P.T.). Therefore, the member states must take them into account when elaborating related policies. The quality of life in prison institutions is of high importance to the C.P.T. and it largely depends on the activities provided for the prisoners and on the general atmosphere of the relationship between the detainees and the prison staff[17].

2. Novelty aspects regarding the respect of the dignity of the human person in the prison environment – Law nr. 254/2013 providing for the execution of sentences and freedom-depriving measures ruled by the judiciary bodies during a criminal trial [18]

And yet there is a certain reticence related to the idea of protecting the dignity of a person who has committed crimes. For some, "should someone who complies with Kant's criteria, such as the ability to lead a moral life, still have an immoral life style, should we respect them? On the contrary, the fact that that person betrays their ability to lead a moral life is a reason for us to humiliate them for having failed to accomplish their goal, rather than respect them. According to this perspective, those criminals who are still able to be moral deserve no respect, given the fact that they have degraded their humanity – their very nature which was seen as a source of respect for them"[19]. Or, as President Aharon Barak of the Israeli Supreme Court wrote: „Life in prison (...) does not imply that the arrested person be denied of their right to physical integrity and protection against any violation of their human dignity. An arrested person is denied of their freedom; they should not be deprived of their humanity"[20].

[14] Case of Renold v. France, Decision of the 16th of October 2008.
[15] Ibid.
[16] Case of Mayzit v. Russia, petition nr. 63378/00, Decision of the 20th of January 2005.
[17] The 2nd General Report [CPT/Inf (92)3] showing that over crowdedness leads to a significantly lower quality of life.
[18] Published in the Official Journal of Romania nr. 514 of the 14th of August 2013.
[19] A. Margalit, *La société decente,* „Flammarion" Publishing House, Paris, 2007, p. 67.
[20] HCJ 355/79 Katlan v. Prisons Service (1980) IsrSC 34(3) 294, 298.

From a judicial point of view, a problem arises of knowing how to ensure the respect of dignity, especially in terms of the fundamental rights of the human person[21]. The adoption of Law no. 254/2013 providing for the execution of sentences and freedom-depriving measures ruled by the judiciary bodies during a criminal trial[22] brings about a change of perspective in terms of the way detainees are treated[23].

As provided for in art. 4 in this piece of legislation, „all sentences and freedom-depriving measures shall be executed in such conditions as to ensure the respect of human dignity". According to art. 5 in the law, it is forbidden to subject any person executing a sentence or any other freedom-depriving measure to torture, inhuman or degrading treatments or any other ill treatments; any violation of these provisions shall be punished according to criminal legislation.

According to art.19 of Law no. 254/2013, detainees are subjected to bodily search in view of preventing any special events or risky situations, as well as of retrieving any forbidden objects. Search must be conducted by persons of the same sex as the persons deprived of their liberty in such conditions as to ensure the respect of their dignity. A thorough bodily search must respect the right to private life of the detainee. Search of the body cavities of the detainee can only be conducted by the medical staff. Therefore, searches and physical examinations are generally compatible with the respect of human dignity. Only the fact that they may be conducted by subjecting the person to pointless humiliation or at a high frequency rate (for no apparent reason) may raise a problem in terms of the respect of human dignity.

Ensuring prison security does not only involve avoiding escapes, but also preventing any kind of aggression, suicide or violence. Art. 23 in Law no. 254/2013 mentions the possibilities of the detainees to be temporarily accommodated in a safe room[24] where they can be supervised at all times by security cameras, should there be any clue that a prisoner intends to recur to self-aggression or suicide, hurt another person, destroy assets or seriously disturb prison order. This measure is taken in view of protecting the detainees and it is limited to a 24-hour time span. It must be applied in such a way as to ensure the respect of human dignity, providing that detainees must not be supervised during their most private moments. Even if there are some serious arguments in favour of supervising prisoners, the authorities must not turn this measure into a permanent one and at some point acknowledge the prevalence of the right to the respect of human dignity of the prisoners. Therefore, they must be allowed to have a minimum of private life, a minimum of privacy, which is part of their personality. The protection of private life implies that any person, including those deprived of their liberty, have a strictly personal space respected, so that they may not have to share their most intimate life experiences or details[25]. In its jurisdictional activity, the Constitutional Court, which

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[21] C. Jorda, *Un espoir pour le respect de la dignité humaine: l'essor de la justice penale internationale*, in S. Gaboriau and H. Pauliat, Justice, éthique et dignité. Actes du colloque organisé à Limoges, les 19 et 20 novembre 2004, Pulim, Limoges, 2006, p. 119. In this sense, the Peruvian constitutional court stated that the principle of the dignity of the human person "in its negative side, insists upon the fact that human beings must not be treated as objects or instruments (rather as subjects to rights and obligations), as any person, including criminals, must be treated as a purpose in itself".

[22] Published in the Official Journal of Romania nr. 514 of the 14th of August 2013.

[23] Law nr. 254/2013 is structured into 7 headings, 24 chapters and 191 articles and came into effect on the 1st of February 2014.

[24] Also known as "the white torture", isolation can seriously violate the rights of the prisoners by its repercussions on their mental health (hallucinations, cognitive and neuro vegetative disorders). In the case of Ireland v. the U.K., the European Court of Human Rights explained that "complete sensory deprivation, doubled by a total social isolation can destroy personality; it is a form if inhuman treatment which should not be accounted for by security requirements". For further details, see the Case of Ireland v. the U.K., in the Commission Report of the 25th of January 1976.

[25] Detainees accommodated in the safe room eat and satisfy their physiological needs in another space than their accommodation.

enforces the supremacy of the Constitution, has connected art. 26 para. (1) to art. 1 para. (3) of the Fundamental Law, in Decision no. 81/1994[26], stating that "(...) in the first paragraph of art. 26 it is mentioned the obligations of the public authorities, ensuring the fulfilment of the provisions in art. 1 para. (3) of the Constitution, according to which "Romania is a democratic and social state ruled by law, wherein human dignity, the rights and liberties of the citizens, the free development of human personality, justice and political plurality are supreme values and are therefore guaranteed".

Taking into account the quality of human person of the detainee depends on the possibility of keeping them attached to the social environment. Detainees have the right to petition, exchange mail, make or receive telephone calls, communicate online, receive visits and be informed about special family situations, receive intimate visits and get married. Persons deprived of their liberty are allowed to receive visits from their family members and from their lawyers; they also have the right to be informed of the serious condition or of the death of their spouse or of one of their close relatives, as soon as the prison administration has been informed of the respective event. The rights granted to the detainees in relation to their family and to the prison staff makes Romanian legislation compliant with the European requirements in this matter[27].

Harm to human dignity is often perceived as harm to physical integrity, life and health. The life of the detainees must be protected against any harm that may occur generated both by the state and by other detainees. The state has the substantial obligation to protect the lives of the detainees, as well as a procedural obligation to investigate the death of any prisoner.

On one hand, health protection implies that some basic measures be taken in view of protecting the health of the detainees and of preventing their existing illnesses from aggravating. On the other hand, it involves an adaptation of the detention place to the specific situation of the prisoner. Most importantly, health protection involves rest and food, as well as medical examination. Law no. 254/2013 includes provisions related to such situations as a prisoner refusing to eat. In this case, the penitentiary administration has the obligation to temporarily transfer the detainee to a medical institution within the network of the Ministry of Health and inform the family or a close relative of the sentenced person, should their health or bodily integrity be seriously affected by their refusal to eat. According to art.71 of Law no. 254/2013, the right to medical assistance, treatment and care to sentenced persons is guaranteed. The right to medical assistance includes medical intervention, primary, emergency and specialized medical assistance, whereas the right to care includes both health and terminal care. Authorities are obligated to protect the health of the persons deprived of their liberty by providing the necessary medical care related to the disease they have contracted upon incarceration or at a later time. Prisoners have the right to free medical care, treatment and medication. Related to medical examinations, Law no. 254/2013 stipulates distinctive, detailed provisions. The medical examination of the sentences person is performed upon admission and during the execution of the sentence, regularly, confidentially and securely. When given access to medical care, the dignity of the detainees is respected by provisions related to the confidentiality of information [art. 72 para. (2)].

[26] Published in the Official Journal of Romania, nr. 14 of the 25th of January 1995.

[27] According to the data provided by the National Administration of Penitentiaries, in 2014 the visit time was maintained to the legal maximum of 2 hours in most penitentiaries; also, the time for making telephone calls was supplemented, to a maximum of 30 minutes a day in most penitentiaries; prison furloughs increased as follows: for 24 hours or less from 1.266 in 2013 to 1995 in 2014 and for 24 hours or more from 398 in 2013 to 627 in 2014; 2-hour intimate visits increased from 9.513 in 2013 to 9.854 in 2014, whereas the 48-hour visits decreased from 635 to 503.

Poor detention conditions may negatively influence the health of the detainees. As mentioned above, the material detention conditions can make the object of art. 3 in the conventional text[28]. Here there are provisions related to the right to food, clothes, barrack equipage and minimal accommodation conditions, given the specific international recommendations, especially those of the Committee for the Prevention of Torture[29]. Firstly, according to art. 48 para. (1) of the Law no. 254/2013, the National Administration of Penitentiaries shall take all the necessary measures in view of progressively increasing the number of individual accommodation spaces. Furthermore, para. (3) and (4) of art. 48 stipulate that the sentenced persons are accommodated either alone or along with others, and that the accommodation rooms have both natural lighting and proper artificial lighting ensured by means of the necessary electrical installations. Moreover, according to the law, each sentenced person is provided with a bed and barrack equipment as decided by the general manager of the National Administration of Penitentiaries. The sentenced persons shall wear decent civilian clothes [art. 49 para. (1)]. In terms of food, art. 50 stipulates that the administration of each penitentiary shall ensure the proper conditions for the preparation, distribution and serving of the food in accordance with the norms of food hygiene, age, health condition, type of work, religious beliefs; they also have access to potable water[30].

In the future, the delinquent shall be seen as a person benefitting from regular rights, as provided for in the recently introduced art.7 of the Law no. 254/2013, according to which "detainees shall exercise all of their civil and political rights except for those which have been denied to them by their permanent sentencing decision as well as those total or partial non-exercise of which inherently result from liberty deprivation or from reasons of maintaining detention security". This view is fully compatible with the respect that person must be shown as human being. The respect of human dignity depends on certain requirements, as human dignity is less a „concrete legal reality, it is rather its realization in each of the fundamental rights"[31]. Dignity is therefore that which must be respected in man as such, it is that which human condition postulates and requires for each person: freedom, identity, chastity, and honour[32].

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[28] Presently, the deficit of accommodation places of 4 s.m. is of 11.170 places (as of the 31st of December 2014). The average decreased by 3,65%, 31.847 detainees in 2014 as compared to 33.053 in 2013. Moreover, there is a decrease of the number of decisions in which the Romanian state was fined by the ECtHR for failing to comply with the detention conditions (29 decisions in 2014 as compared to 32 in 2013). In 2014 Romania had to pay compensations to the amount of 196.400 Euros, as compared to 221.819 Euros in 2013. For further details, see the Annual Report for 2014 of the National Administration of Penitentiaries, available on http://anp.gov.ro.

[29] In the 7th General Report [CPT/Inf (97)10], the C.P.T. emphasized once again the negative effect of over crowdedness and defined an overcrowded prison in a non exhaustive list of characteristics, namely: dirty, cramped spaces, a constant lack of intimacy (even during the use of sanitary utilities), limited outside activities as a result of outnumbered staff and insufficient facilities, overcrowded medical services, high pressure and violence between detainees and in relation to the staff. The C.P.T . concluded that in many cases, the side effects of over crowdedness have led to inhuman and degrading detention conditions. It is noteworthy that in its 11th General Report [CPT/Inf (2001)16], the C.P.T. highlighted the fact that considerable investments in the infrastructure of a penitentiary is not a solution. It is necessary to review the existing practices and legislation in the field of temporary detention, sentence issuance and the available non-depriving sentences. In terms of the minimum space that should be made available for the detainee, the C.P.T. indicated in its 2nd General Report [CPT/Inf (92)3], a minimum of 7 sm/detainee for the cells in police stations, whereas there is no general standard for prison cells. However, reports against different countries mentioned 4 sm/detainee for cells hosting more than one detainee and 6 sm. for individual cells. Further information available on http://www.cpt.coe.int/lang/rom/rom-standards.pdf .

[30] We find it useful to mention that in 2014, the basic cost for detainees was 3.76 lei a day and 535 lei a month.

[31] D. Rousseau, *Les libertés individuelles et la dignité de la personne humaine, «* Montchrestien » Publishing House, Paris, 1999, p.70.

[32] G. Cornu, *Droit civil. Introduction. Les personnes*, 13th ed., "Domat Montchrestien" Publishing House, 2007, p.252.

Until present day, the Romanian Constitutional Court[33] has not been notified in relation to this matter, but it is worth emphasizing the fact that in comparative law it is easily accepted that ”even in this case, and especially in this case wherein the distinctive characteristic is individual vulnerability resulting from the lack of freedom, in such environmental conditions as to become severed from the civil society, human dignity is protected by the Constitution through the inviolable rights of man that the detainee also has and has had throughout the execution of their sentence”[34]. Also, the Spanish Constitutional Court mentions that „applied to the rights of the individuals, the rule in art. 10.1 implies the fact that, being a spiritual and moral value that is inherent to a person, their dignity must stay unaltered whatever the situation that person may be in, including during the execution of a freedom-depriving measure”[35]. It is thus emphasized the strong connection between dignity and the rights of the detainee, wherein the rights are means of protecting dignity.

Human dignity must also be respected when detainees are given disciplinary sanctions. In this sense, art. 101 in Law no. 254/2013 mentions that it is forbidden to apply collective and bodily sanctions and that immobilization and any other degrading or humiliating method may not be used as disciplinary sanctions.

The dignity of a human person is an instrument of interpreting the quality of life in prison, which compels the authorities to withhold from anything that may damage the respect of the detained persons, and then makes the same institutions take actions in order to ensure this respect.

3. Conclusions

The adoption of the new Romanian Criminal Code (Law no. 286/2009), of the new Romanian Code of Criminal Procedure (Law no. 135/2010) and of Law no. 254/2013 regarding the execution of sentences and freedom-depriving measures ruled by the judiciary bodies during a criminal trial has generated an important progress regarding the respect of the dignity of the human being. It is not always the case of a direct protection of the dignity of the human person, but rather the protection of their rights, as being those which ensure the protection of dignity. The respect of dignity focuses on the treatment that detainees receive as human beings and it becomes increasingly important.

In the field of the rights of the detained persons, a new approach of the protection of life focuses on the need to ensure quality in the lives of the persons deprived of their liberty, stipulating the interdiction of incarcerating the detainee in conditions which prove too hard for their human condition. Therefore, respecting the dignity of the human person in the detention places implies a more human nature of the places and people. Transposing the dignity of the

[33] In Ruling nr. 1/2012 for the admission of the objection of unconstitutionality of the provisions of the law which modified and amended the G.E.O. nr. 155/2001 regarding the approach of the management program for stray dogs, as approved by Law no. 227/2002, as well as, especially, the provisions of art. 1 pt. 5 (referring to art. 4 para. (1)), pt. 6 (referring to art. 5 para. (1) and (2)), pt. 8, pt. 9 (referring to art. 8 para. (3) pts. a)-d)), pt. 14 (referring to art. 13 (1) and 13 (4)), pt. 15 (referring to art. 14 para. (1) let. b) of the law), the Romanian Constitutional Court mentioned that human dignity implies two inherent dimensions, namely: human relationships, focusing on the right and obligation of man to have their rights and fundamental freedoms respected and respect them in their turn, and the relation between man and the environment, including the animal world, which implies that man has the moral obligation to care for these beings so as to prove their level of civilization.

[34] The Italian Constitutional Court, Decision no. 26/1999, quoted by M. Di Ciommo, Dignità umana e stato costituzionale, „Passigli Editori” Publishing House, 2010, p.159.

[35] The Constitutional Court of Spain, STC 120/1990, FJ4, quoted in Véronique Gimeno-Cabrera, *Le traitement jurisprudentiel du principe de dignité de la personne humaine dans la jurisprudence du Conseil constitutionnel français et du Tribunal constitutionnel espagnol, „*L.G.D.J.” Publishing House, Paris, 2004, p. 131. Similarly, §139 of the Constitution of the German Kingdom, of March 1849, according to which a free people must respect human dignity, even in the case of a criminal.

human being to the prison environment generates a radical change of perceptions related to prison, prisoners and the way in which they are treated.

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LEGISLATIVE FEATURESIN THE MATTER OF CORPORATE TAX: PRIVATE EDUCATIONAL INSTITUTIONS AND ACTIVITIESOF RESEARCH– DEVELOPMENT

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Abstract
There are often discussions about the „dramatic" situation of the underfinancing of education and of research-development, about the continuous undervaluation and marginalization by the decision makers of these essential components of social life. In this context developed step by step in Romania the private educational system as well, preferred due to the material resources these units have, due to the motivated teachers, the methods used to outline the personalities of the children, etc.

Key words: *corporate tax, exemptions, deductions*

Introduction

The national educational system must be able to assure the competitiveness and prosperity of the country in a period, when the future is more and more dominated by economies and societies based on knowledge.
In this context are welcome all the measures (including fiscal ones) of sustaining the education, the research-development, regardless of their forms of organization (public or private).

According to article 8 from Law no. 1/2011 "for the financing of national education will be yearly allocated from the budget of the state and the budget of public local authorities minimum 6% of the gross domestic product of the respective year. Additionally, the educational units and institutions can obtains and autonomously use their own incomes. For activities of scientific research it is yearly allocated from the budget of the state minimum 1% of the gross domestic product of the respective year".[1] In the same time, another principle of financing education is one, according to which the state assures the basic financing for the foundation stage and for all the pupils attending an approved general compulsory education unit of the state, private or confessional. Furthermore, the state assures the basic financing for professional education or for approved high school education, belonging to the state, private or confessional, or for the post-secondary education of the state. Financing is made based on and within the limits of the standard costs per pupil or per pre-school child, according to a methodology developed by the Ministry of Education and Scientific Research.
The private and confessional education is organized according to the non-profit principle of preuniversity education institutions, at all levels and forms, according to current legislation.

[1] Law no. 1 from 5 January 2011 about national education published in the Official Gazette of Romania no. 18 from 10 January 2011 including subsequent amendments and additions.

The criteria, standards and performance indicators, which have to be meet by the private and confessional preuniversity education institutions are identical to those, which have to be meet by the educational institutions of the state.

Private education units are free, opened and autonomous units, from an organizational perspective, as well as from an economic-financial perspective, the cornerstone being the private property, guaranteed by the Constitution of Romania.

The approved private and confessional preuniversity education units must be sustained by the state, the conditions being established by Government decision. But even if this provision is stipulated in the content of the law, the state still lacks sufficient resources to support and coordinate private education respecting its rights. Thus we can observe that the provisions of the law of education, concerning the basic financing of the approved private preuniversity education is extended until December 31, 2016.[2]

Currently the corporate tax is still regulated by Law no. 571/2003 concerning the Fiscal Code, but beginning with January 1st 2016 we have to take into account the new law in fiscal matters, respectively Law no. 277/2015 concerning the Fiscal Code[3], both normative documents providing essential information for every taxpayer, in order to follow and understand the tax burden, to be aware of the fiscal principles, mechanisms and procedures, so that eventually the taxpayers can analyse the influence of the decisions of financial management upon their fiscal burden.

According to the current legal provisions[4] among those who benefit from corporate tax exemption we can also find the approved and/or authorized private education institutions. The above mentioned entities benefit from this aspect in case in which the incomes are used in the current year or in the next years according to the regulations concerning the education, for instance activities of improving material resources(incomes earned by these taxpayers from economic activities, but are used for purposes other than those expressly provided by law, fall under the tax rate of 16%).

We should mention, that given the legal framework in the matter of assuring the quality of education, any legal, public or private person interested in providing education was subjected to the evaluation and accreditation process, before starting their activity (procedures being differentiated according to educational form, preuniversity or higher education). The education providing organization and other legal person, who according to his status, develops educational activities based on legally authorized programs. For example, according to the basic form of Government Emergency Ordinance no. 75/2005 regarding quality assurance of education[5], an education provider could be a commercial company, which according to its status develops legally authorized activities or programs of initial or continuous training. If this company, founded and organized according to the provisions of

[2] See art. 36 from the Government Emergency Ordinance no. 83/2014 published in the Official Gazette of Romania no. 925 from 18 December 2014. In the same subject see also the address of theVice-President of the Commission for education, science, youth and sport – Chamber of Deputies, registered under no. 72724/02 June 2015, on subsidizing private education in Romania. This document addressed to the Minister of Education and Research is based on a memorandum submitted by the National Union for Private Education Development in Romania (UNDIPPR), which draws attention to the lack of subsidies of the state budget to support private education. This Union, representing the interests of the private authorized and/or approved education institutions, invokes the total lack of budget financing and promoting of some normative acts which "exclude or discriminate" private education.

[3] Published in the Official Gazette of Romania no. 688 from 10 September 2015

[4] Art. 15 paragraph 1 letter g of Law no. 571/2003 including subsequent amendments and additions.

[5] See art. 2 lit. b of the Government Emergency Ordinance no. 75/2005 published in the Official Gazette of Romania no. 642 from 20 July 2005

Law no. 31/1990[6] has as activity object compulsory primary education, particularly, from fiscal point of view, the company was taxpayer and was subjected to the corporate tax obtained from this type of activity. For this legal person are not applicable the provisions of Law no. 571/2003 regarding to Fiscal Code, Title II, art. 15, paragraph (1), letter g) concerning the exemption from corporate tax, because the normative act expressly refers to private education institutions accredited and authorized[7].

In terms of research-development, in calculating profits subjected to corporate tax, some fiscal deductions or incentives are applicable for the expenses of this nature, namely: a) additional deduction by calculating the taxable profit, in a rate of 50% of the eligible expenses for these activities; the additional deduction is calculated quarterly / annually; b)application of the accelerated amortization method in the case of appliances and equipment destined for research and development.

In the application of Fiscal Code rules concerning the deductions for research-development expenses were drafted, approved by the Order of the Minister of Public Finances and of the Minister of Education and Scientific Research[8].

Fiscal incentives are granted for research and development activities, leading to obtaining results of research, which can be fully exploited by taxpayers; carried out both on national territory and in the European Union member states or in countries belonging to the European Economic Area.

Research-development activities eligible for additional deduction when establishing the taxable profit, must be part of the categories of applied research activities and/or technological development relevant to industrial or commercial activity carried out by the taxpayer.

Fiscal incentives are granted separately for research and development in each project.[9]

Among the eligible expenses taken into account by granting the additional deduction in determining taxable profit we mention the followings:

a) expenses with amortization or with or renting tangible and intangible assets, or some of these expenses for the period of use of tangible and intangible assets in research and development activities;

b) expenses with personnel involved in the research and development activities, including activities related to support them (documentation, conducting studies, experiments, measurements, exchange of experience);

c) operating costs, including: expenses on third-party services, expenses on consumables, expenses related to materials of inventory objects, expenses on raw materials, parts, modules, components;

d) overheads that can be allocated directly or proportionately to research results by using an allocation key; the allocation key is the one used by taxpayers to allocate common costs: in the category of overheads allocated directly, the followings may be included: rent of the location where they carry out research and development activities, provision of utilities such as: water supply, sewerage, sanitation, electricity and heat etc.

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[6] Law no. 31 from 16 November 1990 concerning companies, published in the Official Gazette of Romania no. 126-127 from 17 November 1990, republished in the Official Gazette of Romania no. 1066 from 17 November 2004, including subsequent amendments and additions.

[7] It must be also considered the fact, that in order to legally function, private education must be organized on non-profit principle, musthave teachers, a basic material and sufficient financial resources in order to develop educational activities

[8]See Order of the Minister of Public Finance and Minister of Education and Scientific Research no. 256/3331/2015 amending and supplementing Rules on deductions for research-development expenses la in determining taxable income, approved by Ministry of Public Finances and of Minister of Education, Youth and Sports no. 2086/4504/2010 published in the Official Gazette of Romania no. 178 from 16 March 2015.

[9] See art. 19[1] from Law no. 571/2003 concerning Fiscal Code

Due to the continuous concerns to improve and simplify the provisions of the Fiscal Code, and due to the dynamic development of the business environment and to the evolution of the economic, social and political realities, the consolidation of the fiscal-budgetary politics was assessed, by rewriting of the Fiscal Code. Thus, through the complex modernization process of fiscal legislation was created Law no. 227/2015 concerning the Fiscal Code[10].

Please note that among the legal persons, who are paying corporate tax, the current legislation (Law no. 571/2003) delimits two categories of taxpayers exempted from the payment of the tax, integrally or partially, for certain types of incomes: legal persons fully exempted from the payment of corporate tax (see art. 15) - the State Treasury, the National Bank of Romania; legal persons exempted from corporate tax for certain types of incomes - these people are eligible for a special tax regime based on their legal status.

According to the new legal provisions, in case of the approved and/or authorized private higher education institutions in the calculation of the fiscal results the following types of incomes are considered to be non-taxable incomes: incomes obtained and used in the current year or in the following years, according to the legal legislation in the domain of national education.

Conclusions

In conclusion, we must remember that education policies should permanently contribute to the development of the Romanian society, and in this context any supporting measures are welcome. Only by also promoting the private components of education and research-development can be assured a systematic, efficient and coherent reform of the educational process.

Starting from the principle of the general right of every person to freely choose the state or private education unit he or she wants to attend, differential treatments cannot by applied, and the law of education must be respected also regarding to the financing regime of the latter.

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[10]Law no. 227 from 08 September 2015 concerning the Fiscal Code, published in the Official Gazette of Romania, no. 688 from 10 September 2015, by which, starting from 01 January 2016 Law no. 571/2003 concerning the Fiscal Code is abolished.

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AN ANALYSIS OF WOMEN'S STATUS IN THE MUSLIM SYSTEM AS OPPOSED TO TE EUROPEAN

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Abstract:

Article 14 of the ECHR Convention guarantees women the same rights as men. This is just one example. Gender equality is recognized in the Romanian legal system from the constitutional level — Article 16. The Coran guarantees equality between women and men. How is the woman subject to the protection of her husband in each of these law systems? We propose to analyze this in this article.

Keywords: *Islam, Muslims, women's rights, marriage, ECHR.*

Introduction

Both from a structural and especially substantive point of view, the legislative system in Europe is very different from the Muslim system, even if over time there have been attempts at dialogue in the sense of near convergence of the two great systems.

In this study, we propose a brief analysis of what married life means for Muslim women, compared with the rights and obligations of married woman under legal texts at European level in general, and in particular her status as regulated by the Romanian legislation. Interest in this subject lies in the controversy that the "Western world" and the "Muslim world" grant women rights that place her in an uncertain area — the woman is protected by or subject to environment in which "functions"?

1. Common Legal Principles Applied Differently

In order to understand and analyze how the state of Muslim women is regulated, we consider it necessary to look at a few aspects of the Islamic legal system.

For Islam, the Qur'an is the central reality around which all other beings and things revolve. The Qur'an contains the message that helps to maintain the pact between man, the servant of God, and God[1]. It is not the written text of the prophet Mohammed but the word of Allah to the prophet who is just a messenger. From the legal point of view, the Qur'an along with the Shari'ah is the basis of Islamic law.

1.1. The Principle of Equality of Rights

Equality of the sexes is presented and interpreted from the Qur'an: "Do you despise the work of any of you, male or female, for one from another on moving" (3: 195)[2]

We will see many such texts in the Qur'an, but none that actually confers gender equality or any non-discrimination principle as owe are accustomed to in the European Convention on Human Rights or domestic provisions of our state.

Moreover, we shall see this equality treated in a manner different from the European way, because man and woman are equal to where differences occur natural, physical and

[1] Ş. Reşceanu, *Islamul între istorie şi modernitate*, Ed. Universitaria Craiova, 2007, p. 27.
[2] Y. Al-Qaradawy, *Statutul femeilor în Islam*, Ed. Taiba, Bucureşti, 2008, p. 23.

moral. For example, a woman is considered more attached to her emotional life and much more easily influenced by her emotions than a man who is considered to be dominated by rational thought. In this context, women cannot hold an administrative, political or juridical position, given that in performing the required function her emotions would take precedence over rationality.[3]

1.2. The Principle of Human Dignity

It should be noted that differences in history, culture and mentality between Westerners and Muslims have led the latter to consider that they cannot be forced to abide by the UN Declaration, but must make their own statement on human rights.[4] Throughout history, we see many attempts at such statements. Thus, the Declaration of Human Rights, the second part in which were provided the conclusions and recommendations of the 1980 Kuwait symposium[5] states that Islam gave women a worthy and honorable status long before the advent and enshrinement of modern human rights.[6]

The status of dignity and honor that Muslims give their women much disputed along with the much disputed equality between men and women are supported, in a slightly different manner, however, by the Qur'an. Thus, it establishes the man's authority over the woman by virtue of the preference that God has bestowed to it. "Rebuked those you think unfaithful; close them in separate rooms and beat them"(Qur'an 4:34)

Even though this is the text of the Qur'an, it seems that its true meaning can only be discerned by a Muslim, because "this verse in no way endorses domestic violence (...) The main method of interpreting the Qur'an applied by scientists is intertextual reading of the text."[7] In this manner, "it becomes clear that the Qur'an prescribes both partners to be treated with respect, justice and benevolence" However, it is explained to us how is to be interpreted and what this text represents to the real life of women in Islam. Despite all this, it has been admitted that "religion is never a cause of domestic violence. While Muslim men try to justify the abuse through this verse, the truth is that the reason for this abuse is not and can never be religion."[8]

1.3. Principles of Social Coexistence in Matters of Family Relationships

Distinguishing it from the Qur'an, Shari'ah represents the sacred law of Islam that includes jurisprudence. Shari'ah has known over time and depending on every Muslim country, changes and improvements made by the prophets in line with social particularities, political and economic aspects of the time. Religious and secular law are separated from one another.

We could say that in Shari'ah can be found the rules of conduct for any Muslim, rules that if broken attract the penalties from the state authorities, and especially from the community. "Shari'ah is for Islam the way that enables to integrate persons in society. (...) The Divine Law is a network of command and attitudes that govern all human life and which, taken as a whole, allow people to integrate into society, as the dominant principle of Islam."[9] Precisely because it is for all Muslims, Shari'ah is not made up of teaching general, but specific rules applicable in daily life. Thus it includes human actions into five categories: obligatory, recommended and meritorious, prohibited, reprehensible and indifferent.[10]

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[3] *Idem*, p. 40.
[4] Ş. Reşceanu, *op. cit.*, p. 162.
[5] The Kuweit Colloquium was organised by the International Commission of Jurists, University of Kuweit and the Union of Arabic Lawyers, Kuweit, 9-14 December 1980.
[6] S. A. Aldeeb Abu-Sahlieh, *Projets de constitutions et droits de l'homme islamique*, Studia Arabica VIII, Ed. De Paris, 2008, p. 152.
[7] Muslim Women Association, *Femeia în Islam*, Ed. Femeia musulmană, Bucureşti, 2013, p. 115.
[8] *Idem*, p. 129.
[9] S. H. Nasr, *Islam. Perspectives et realites*, Ed. Buchet/Chastel, 1991, p. 115.
[10] Ş. Reşceanu, *op. cit.*, p. 39.

In matters of family relationships, we could include into each of these categories the following facts:

- Compulsory: marriage, divorce when the woman does not listen to the man, female circumcision;
- Meritorious and recommended: the martyrdom of women dying in childbirth;
- Prohibited: the interdiction of having two sisters as wives; it is forbidden for the wife of the younger brother to marry his elder brother (the reverse situation is allowed); prohibition to marry one's sister, niece, daughter or aunt; adultery (represented by looking or touching another woman);
- Reprehensible: the rules are not of great importance, being more rules on hygiene and nutrition;
- Indifferent: they do not cause "legal effects" in the sense that they not attract any penalties, nor rewards.

It is not difficult to recognize in these Islamic rules, even classified as Shari'ah some of the impediments to marriage regulated in the Romanian legal system: an example might be the prohibition of marriage between relatives enshrined in Article 274 of the Romanian Civil Code.

On the status of the woman to her husband, Shari'ah comprises of three categories of rights and obligations: reciprocal rights and obligations, rights and obligations that man has towards his wife, rights and obligations which the woman has towards her man - the woman can never have more rights than obligations.

1.4. The Monogamous/Polygamous Marriage

Unlike European countries, or rather, most Christian countries, that have regulated monogamous marriage - since polygamy is most often penalized both by civil (nullity of marriage later concluded), but also criminal law – it is very well known that the majority of Muslim countries have established rules that support polygamy.

At a European level, the European Convention on Human Rights affirms marriage between **a** man and **a** woman and subjects the celebration of the marriage to the rules regulated at a national level. Thus, the Romanian Civil Code regulates in article 273 the prohibition of a person who is married to enter into a new marriage. In terms of civil law, the penalty for violating this legal text is then the complete nullity of marriage (according to article 293 of the Romanian Civil Code)[11]. In terms of criminal law, according to art. 376 of the Romanian Penal Code, the imposed penalty for the conclusion of a new marriage by a married person is imprisonment from 3 months to 2 years or a fine.

"Several societies wished the occidentalization of the Muslim women, but they didn't succeed in each time because they were educated according to the Islamic moral and didn't change their opinion; one could notice the strong belief of the Muslim woman and the extremely important role that the Islam has in her way of thinking, mentality and feelings".[12]

Despite all the above-stated on the situation of monogamous marriage in European countries, in "the Islamic state" a man can have up to 4 wives — "get married to your pleasure with two, three or four women..." (4: 3 Qur'an).

Polygamous marriage continues to be a controversial subject, with particular problems occurring internationally in applying the rules of private international law, when such marriages involve "non-Muslim" persons. In the opinion of Muslims, "misconceptions about this traditional Islamic institution are widespread and strongly condemned by non-Muslims because the first image outlined in the minds of these is that Islam is a religion that encourages sexual indulgence of men in society and the subjugation of women through this

[11] Please refer to Oana Ghiţă, Roxana Gabriela Albăstroiu, *Dreptul familiei. Regimuri matrimoniale*, Ed. Humanitas, Bucureşti, 2013, p. 14 and the following.

[12] Cristina Otovescu Frasie, "The Women's Rights in the Islamic World", *AGORA International Journal of Juridical Sciences*, Agora University Press, Oradea, no.2/2011, p. 419.

hereditary system."[13] In supporting polygamous marriage, Arabic doctrinaires[14] inform those who do not show their adhesion to such principles that the conclusion of a polygamous marriage envisages compliance with some very strict rules, which we will briefly enumerate:

- The institution of polygamy is confirmed in principle by the Qur'an;
- The status of polygamy in Islam is one of permission which presents clear limitations;
- The practice polygamy arose as a way to protect widows and orphans – "social necessity and not someone's fantasy or indulgence"[15];
- A man should be able to financially keep their wives;
- A man must treat all wives in a completely equal manner.

To these rules, others can be added which are more or less accepted by some Arabic authors[16]. A man can marry a second woman if his first wife:

- Cannot have children;
- Proves to be disobedient;
- Has a nasty character from the point of view of her husband;
- Does not take care of her husband to his liking etc.

2. Concluding a Marriage

As we saw in the enumeration of facts set out in the Shari'ah, every Muslim man must enter into marriage. "Marriage in Islam is noble and necessary in general as it brings tranquility, procreation and the continuation of life with purity and responsibility. Marriage is an act of worship; it provides a legal relationship between a man and a woman, and most importantly, provides a means to fulfill the divine purpose of human procreation and human relations."[17]

According to Shari'ah, a man can marry a female child who has reached the age of 1 year and may have sex with her once she has reached the age of 9 years. To conclude this marriage the man must pay the girl's family a dowry.[18]

Some doctrinaires[19] say that the dowry is no longer usually paid in most Muslim countries to the girl's family, but to the woman herself, because Islam gave women the right to property.

To legally conclude a valid marriage, several conditions must be met:

- There are no impediments to the marriage; these include well known Shari'ah impediments regarding the impossibility of concluding the marriage of some people which have "blood or milk ties";
- To have the consent of themselves and their families;
- Legal formalities to be fulfilled;
- To pay the dowry - as we see it is not necessary to specify this in the contract what or how much the dowry represents, but only that it be paid after the conclusion of the contract or, in certain circumstances, after consummating the marriage.

There are a few well known impediments to marriage:

- Kinship by blood or marriage, co-lactation, oath of anathema - *standing impediments*;
- Mixed religion, the triple repudiation, kinship between the wives of the same husband, the idda period - *temporary impediments*.

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[13] Muslim Women's Association, *op. cit.*, p. 73

[14] Jamal A. Badawi, *Poligamia în Legea islamică*, Ed. American Trust, Indiana, 1976, p. 1.

[15] Eliz Sanasarian, *Activismul politic şi identitatea islamică în Iran*, în Lynne B. Iglitzin şi Ruth Ross (coord.), Femeile în lume 1975-1985, ed. a II-a, Ed. Santa Barbara, California, 1986, p. 215.

[16] Halef Afshar, *Femeile, Statutul şi Ideologia*, Ed. Macmillan, Londra, 1987, pp. 78-81.

[17] Muslim Women's Association, *op. cit.*, p. 124.

[18] http://www.pointsdereperes.com/articles/condition-femme-musulmane

[19] S. A. Aldeeb Abu-Sahlieh, *op. cit.*, p.151.

The impediment of marriage between persons related by blood or by marriage leads to the category "of prohibited persons" (maharim) which comprises ascendants and descendants and their spouses, the sister and descendants of siblings, aunts, sisters and aunts of ancestors, the mother and offspring of the wife. It is allowed to marry between cousins (collaterals four times removed).

The oath of anathema is the formula which invokes the wrath of God against adulteress women, which even at present leads to adverse social consequences for the woman who has suffered such an oath, the penalty is most often death, especially when she becomes pregnant because of the adultery.

Regarding mixed marriages between people of different religions, certain clarifications must be made: is not allowed for a Muslim woman to marry a non-Muslim man. However, it is possible for a Muslim man to marry a woman belonging to a revealed religion (Christianity and Judaism).

The idda period - withdrawal continence - is a period of four months and ten days between two consecutive marriages in which the woman is forbidden to marry or have sex in order not to give rise to doubts about a possible pregnancy.

We notice that the conditions which need to be observed upon marriage do not have too much in common with the conditions to be fulfilled by a European citizen, in general, to conclude a valid marriage. In the Romanian legal system, the conditions are set out in articles 271-277 of the Civil Code, in which we find all aspects concerning both positive background conditions (consent, age, marital status, sex difference) and impediments (bigamy, natural or blood kinship, guardianship, insanity and mental illness) . To these are added the substantive conditions and formalities to be observed at the marriage, provided for in articles 278-292 of the Civil Code.

During marriage, Muslim women have the right to be financially kept by her husband. Given that social repartition of activities has been made, as stated in Arabic literature, according to physical abilities and spiritual needs of women and men, quite often a woman cannot to have a job, because she is the one that takes care of the household and the children, and her husband is the one who financially support the whole family.

The husband's financial obligations include:

2.1. The Wife's Dowry

As we have mentioned earlier, in order to conclude the marriage, the husband must provide a dowry to the wife or her family. This dowry must be given when:

- A valid marriage contract is concluded, in which case the whole or part of the dowry is returned if the marriage is not confirmed or consummated or if the woman dies before its consummation.

- The actual consummation of a marriage, which was not validly concluded, in which case the man must pay the full dowry, if not forgiven by the woman.

We must keep in mind that the dowry does not represent a prerequisite to marriage, but a result of its conclusion. Thus, the fact that it was not stipulated within a marriage contract, does not prevent its valid conclusion, but once completed, the payment of the dowry becomes mandatory for the man.

No text of the Qur'an or Shari'ah provides a minimum or maximum value of the dowry, however it is believed that "the woman is entitled to a dowry equal to that of her peers upon the conclusion of a marriage"[20]. Besides, the dowry can be represented by any sum of money or any property that can be capitalized, a title of ownership or assignment of a debt.

In the Romanian legal system, the dowry appears somewhat different, being regulated by the Civil Code of 1864 as a matrimonial conventional regime with separation of assets that represented the legal regime. Currently this matrimonial regime no longer exists, the 2011

[20] Muslim Women's Association, *op. cit.*, p. 33.

Civil Code regulations are adapted to the social realities of the moment. Thus, we find stipulated that legal matrimonial regime - the regime of community of property (articles 339-359 of the Civil Code.) and conventional regimes: the regime of separation of property (articles 360-365 of the Civil Code.) and conventional community regime (articles 366-368 of the Civil Code.)

2.2. Marriage Expenses

Marriage expenses include several categories of costs. First are those costs incurred by marriage: the marriage contract, the marriage celebration. The wife or her family is not obliged to contribute to these expenses. Also, only where desired, she may bear some of the dowry costs, but most often this does not happen.

It is also the husband who takes care of the provision of housing for the family, as well as its setting. Whatever the material possibilities of the husband may be, he is obliged to ensure his wife with a space in which she is not obliged to wear a hijab. "Every woman needs an area in which she is not forced to wear hijab, whether it involves an apartment for her, her house, her bedroom in an extended family home or even an area with a curtain of a barracks or hut, if in a precarious financial situation"[21]

When it is the husband who contributes exclusively to the purchase of the house and its arrangement, it becomes his personal property, and his wife is granted a right of use of the residence and its accessories under the permission given by her husband. In some countries, the married woman's family may request that all the furnishings and decoration for the home be included in the dowry, recording them all in a list of household items and wedding jewelry.

Likewise, in other states the family of the future wife may help buy and prepare the necessary items for the family home. Depending on the will of the father of the bride, these goods will be the married couple's property, or may be just on loan until they are requested by the bride's family.

A third category of expenditure within a marriage agreement is the financial support that the wife owes her husband regardless of her physical condition. The husband must provide his wife, food, clothing, medical treatment and anything else she may need that is not disproportionate to the financial situation of the husband.

In the Romanian legal system the statement of expenditure is provided by the Civil marriage in a special way, by mandatory rules, under the primary imperative scheme (article 325-328 of the Civil Code). In these pieces of legislation, it is required for spouses to contribute to the marriage expenses within each other's means, but it also provides that the household work of either spouse is a contribution to the marriage expenses.

In the same manner, is the special legal status of the family home regulated (articles 321-324 of the Civil Code). This is the house where spouses and their children actually carry on family life and is legally protected by any act done by one of the spouses - even a sole owner - without the permission of the other and that could lead to the loss of the family house or furnishings and decorations.

3. Dissolution of marriage

Both the Qur'an and the Shari'ah do not encourage divorce, but ban it. Even on a social level, Muslims that go through a divorce, where it is allowed, are subjected to public scorn and become marginalized by the community to which they belong. In theory, in order to not be so "distant" from Western civilization, the possibility of divorce is allowed at the request of either or both spouses, when there are serious reasons affecting the marriage, and its continuation it would have highly serious effects on the family members.

Divorce may have two very different forms:

- *Divorce at the request of the husband* (talak) *or repudiation* occurs only if the marriage was consumed and represents a suite of procedures that are initiated by the husband

[21] *Idem*, p. 15.

who pronounces a sacramental formula followed by a period of separation in fact. This must be repeated three times. If after the third separation an agreement is not reach between spouses or the husband does not forgive his wife, the separation will be final.

The former husband will no longer be able to remarry the repudiated woman after the marriage ends and she gets remarried. Or, in the past not only could the repudiated woman not marry again, but more than that, once returned to her family, she was killed in order to remove the traces of any dishonor.

Repudiation by the husband can be done without this period of repeated separation by uttering three times the sacramental formula.

- *Proper divorce* (or tarliqa tatliq) is the divorce pronounced by the kadi at the request of the man or woman for very serious reasons. There are still many Muslim states that do not allow this form of divorce, because most Muslim countries do not give the woman the opportunity to get out of the marriage by her will.

Moreover, there are situations where divorce is granted to women in extremely difficult conditions, and the consequences are extremely serious. For example, a woman who was subjected to rape by her husband and accuses him of it must prove the rape through four male witnesses. Once proven, the woman will be sent back to his family who will have to return the dowry to the former spouse. To erase the dishonor done to by the wife who has failed to maintain the marriage and that certainly will not be able to contract a new marriage, the families of these women choose to kill them.[22]

In the Romanian legal system, even before the entry into force of the Civil Code there was the possibility of spouses to divorce by mere agreement. This dissolution of marriage may be carried out, under the law by the competent court or notary or the justice of the peace. Also, there is also the option of divorce due to the fault of one or both spouses, divorce at the request of either spouse after a separation which lasted at least two years or dissolution of marriage at the request of one spouse whose state of health makes it impossible to continue the marriage (according to article 373 of the Civil Code.).

Conclusion

At a mere enunciation of rules laid down in the Qur'an and Shari'ah or the way they are interpreted we understand immediately that we are talking about quite a different value system than any known to the European citizens, not to mention that to say that a clear and timely comparison of the European legal system with the Muslim legal system is impossible.

This different "vision" of legal values regarding women's rights that the "Islamic state" has towards the West has its source in a well-established tradition firmly implanted in the social consciousness and nurtured by experience and education during many generations. Muslim women, while enclosed in the cultural cage that religion provides under the watchful eye of the father or the husband - because most times she is illiterate - is subject to the husband and not the protection that he should offer her as the Holy Book prescribes in its ideas.

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DONATION AND REMOVAL OF ORGANS, TISSUES OR HUMAN CELLS FROM THE DECEASED PERSONS

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Abstract: This paper proposes an approach to a subject with profound implications, generating a lot of controversy, the donation and removal of organs, tissues and human cells from the deceased persons. There will be analyzed the legal conditions required to be met according to the law for this process to be feasible, not forgetting of that exposure the possible criminal consequences that failure of these conditions could attract.

Key words: donation, removal, deceased person, organ, tissue, human cell, consent.

I. Introduction

Death and the legal consequences that it generates has been the subject of numerous doctrinal analysis, likely to reveal the peculiarities of this phenomenon. "The universal experience of human death generates responses in every medium of individual, social and cultural expression. Laws based on religious or moral principles reflect this conditioning in their approaches to death (…) less attention is paid to the inherent qualities or rights of people than to their property; people are a means by which property is owned, possessed, protected and transferred. Death is considered a legal status. The time of a person's death marks the point at which other legal events occur, such as the inheritance of an estate by survivors or the process of distribution of an estate, a body may (and in a relatively short time must) be buried, cremated or otherwise disposed of in accordance with law (…) it also marks the point under modern legislation at which organs may be recovered for posthumous transplantation. The legal status of death arises when the legal criteria of death are satisfied. The criteria are based on observations that medically qualified persons have the capacity to make, although in many circumstances lay persons could apply the criteria too. Classically, the criteria of death were the cessation of respiration and blood circulation[1]".

As for the aspects regarding the inviolability of a person, doctrine makes a clear distinction between a living person and a deceased one, by stating that "even if it is still impregnated with the personality of the person it used to be, a corpse is merely a thing. This does not mean that a corpse does not require special protection. But the notion of inviolability does not have the same meaning whether we are discussing a living person or a deceased person[2]".

As regards the content of the process of donating vital organs after death "donation of skin, bone, cornea, as well as total body donation for research and teaching. The term is more often used in the context of organ transplantation where large solid organs can be transplanted

[1] Bernard M. Dickens, Legal and judicial aspects of post mortem organ donation in Procurement, Preservation and Allocation of Vascularized Organs, Springer Link, p. 343, 344.
[2] T. Prescure, R. Matefi, Civil law. General Part, Hamangiu Publishing House, Bucharest, 2012, p. 307, authors who quote O. Ungureanu, C. Munteanu, Civil law. The person in the regulation of the new Civil Code, Hamangiu Publishing House, Bucharest, 2012, p. 23.

into recipients. The declaration of death by neurological criteria takes on special significance in the setting of transplantation because the majority of donors are declared dead by neurologic criteria[3]".

As shown in the doctrine this process of organ transplantation is not new, so „the miraculous transplantation of organs was spoken about in medieval times, and a 16th century picture by Fernando del Rincon, hanging in the Prato, shows a sacristan whose leg had become gangrenous receiving the healty leag of a black man, presumably a slave[4] ".

2. The legal conditions of donation and removal of organs, tissues or human cells from the deceased persons

The issue of removing organs from the deceased person is one with profound implications, likely to cause controversy on a doctrine level. Once the new Civil Code came into force, it introduced a section which regulates the respect owed to the deceased person, as the lawmaker found it is necessary to regulate these aspects. Thus, as stated by article 81 of the Civil Code "removing organs, tissues and human cells from the deceased person, whether it is for a therapeutic of scientific purpose, is performed only under the conditions stated by law, with prior written consent of the deceased person, expressed during lifetime or, in lack of, based on the freely expressed consent from the surviving spouse, the parents, the descendents or the collateral relatives until the fourth degree".

This provision regarding the order of the relatives which express consent for the deceased person is regulated in article 147 point 4 of Law no 95/2006 regarding the health reform. The lawmaker expressly regulates the imperative conditions which should be met in order to remove organs from the deceased person.

This procedure is possible only if the deceased person offered consent during lifetime or, in lack of, consent is necessary from the people expressly regulated by the lawmaker, by respecting the outlined order. "By mentioning a specific order of the people who can express consent for removing organs, we can draw the conclusion that relatives of a more distant degree can only express valid consent if the closest relatives are unable to do so (...) if the person who is the closest relative of the deceased refuses removal of organs, consent expressed by a more distant relative is ineffective[5]". As for the form of the consent, it is necessary that it is expressed in writing, as an ad validitatem condition, whether it is a prior consent from the deceased person, or it is provided by the relatives, as pointed out by the lawmaker. Given the implications of this act it was natural for the legislature to impose specific conditions of form which are required to be fulfilled by the document which contain the consent for removal.

The lawmaker also regulated the possibility of the living person to express consent for removal of organs once deceased, by notary consent and registration in the National registry for organ, tissue and human cells donors[6].

However, if during lifetime, a person expressed its option contrary to organ donation, organ removal is strictly forbidden[7]. The possibility to consent or oppose removal of cells, tissue is qualified by doctrine as a component of a person's right to decide regarding its own body[8].

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[3] Encyclopedia of Intensive Care Medicine, Springer Link, p. 1630.
[4] Erich H. Loewy, Textbook of Medical Etichs, Springer Link, p. 109 și urm.
[5] E. Chelaru, Civil law. The person in the regulation of the new Civil Code, C.H. Beck Publishing House, Bucharest, 2012, p. 30.
[6] Article 147, point 5 of Law no 95/2006 regarding the health reform.
[7] See article 147, sixth alignment of Law no 95/2006 regarding the health reform.
[8] E. Chelaru, op. cit., p. 29.

The text of article 147 of the Law regarding the health reform makes a distinction between the deceased donor with no heart activity and the deceased donor with some cardiac activity. Thus, the deceased donor with no cardiac activity is, according to point 1 of the previously quoted text of law "the person who has no cardiac or respiratory function, with no possibility of resuscitation and in an irreversible manner, as confirmed by two primary physicians. The confirmation of the deceased donor with no cardiac activity is performed according to the resuscitation protocol, as approved by the health ministry, except for the unequivocal situations"; the deceased donor with cardiac activity is "the person who has no brain function, according to the protocol for declaring a person brain dead, as approved by the health ministry"[9].

The lawmaker also states that "declaring a person brain dead is performed by physicians who are not a part of the teams who coordinate, remove or transplant organs, tissues and human cells"[10].

The lawmaker limits the performance of this procedure, whether it is for therapeutic or scientific purpose. Thus, the provision of article 141 first alignment of Law no 95/2006 regarding the health reform states that "donation and transplant of organs, tissue or human cells is performed in a therapeutic purpose, by ensuring quality and safety standards in order to protect human health". We must also mention the provision of article 23 of Law no 104/2003 regarding the handling of human corpses and removing organs and tissues from corpses for transplant purposes "the university course of anatomy, pathological anatomy and the corresponding services can take over bodies for scientific and teaching purposes in the following situations:

a) when there is a written prior agreement from the patient or the family;

b) living people can decide that, upon their death, their body will be given to teaching institutions, based on common regulations elaborated by hospitals and universities;

c) unclaimed bodies are given to teaching facilities, according to the provisions of article 17 and 18".

3. Criminal consequences of not full filling the legal conditions regarding organs' removal and transplant

Removal or transplant of organs, tissues or human cells require some strict conditions which are expressed by the lawmaker; disrespecting these conditions can cause criminal consequences, whether we are discussing removal or transplant from living donors or from deceased persons.

Thus, according to the provisions of article 155 of Law no 925/2006 regarding the health reform "removal of organs when it compromises an autopsy, as requested by law, is a crime and is punished with imprisonment from 6 months to 3 years or a fine". Donation of organs, tissue or human cells, in order to obtain material benefits, for himself or for another person, is also a crime and is punished with imprisonment from 3 months to 2 years or a fine[11].

It is also a crime to force a person to donate organs, tissue or human cells and it is punished with imprisonment from 2 to 7 years and the forbidding of some rights[12] .

"The publishing or advertising of notices regarding organ donation or donation of tissue or human cells, donation which would be performed in order to obtain material benefits

[9] Article 147, point 2 of Law no 95/2006 regarding the health reform.
[10] Article 147, point 4 of Law no 95/2006 regarding the health reform.
[11] Article 156, first alignment of Law no 95/2006 regarding the health reform.
[12] Article 156, second alignment of Law no 95/2006 regarding the health reform.

for that certain person of for another person" is also a crime as regulated by the lawmaker and is punished by imprisonment from 6 months to 3 years or a fine[13].

Other crimes sanctioned by the lawmaker are "organizing or performing organ, tissue or human cells removal for transplant, in order to obtain material benefits for the donor or organizer"[14] as well as buying organs, tissue or human cells in order to resell it"[15]. In both cases, the punishment is imprisonment from 2 to 7 years and the forbidding of some rights. The attempt is also punished.

4. Conclusions

As is results from this analysis, the donation and removal of organs, tissues and human cells from deceased persons can be done only under the conditions expressly laid down by the legislator. This procedure is not possible if the deceased person did not offered his consent during lifetime or, in lack of, the consent is necessary from the people expressly regulated by the lawmaker, namely the surviving spouse, the parents, the descendents or the collateral relatives until the fourth degree, respecting this order. As for the form of the consent, it is necessary that it is expressed in writing, as an ad validitatem condition.

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[14] Article 157, first alignment of Law no 95/2006 regarding the health reform.
[15] Article 157, second alignment of Law no 95/2006 regarding the health reform.

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MATERIAL COMPETENCE OF THE NATIONAL DIRECTORATE FOR INVESTIGATING ORGANIZED CRIME AND TERRORISM

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Abstract:
In Romania, nowadays, there is a general effort to prevent, but also to combat the most important categories of crimes, those which have the aptitude to affect public order and social peace. It is about violent crimes relied to organized criminality and to organized crime itself. In order to succeed in this effort, there were created specialized judicial authorities, with competences in prosecuting these cases, as National Directorate for Investigating Organized Crime and Terrorism or National Anticorruption Directorate. Being concerned not to omit some crimes in these special competences, sometimes, can be observed positive conflict of competences between the special judicial authorities. This study observes some particular situation and indicates the adequate solution for each of them.

Key words: *National Directorate for Investigating Organized Crime and Terrorism; National Anticorruption Directorate; prosecution competence; positive conflict of competence.*

Introduction

In accordance with provisions of art. 1, para. (1) of Law no. 508/2004[1], the Directorate for Investigating Organized Crime and Terrorism (hereinafter referred to as DIOCT), operates as a structure specialized in countering organized crime and terrorism, within the Public Prosecution Office of the High Court of Cassation and Justice.

This structure's authority is to perform criminal prosecution in particular cases. Crimes that determine this authority are indicated under art. 12 of Law no. 508/2004 and the indicated text specifies that the authority is "regardless of the person's position/quality", meaning an authority determined only by the nature of the crime[2]. Please find below an analysis of the crimes specified by law.

1. The material competence of DIOCT

a) Crimes those are included in the scope of an organized criminal group

[1] Law on the establishment, organisation and operation within the Public Ministry of the Directorate for Investigating Organised Crime and Terrorism, published in the Official Journal of Romania, Part I, no. 1089 dated 23 November 2004, as amended and supplemented.

[2] I. Neagu, M. Damaschin, Tratat de procedură penală, Partea generală, Universul Juridic PH, Bucureşti, 2014, p. 338.

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According to the meaning of article 367, para. (6) of the Criminal Code, an organized criminal group means a structured group consisting of three or more persons, established for a particular period of time to act in a coordinated manner in order to commit one or more crimes. Therefore, it mentions one of the forms of mandatory plurality of perpetrators, specifically established plurality. Under this circumstance, the lawmaker chose to incriminate the simple establishment of a group in order to commit crimes[3].

DIOCT's authority is involved in particular crimes, in the extent they are found in the program of such an organized criminal group. The lawmaker chose to specify the crimes expressly:

- the crimes of murder (art. 188 Criminal Code), first-degree murder (art. 189 Criminal Code), unlawful deprivation of freedom (art. 205 Criminal Code), blackmail (art. 207 Criminal Code), slavery (art. 209 Criminal Code), subjection to forced or mandatory labour (art. 212 Criminal Code), procurement (art. 213 Criminal Code), exploitation of begging (art. 214 Criminal Code), use of an underage person for begging purposes (art. 215 Criminal Code), use of services of an exploited person (art. 217 Criminal Code), computer fraud (art. 249 Criminal Code), fraudulent performance of financial operations (art. 250 Criminal Code), acceptance of financial operations performed fraudulently (art. 251 Criminal Code), property damage (art. 263 Criminal Code), first-degree criminal damage (art. 264 Criminal Code), currency forgery (art. 310 Criminal Code), forgery of credit instruments or payment instruments (art. 311 Criminal Code), circulation of forged currency or forged credit or payment instruments (art. 313 Criminal Code, with reference to forged instruments stipulated under article 310 and article 311 Criminal Code), holding of instruments in order to forge securities (art. 314 Criminal Code), fraudulent issue of currency (art. 315 Criminal Code), forgery of foreign securities if the forged foreign securities are forged coins or credit or payment instruments (art. 316, with reference to art. 310 and art. 311), computer fraud (art. 325 Criminal Code), infringement of the arms and ammunition conditions (art. 342 Criminal Code), unlawful use of weapons (art. 343 Criminal Code), forgery, deletion or modification of marking on lethal weapons (art. 344 Criminal Code), infringement of conditions on nuclear materials or other radioactive materials (art. 345 Criminal Code), infringement of conditions on explosive materials (art. 346 Criminal Code), criminal usury (art. 351 Criminal Code), trafficking toxic products or substances (art. 359 Criminal Code), illegal access to a computer system (art. 360 Criminal Code), illegal interception of a transmission of computer data (art. 361 Criminal Code), alteration of integrity of computer data (art. 362 Criminal Code), disruption of operation of computer systems (art. 363 Criminal Code), unauthorized transfer of computer data (art. 364 Criminal Code), illegal operations with computer devices or programs (art. 365 Criminal Code);
- the crime of theft (art. 228 Criminal Code), aggravated theft (art. 229 Criminal Code), robbery (art. 233 Criminal Code), aggravated robbery (art. 234 Criminal Code), piracy (art. 235 Criminal Code), robbery or piracy followed by the death of the victim (art. 237 Criminal Code), abuse of trust by defrauding the creditors (art. 239 Criminal Code), simple bankruptcy (art. 240 Criminal Code), fraudulent bankruptcy (art. 241 Criminal Code), fraudulent

[3] M. Gorunescu, I.A. Barbu, M. Rotaru, Drept penal, Partea general, Universul Juridic PH, București, 2014, p. 196.

management (art. 242 Criminal Code), fraud (art. 244 Criminal Code), insurance fraud (art. 245 Criminal Code), embezzlement of public tenders (art. 246 Criminal Code), patrimonial exploitation of vulnerable persons (art. 247 Criminal Code), misappropriation (art. 295 Criminal Code, art. 308-309 Criminal Code), embezzlement of funds (art. 307 Criminal Code, including the scenario under art. 309 Criminal Code, *but only if the case, regardless of the number of concurring crimes, the material damage incurred exceeds the Romanian currency equivalent of EUR 500,000.00*;

- the crime stipulated under art. 5 of Law no. 11/1991 on the countering of disloyal competition[4]. In legal contextual definition, art. 2, para. (1) of the same regulation provides a generic definition of the acts that represent disloyal competition as being those "commercial practices of the enterprise that come against fair practices and the general principle of good faith and which generate or may generate damages to any participants on the market". The definition of disloyal competition is found in article 5, the behavior patterns representing the material element including: a) the use of a company, logo or packing material likely to generate confusion with those used legitimately by a different company; b) the use in commercial purposes results of experiments or of other confidential information related thereto, transmitted to competent authorities in order to obtain authorizations to market pharmaceutical products or chemical products destined for agriculture, which include new chemical compounds; c) disclosure, acquisition or use of trade secrets by third parties, as a result of industrial espionage, if this affects the interests or activity of a legal entity; d) disclosure or use of commercial secrets by persons authorized by the legitimate holders of such commercial secrets to represent them in front of public authorities or public institutions, if this affects the interests or activity of a legal entity; e) the use by a public servant in the meaning of article 175, para. (1) of the Criminal Code[5], of commercial secrets of which they become aware during the exercise of job attributions, if this affects the interests or activity of a legal entity; f) production in any form, import, export, storage, offer for sale or sale of merchandise or services with false indications[6] on invention patents, patents for plant types, trademarks, geographical indications, drawings or industrial models, topographies of semiconductor products, other types of intellectual property, such as the outer image of the company, showcase design or clothing design for staff, advertising means and similar, origin and characteristics of merchandise, as well as with regard to the name of the producer or dealer, in order to mislead the other dealers and beneficiaries.
- *the crimes stipulated by Law no. 297/2004 on the capital market*[7] are those stipulated under art. 279 of this regulation, consisting of: a) intentional presentation by the administrator, manager or executive manager of the company to shareholders of inaccurate financial statements or false information related to the company economic circumstances; b) perpetration of market manipulation, market abuse or inappropriate use of privileged information[8], stipulated under art. 245-248 of Law no. 297/2004; c)

[4] Published in the Official Journal of Romania, Part I, no. 24 dated 30 January 1991, as amended and supplemented.

[5] It can be found that the lawmaker chose to limit to scenarios under art. 175, para. (1) of the Criminal Code, excluding those under art. 175, para. (2) of the Criminal Code.

[6] False indications on the origin of goods, in the meaning under para. 1 letter f), mean any indications likely to induce the idea that the goods have been manufactured in a particular locality, territory or State. False indication regarding the origin of goods does not include the name of products with a name that became generic and only indicates its nature, apart from the situation when the name is accompanied by a mention that could lead to the belief that those goods have that origin.

[7] Published in the Official Journal of Romania, Part I, no. 571 dated 29 July 2004, as amended and supplemented.

[8] According to art. 244, para. (1) of Law no. 297/2004, privileged information means information of precise nature which was not made public, which refers directly or indirectly to one or more issuers or one or more

purposeful access by unauthorized persons of electronic systems for transaction, storage or settlement;

- crimes stipulated under Law no. 241/2005 for the prevention and countering of tax evasion, if the respective case, regardless of the number of concurring crimes, the generated material damage exceeds the Romanian currency equivalent of EUR 500,000.00;
- crimes stipulated by Law no. 86/2006 on the Romanian Customs Duty Code, namely contraband, aggravated contraband, use of false documents for Customs authorities;
- the crime stipulated under art. 155 of Law no. 95/2006 on the reformation of the health sector[9], consisting of: "harvesting or transplant of organs, tissue or cells of human origin from live donors without a consent given according to the Law".

b. crimes that involve DIOCT*'s authority, regardless of them being committed or not within the organized crime group:*

- crimes stipulated under art. 210 Criminal Code (trafficking of persons), 211 Criminal Code (trafficking of underage persons), as well as attempted trafficking, art. 303 Criminal Code (disclosure of Secret of State information), including the instance of particularly severe and material consequences, art. 325 Criminal Code (computer fraud), including the scenario where it is committed in relation with the authority of a foreign State, art. 360 Criminal Code (illegal access to a computer system), art. 361 Criminal Code (illegal interception/tapping of a transmission of computer data), art. 362 Criminal Code (alteration of integrity for computer data) art. 363 Criminal Code (disturbance of operation of computer systems), art. 364 Criminal Code (unauthorized transfer of computer data), art. 365 Criminal Code (illegal operations with computer devices or programs), as well as the attempted crimes specified above, art. 374 Criminal Code (child pornography), art. 394-412 Criminal Code (crimes against national security);
- crimes specified under Law no. 51/1991 on the national security of Romania;
- crimes stipulated under Law no. 111/1996 on the safe performance, regulation, authorization and control of nuclear activities;
- crimes specified under Law no. 143/2000 on the prevention and countering of trafficking and illicit consumption of drugs;
- crimes specified under Law no. 535/2004 on the prevention and countering of terrorism;
- crimes specified under the Government Emergency Ordinance no. 121/2006 on the legal conditions of drug precursors[10];
- crimes specified under Law no. 194/2011 on countering operations with products susceptible of having psychoactive effects, other than those stipulated in the regulations in force.

c. the crime stipulated under article 367 of the Criminal Code, if the purposes of the criminal group include any of the crimes specified above;

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financial instruments and which, if they were made public, may have a significant impact on the price of such financial instruments or the price of derivatives they are related to.

[9] Published in the Official Journal of Romania, Part I, no. 372 dated 28 April 2006, as amended and supplemented.

[10] Approved with modifications by Law no. 186/2007, as amended.

d. the crime of money laundering stipulated under Law no. 656/2002 for the prevention and sanctioning of money laundering, as well as for the establishment of measures to prevent and counter the financing of terrorism, republished, as amended, if the money, goods and values subject to money laundering are generated by the perpetration of crimes assigned to the authority of the Directorate for Investigating Organized Crime and Terrorism;

e. crimes which are related, according to art. 43 Criminal Procedure Code, to those stipulated under letters a)-d). These are the situations where it is justified to merge two or more cases. Concretely, DIOCT's authority shall cover the investigation of crimes committed by the same person who perpetrated a crime of those specified above, even if judging by their nature they would not fit this area of competence/authority. The same is the solution when two or more crimes are related and it is necessary to merge the cases for the proper serving of justice, even if only one of the crimes falls under DIOCT's authority.

2. Some incidents related to the competence of specialized judicial entities

The indications of the special law as representing the material competence with regard to DIOCT's criminal investigation represent the rule, and particular exceptions are possible from this rule.

Therefore, it is possible that one of the crimes under DIOCT's authority is committed in criminal participation conditions by persons who are in a military position and by persons without such position. Under such circumstances competence and authority must be established, because art. 54, para. (3) of the Criminal Procedure Code indicates that "criminal prosecution in case of crimes perpetrated by members of the military must be performed by the military prosecutor". The quoted text considers the scenario where all participants in a crime are members of the military. However, if the criminal prosecution case includes at least one defendant which is not a member of the military, consideration must be given to dispositions under art. 63, para. (1) Criminal Procedure Code, related to art. 44, para. (4) and (5) Criminal Procedure Code, the prosecution authority belonging, under such circumstances, either to the civil criminal prosecution entity with equal ranking to the military prosecution entity, or to the civil criminal prosecution entity with equivalent ranking to the military prosecution entity (if the military prosecution entity has a superior ranking than the civil one).

In other concrete circumstances, there may be a positive conflict of authority and competence between DIOCT and the National Anticorruption Directorate (hereinafter referred to as NAD), considering the nature of the crime and the damages generated by the perpetration of such crime. Therefore, we can make reference to a scenario where an embezzlement of public tender occurs (art. 246 Criminal Code) in the circumstances of an organized criminal group which generates a damage of EUR 1,200,000.00. Under such circumstances, the generated damage exceeds the threshold of EUR 500,000.00 specified under art. 12, para. 1, letter a, section ii) of Law no. 508/2004, coming under the authority of DIOCT, but is also in excess of the EUR 1,000,000 specified under art. 13, para. (3) of Ordinance no. 43/2002, and it can come under the authority of the NAD. We believe that under such circumstances the competence and authority to perform the criminal prosecution shall be with the judicial entity notified first. The solution is indicated by the provisions of art. 63 related with art. 44, para. (1) of the Criminal Procedure Code. Art. 63 states expressly that, among others, provisions of art. 44, para. (1) of the Criminal Procedure Code also apply correspondingly during the criminal prosecution, and the referenced text in case of merger, if, in comparison with various perpetrators or different crimes, the competence belongs, according to the law, to multiple courts of equal ranking, the competence to judge all crimes and all perpetrators belongs to the court notified first.

In the extent that a crime which, according to its nature, belongs to the authority of DIOCT is perpetrated by a person in a position that involved higher competence, on the grounds of art. 63 related with art. 44, para. 1, the final thesis in the Criminal Procedure Code:

"if, considering the position of persons, competence belongs to courts of various rankings, the competence and authority to judge all merged cases belongs to the court of higher ranking", and this disposition is also applicable with regard to criminal prosecution entities.

Conclusions

Even in practical situations there are cases of positive conflict of competence between the specialized prosecuting authorities, it is more important that no author of a serious crime to remain unpunished than to keep rigid limits of material competences. In the same time, is capital in order to respect international standards in human rights protection to create efficient mechanisms to avoid *bis in idem* cases and to respect the legality[11].

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[11] C. Nedelcu, Criminalistică, Hamangiu PH, Bucureşti, 2014, p. 15.

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SUCCESSOR REPRESENTATION – A THEORETICAL APPROACH IN THE LIGHT OF THE NEW CIVIL CODE
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Abstract*:* According to the current legal provisions, successor representation is that legal institution which allows a legal heir of a more distant degree in relation to the defunct, named as a representative, to gather the successor rights of his ascendant, called a represented, whether he renounced his inheritance, he is undignified or he proceeded the time of succession. Successor representation is a distinctive institution from that of representation both in regard to its legal nature and in regard to the effects it produces, a fact which is clearly pointed out in the new Civil Code.
Key-words*:* representation, successor representation, legal fiction, descendents, privileged collaterals

I. INTRODUCTION

Amongst the forms in which representation is expressed, a particular one, by notes and judicial legal characters, is successor representation.

In this context, article 965 of the new Civil Code states as follows: „By successor representation, a legal heir of a more distant degree, named a representative, by the effect of law, receives the rights of his ascendant, called a represented, in order to inherit the amount which would have been awarded to his ascendant, had he not been undignified when the inheritance procedures began"

Thus, we notice that, by this article, the lawmaker introduces the representation of the undignified person as a novelty.

In such circumstances, the annulment of the title of heir of the undignified person[1] does not result in the legal impossibility of him being represented by his descendents. As a consequence, the representatives of the undignified person become heirs by representation and can be awarded parts of the inheritance not only for themselves, as stated in the 1865 code.

Specialty doctrine created several definitions for successor representation, but all of it point out the same legal consequences. Thus, the literature which we believe to be „classical", by authors such as M. Planiol and G. Ripert define successor representation as „a legal institution according to which certain heirs, descendents of the same branch as opposed to descendents from another branch, exercise the rights which should have been exercised by their predeceased ascendant, had he survived "de cuius."[2]

On this note, professor Fr. Deak shows that successor representation represents a benefit of the law according to which a legal heir (or more heirs) of a more distant degree – called representatives – become heirs by taking over the rights of the ascendant – called a

[1] Acording to the Romanian Civil Code, notary guide, The Official Bulletin, Bucharest, 2011, p. 335.
[2] M. Planiol, G. Ripert, Troite pratique de droit civil francaise, Librairie generale de droit et de jurisprudence, vol VI, Paris, 1932, p. 78-80.

represented – who is deceased at the time of inheritance in order to gather the part of the inheritance which should have been awarded to the ascendant, had be been alive.[3]

As a consequence, the representative will gather the goods instead of the represented[4] or the part of the inheritance which should have been awarded to the author of the representative, had he been able to inherit.[5]

These definitions present the essential traits of this institution, as well as the mechanism, the conditions and the effects it produces.[6]

Based on these traits, the lawmaker of the new Civil Code created "succesio in locum" in order to accomplish a complete balance between the different branches.[7]

Recent specialty doctrine showed that by the effect of successor representation, the inheritance is awarded to the most distant descendents "in locum parentis praedefuncti" based on their own right – in jure proprio – an not as a consequence of the rights of the predeceased.[8]

The reasoning behind this legal institution was that there should be an obvious balance between branches; also, there shouldn't be a state of judicial synchronization between brothers and sisters on one hand and descendents on the other hand.

Thus, recent specialty doctrine in France shows that „if the lawmaker regulated representation, the purpose of this institution was to neutralize hazard and all this was achieved in order to promote the equality of branches". [9]

II. IS THE SUCCESSOR REPRESENTATION "A FICTION OF LAW"?

Article 664 of the 1865 Civil Code, a rather similar regulation to that of article 738 of the French Civil Code, stated that representation was a fiction of law with the effect of placing the representatives in the place, degree and rights of the represented, a solution which would be subject of criticism from specialty doctrine.

We can easily see that the phrasing according to which representation is „a fiction of law" is used in an express manner. Thus, the normal question of knowing what this fiction of law was, arose; as a consequence, was the legal mechanism which made representation possible a fiction or not?

"Ad abruptum" we could state an opinion as follows: any representation entails a fiction according to which the representative, by concluding legal acts for the represented, substitutes him, thus resulting in the idea that the representative himself concluded that act.

In this simplified vision, we can assume the existence of fiction by replacing the represented, thus allowing for the representative to valorize the interests of the representative as if he would act [10]

This hypothesis would lead to a simplified and speculative scheme. Thus, doctrine stated a reasoned opinion according to which, in case of conventional representation, there are two distinctive realities. First, there is an agreement between the two legal wills expressed by the conclusion of a representation convention. Second, there is the effective operation of valorizing the interests of the represented by the representative. On the other hand, we can

[3] Fr. Deak, Succession law treaty, Universul Juridic Publishing House, Bucharest, 2002, p.78
[4] M. D. Bob, Issues of regulating successor representation in the new Civil Code in R.R.D.P. no 1/2011, p.37
[5] M. C. De Roton-Catala, Droits des parents en l'absence de conjoit succesible, p. 459 cap. 231 in the paper Droit patrimonial de la famille, Dallas, 2011, coordinated by Michel Grimaldi.
[6] C. Murzea, E. Poenaru, Representation in private law, C. H. Beck Publishing House, Bucharest, 2007, p. 80
[7] Ioan Popa, Inheritances and liberalities, Universul Juridic Publishing House, Bucharest, 2013, p. 102
[8] M. Grimaldi, Droite civile. Succesions, Litec, Paris, 2011, p. 136
[9] M. Grimaldi, Droite civile. Succesions, Litec, Paris, 2011, p. 136
[10] C. Murzea, E. Poenaru, op. cit., p. 81

easily see that the representative manifests his own will in order to fulfill the empowerment provided to him as, regardless of how limited his empowering is, he still has some degree of freedom in making decisions.[11] The situation is similar in case representation is made by legal or judicial manner.

As opposed to the above mentioned aspects of representation, if fiction would be the simple replacing, we could be discussing „imperfect fiction" as we can't discuss fiction in the most pure sense of the word because, in this case, there is a convention which involves an agreement between two wills, a situation which is likely to formally invalidate the existence of a legal fiction.

The opinion phrased by professor I. Deleanu is much more trenchant, stating that „the idea of fiction in the matter or representation must be definitely removed."[12]

Thus, we are faced with the dilemma of whether, in the matter of representation, the idea of fiction is unacceptable, as would be explained by the „expresis verbis" phrasing of article 664 of the Cuza code, which shows that successor representation is a fiction of law; however, this phrasing is the only mention of this kind. This originates from the lawmaker of Napoleon's Code intention of taking over certain institutions from Roman law, thus influencing the Civil Code of 1865, according to which the existence of a patrimony without a living owner was inconceivable, thus resulting in the introduction of fiction according to which the predeceased heir was considered to be alive, which would allow him to inherit, thus allowing his representative to inherit in his place.

In this context, according to a legal fiction, the represented, although deceased, was considered to be alive, thus being able to inherit; this would result in his representatives becoming heirs in his place. The above mentioned opinion is inexact, as successor partition does not mean the predeceased inherits his part and then transfers it to his heirs; it means that the representative is entitled to inherit by "apae legis". As a result, the representatives do not benefit from fiction of representation, but a fiction by replacing within the same degree.[13]

In a quite clear statement, professor I. Deleanu shows that the inheritance rights of the representative, even if they should have been awarded to the predeceased, „are not transferred thought the patrimony of the represented", an issues which was also pointed out by classical doctrine represented by M. Planiol and G. Ripert, who showed that „the representative does not exercise his right as an heir of the represented, but as a personal right, thus the idea according to which everything occurs as if the representative would be alive is not entirely correct."[14]

For these reasons, some authors believe that successor representation is an exception from the rules of partition of inheritance „ab intestat", thus invalidating the idea that all relatives of the same degree are equal.

Thus, professor I. Deleanu mentions that – „the law derogates from the rule of proximity of relatives and the rule of equality of relative of the same degree"[15].

By analyzing this matter in detail, by using the means of judicial logic and the internal resources which are the basis of these exceptions, we can't ignore the fact that the lawmaker regulates the assumption that the represented is still alive when the procedures for de cuius succession begin. Thus, the lawmaker ignores the obvious reality and creates a „legal fiction".

In this context, the lawmaker creates, by fiction, legal consequences resulting from a hypothesis which represents it own creation. We agree with the majority opinion phrased by doctrine according to which successor representation is „a legal fiction according to which the

[11] According to P. Vasilescu, The relativity of the civil legal act, Rosetti Publishing House, Bucharest, 2003, p. 203-204
[12] I. Deleanu, Judicial Fictions, All Beck Publishing House, Bucharest, 2005, p. 443,
[13] Ibidem, p. 263
[14] M. Paniol, G. Ripert, op. cit., p. 80-81
[15] I.Deleanu, op.cit., p.263

mechanism by which the representatives become heirs instead of the predeceased is established"[16].

Article 751 of the French Civil Code clearly mentions that „representation is a legal fiction which results in calling in succession the representatives to gather the rights of the represented, a situation which clearly abandons the vision phrased by the Roman system of law, according to which the representative becomes heir by effect of his own right „in locum parentis praedefuncti" thus inheriting a right which belonged to the predeceased[17].

As a conclusion, we believe that successor representation is an exception from the principle of proximity of relatives between heirs form the same category, as well as from the principle of equality between relatives of the same category and same degree called to inherit. Thus, successor representation is a fiction of law which results in placing the representatives in the place, degree and rights of the represented.

The utility of representation is that, by the effects is produces, it removes some unjust consequences of the principle of proximity of relatives and the principle of equality between relatives of the same degree[18].

In regard to the area of enforcement, successor representation can apply to descendents of the children of the defunct and descendents from brothers and sisters.

The institution of successor representation is an exception from the principles of the legal partition of the inheritance, thus it derogates from these rules; as these exceptions are to be strictly interpreted, the provisions which regulate these issues have the same legal regime.

As a consequence, no other person can benefit from representing the parents of the defunct or his own parents (uncles or aunts of the defunct). Similarly, the surviving spouse can't inherit by representation from a brother or a parent or any other relatives of the predeceased spouse; also, he can't be represented[19].

Article 741 of the French Civil Code clearly states that representation is not allowed in regard to decedents.

We notice that the Romanian lawmaker makes no mention of this situation, although the strict interpretation of article 966 first and second alignment would lead to the same conclusion. Article 976 second alignment expressly mentions that „in order to represent for the inheritance of the defunct, the representative must meet all the general conditions required in order to inherit".

Given the situation that successor representation is an exceptional benefit which the law grants to some heirs, we can't expand it to other heirs, as we lack a formal text of law.

III. CONCLUSIONS

This article deals with the issue of representation succession, an institution whose role is to achieve an evident balance between strains.

The successor representation institution is distinct from that of representation in private law, both from the perspective of the judicial nature as well as the legal effects it produces. The theme contains the novelty introduced in Romanian civil law in matters of succession representation by the provisions of the new Civil Code, being also a tool used in the process of interpretation of succesoral law from the doctrinal perspective.

[16] I.Popa, op.cit., p.102
[17] Ibidem
[18] Ioana Nicolae, Civil law. Succession. Legal inheritance, Hamangiu Publishing House, 2014, p.97
[19] C.Murzea, E.Poenaru, op.cit., p.85

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ASPECTS OF PRIVATE LAW WHICH ARE NOT ENFORCED BY THE REGULATION (EU) No 650/2012

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Abstract: *A novelty element which concerns even Romanian citizens is the enforcement of Regulation (EU) no 650/2012. Although the area of enforcement of the regulation should include all aspect of civil law regarding a deceased person's patrimony, certain aspects were deliberately left out from the enforcement area of this regulation, as the questions governed by the law of companies or relating to matrimonial property regimes. To illustrate the effects of the death of an associate in a company, we will provide a short comparative presentation of the continuance of the collective society with the heirs of the deceased partner as regulated by Law no 31/1990 regarding Romanian companies as opposed to the French Civil Code. Also, our brief analysis of the Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, may shed some light on what is to come in matrimonial property regimes.*

Key-words*: succession, inheritance, companies, matrimonial regimes, choice of governing law, comparative law.*

The regulation of succession law is different from one state to the other within the European Union, as there is no unified succession regime, thus allowing each state to enforce its own system in regard to succession, according to its notational traditions in this area; the succession regime may be one of the most stable components of civil law.

In spite of the local specifics, national tradition in regard to succession, at least within the great Roman-German system of law, have the same origin, as the two main pillars of European continental civil law - French law and German law - derive from Roman law1.

A novelty element which appears in the European continental system, which concerns Romanian citizens who own goods or have a usual residence in another member state, is the enforcement of Regulation (EU) no 650/20122 in case of succession which began on the date of August 17th, 2015 or after this date3.

The purpose of this regulation is that the citizens can organize their succession in a timely manner, mostly in regard to the law that applies to the inheritance; also, it aims to

1 See V. D. Zlătescu, Panorama of the great contemporary systems of law, „Continent XXI" Publishing House, Bucharest, 1994, p. 29.

2 *Regulation (EU) no 650/2012 of the European Parliament and the Council of July 4th, 2012 regarding the competence, the law which applies, the acknowledgement and execution of legal decisions and accepting and executing authentic documents regarding succession and the creation of an European heir's certificate, published in the Official Bulletin of the European Union,* L 201, of 27.7.2012, p. 107-134.

3 According to alignments (2) - (4) of article 83 of the Regulation, these provisions will be applied in certain situations even if the law which applies was chosen before August 17th, 2015.

eliminate obstacles which prevent the free circulation of people who are faced with difficulty in exercising their own rights in regard to succession with foreign elements.

However, we must state that choosing the law which applies to succession is limited by the law of the state whose citizenship *de cuius* has at the time that law was chosen or at the time of death. If *de cuius* has several citizenships, he can choose the law of any of the states whose citizen he is at the time of choice or at the time of death.

If *de cuius* fails to make a valid choice, the law of the state where the deceased had its domicile at the time of death will apply; the European lawmaker's choice to establish the usual residence as a connection factor between succession and the law which regulated it is justified by the increase of citizen's mobility as well as the need to ensure a correct enforcement of European Union justice.

The area of enforcement of the regulation should include all aspect of civil law regarding a deceased person's patrimony, namely all forms of transfer of goods, rights and obligations, whether it is a voluntary action of transferring goods based on a will or an *ab instestat* succession.

According to article 23 second alignment, the law which applies to succession, regulates the cause, time and place where inheritance procedures begin; quality of heirs of the beneficiaries, succession capacity, disownment and indignity, transfer of rights and obligations which form the succession patrimony to heirs and legatees, the powers granted to the heirs and the people chosen to execute the will; responsibility for succession debts, succession reserve, calculation of the parts of the inheritance which are awarded to each heir, succession partition.

However, certain aspects were deliberately left out from the enforcement area of this regulation. Thus, according to article 1 second alignment letter h), "the matters regulated by corporate law and the law of other bodies which are organized as companies or not, such as statements included in the articles of association of companies or other such bodies which establish what will happen with the shares4 in case the members or the holders of these shares die".

As a result, even if *de cuius,* partner, in a Romanian company, would choose to apply the law of another state to his succession, in regard to the shares he holds, Romanian law will apply and not the foreign law chosen based on the Regulation.

To illustrate the effects of the death of an associate in a company, we will provide a short comparative presentation of the continuance of the collective society with the heirs of the deceased partner as regulated by Law no 31/1990 regarding Romanian companies as opposed to the French Civil Code.

In case of collective society, the first alignment of article 229 of Law no 31/1990 states that "it is dissolved by [...] the death of one of the associates when, due to these causes, the number of the associates was reduced to one". Unlike companies with limited liability, the collective ones do not allow for the possibility to continue their existence as a single partner

4 The European lawmaker considers not only the actions in a restricted manner but also the shares of other types of companies.

company5.

Nevertheless, the second alignment states that the company will not be dissolved if, at the time the company was founded, its articles of association mention that the companies can continue to exist with the heirs of the deceased partner. Thus, the articles of association can state the possibility that the heirs of the deceased partner become partners. On the other hand, the same document can state the impossibility to continue the activity with the heirs of the deceased partner. In any of these two cases, the statement contained in the articles of association will produce effects and the company will either continue with the heirs, or it will not continue with the heirs of the deceased partner.

In regard to the succession of an associate, the third alignment of article 202 provides that "in case an amount of shares are acquired by succession, the provisions of the second alignment are not to be applied unless the articles of association state otherwise"; thus, the second alignment states that "the transfer to people outside the company is only allowed if it has been approved by the partners who hold at least three fourths of the shares".

As a consequence, if the article of association does not mention this aspect, such an approval will not be necessary to the heirs as they will become partners. Even if it would state the possibility to continue with the heirs, acquiring the quality of shareholder would be subject to a certain condition, namely the approval of the current shareholders.

A specific case is that in which the article of association contains no mention of whether the company can continue with the heirs of the deceased share holder, but it also does not forbid this aspect, making no mention of it whatsoever.

This situation was the object of a decision of the commercial section of the High Court of Romania which stated that "as the articles of association of the company made no mention of the fact that the activity of the company can continue with the heirs of the deceased partner, the ex wife of the deceased shareholder does not acquire the quality of heir or that of partner"6.

The French Commercial Code states, in article L221-15, that the company dissolves when one of the associates dies. Unlike Law no 31/1990, the death of a single partner, even if the number of the remaining partners is of more than one, is enough to cause the dissolve of the collective company.

According to the same article, if the articles of association state that, in case one of the partners dies the company can continue with the heirs, these mentions will apply, except for the case when, in order to become an associate, the heir will have to be approved by the company.

Thus, the French Commercial Code also states that acquiring the quality of heir depends on the approval of the remaining partners in case the article of association contains

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[5] See HCR, commercial section, decision nr. 1920/2002, în „Romanian Law Review" no 1/2003, p. 83, quoted by S. D. Cărpenaru, *Romanian commercial law treaty*, Bucharest: Universul Juridic Publishing House, 2012, p. 297, n. 3.

[6] High Court of Romania, commercial section, decision no 4372 of November 13th, 2003 [www.scj.ro]. For contrary opinion see doctrine quoted by M. Barbu, *Can the heirs continue as associates in a limited responsibility company instead of their deceased author*? in „Judicial Courier", no 1/2009, p. 18, n. 18.

such a provision. Obviously, if it states that continuing the activity with the heirs without requiring approval, the heirs of the deceased person will have the quality of partner as a result of accepting the inheritance.

Neither Law no 31/1990 nor the French Commercial Code make a distinction between the heirs of the deceased associate; they can be legal heirs or legatees, provided the articles of association authorize the continuity of the company with them.

If the company continues with the remaining partners or if, in order to become an associate, the heirs must be approved by the company, but did not receive that approval, the French Commercial Code states that possibility of the heir to become a creditor of the society, thus being entitled to receive the shares of his author.

Similarly, the Romanian lawmaker stated that, in case an associate dies, the collective society must pay to the heirs the share they are entitled to, based on the final accounting balance sheet, within 3 months from the notification regarding the death of the associate7.

As we have seen, both regulations, Law no 31/1990 regarding Romanian companies and the French Commercial Code, are not substantially different in regard to continuing the activity of a collective society, as the principles which govern this matter are essentially the same.

However, the European lawmaker excluded the right or Romanian Companies from the enforcement area of Regulation (EU) no 650/2012 as there is the risk that the economical activity undergone by the Romanian companies is affected by the enforcement of a regulation (even if it is limited to matters of succession) which is different from the laws which regulate the articles of association of companies, as well as the forming and functioning of companies, as the laws are not unified in this matter.

As a result, although *de cuius* can choose the law which will be applied to his succession, as this law will determine the quality of heir of the beneficiaries, establishing the shares of inheritance which they are entitled to, as well as other rights regarding succession, including the succession rights of the surviving spouse, are the clauses mentioned in the articles of association of companies which establish what will happen in case the associate dies. These are still subject to national law based on which that certain company was created.

Another aspect which should be left out of the enforcement of the Regulations is the patrimonial matter of matrimonial regimes, including matrimonial conventions, as they are known in some legal systems, provided succession matters are not the object of these conventions8.

Although matrimonial regime does not have a direct influence over the successor right of the surviving spouse, determining the entire inheritance entails a liquidation of the matrimonial regime, an operation based on which the surviving spouse can own a smaller or a larger size, depending on the law which applies to the matrimonial regime.

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[7] See S. D. Cărpenaru, *Romanian commercial law treaty*, Bucharest: Universul Juridic Publishing House, 2012, p. 297.

[8] The matter of matrimonial regimes was explicitly left out from the enforcement of the Regulation (CE) no 593/2008 of the European Parliament of June 17th, 2008 regarding the law which applies to contract obligations (Rome I). Thus, in article 1 second alignment letter c) it is stated that „the obligations resulted from *patrimonial aspects of matrimonial regimes* [...] are not subject of enforcement of this regulation [...].

Thus, it is not only the matrimonial regime chosen by the spouses that can influence the length of the inheritance, but also the law which applies to it.

The matter of which law applies to matrimonial conventions is the object of a project of Council Regulation regarding the competence, the law which applies, the acknowledgement and execution of legal decisions in the matter of matrimonial regimes9.

The need of a regulation which establishes a unified regulation for matrimonial regimes in transnational situations is needed as a result of the increased mobility and the number of marriages which involve at least two member states, as well as the number of divorces and the transnational marriages which dissolve as a result of the death of one of the spouses.

The European Commission issued a communication10 which became an annex to the suggestion of regulation, by providing an example regarding the partition of goods acquired after marriage, a situation which should be avoided once this new regulation is passed.

According to this example, a Greek-Hungarian couple was married in Greece and lived there for three years. After this time, the two decide tot move to Hungary. After two years in Hungary, the marriage was dissolved.

On one hand, according to Greek law, by applying the regulations regarding conflicting laws, the liquidation of the matrimonial regime is subject to Greek law, as the liaison factor is the common residence of the spouses at the time of marriage. On the other hand, by applying the regulations regarding conflicting laws in the Hungarian system of law, the liquidation of the matrimonial regime should be governed by Hungarian law, as the liaison factor is the common residence of the spouses at the time of divorce.

As a consequence, if the Hungarian spouse estimates that the law of his state would be favorable, by protecting its interested in a privileged manner, he will file a complaint before the Hungarian court and, according to current regulation, the spouse who is more informed can initiate this procedure first, thus placing the other spouse in an inferior position.

This is why the European lawmaker chose to regulate these matters in order to ensure security and judicial predictability in the matter of matrimonial regimes, thus thinking that these objectives could not be achieved if the member states would benefit from appreciation in including the suggested regulation in national law11.

We must also state that this regulation, much like the one regarding succession, does not aim to unify internal law in the matter of matrimonial regimes, which are different from one member state to the other, but to ensure predictability in regard to the law which applies to all the goods of a couple, regardless of where these goods are, thus avoiding to divide the law which applies12 to the matrimonial regime of a couple, namely the enforcement of

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[9] European Commission, Suggestion of regulation regarding the competence, the law which applies, acknowledgement or the execution of legal decisions in the matter of matrimonial regimes, Brussels, 16.03.2011, COM (2011) 126 final.

[10] European Commission, Notice of the Commission to the European Parliament, Council, the European Economical and Social Committee and the Regions' Committee - Eliminating uncertainty in regard to the patrimonial rights of international couples, COM(2011) 125 final, Brussels, 16.3.2011, p. 2-3.

[11] European Commission, COM (2011) 126 final, p. 5.

[12] European Commission, COM (2011) 126 final, p. 8.

national laws which are different in regard to goods subject to matrimonial regime, thus causing a high degree of legal insecurity.

According to article 15 of the suggested regulation, "the law which applies to matrimonial regime [...] is applied to all the goods owned by the spouses"; point 13d states that the notion of matrimonial regime should comprise all provision of patrimonial law which is applied between spouses and in their relation to third parties, after marriage and after the marriage ends13. Patrimonial law provisions should include not only mandatory provisions of the law which applies, but also certain facultative provisions which can be agreed upon by spouses based on the law which applies.

After this regulation is enforced, the spouses or the future spouses will be able to choose the law which applies to their matrimonial regime. However, this choice will be limited to one of the following laws: either the law of the state where the future spouses have their common residence, or the law of the state where one of the spouses or future spouses has its residence at the time of making this choice, or the law of the state whose citizen one of the spouses is at the time of making this choice. As a result, the spouses are given the possibility to choose the law which will apply, but this choice is limited in order to avoid the situation in which the spouses would be tempted to choose a law which would have nothing to do with their marriage.

There is also the situation in which the spouses do not expressly choose the law which applies to the their matrimonial regime; in this case, according to article 17, the law which applies is either the law of the state where the spouses or future spouse have their first common residence or the law of the state whose citizen one of the spouses is at the time of marriage (this will not apply if the spouses have more than one common citizenship) or the law of the state to which the spouses have the strongest connection with, considering all circumstances, including the place where the marriage was concluded.

Thus, the European lawmaker established a series of objective factors which will be applied based on their importance (the first common residence, common citizenship, the state to which the couple has the strongest connection with) in order to determine the law which applies, as the chosen criteria ensure a balance between the reality of the couple's life and the need to easily identify the law which applies to the matrimonial regime in regard to the spouses as well as third parties14.

The law which applies to the matrimonial regime will regulate, among others, the partition of the spouses' goods in different categories, before and after marriage; the responsibility for the debts of the other partner, the power to administrate the goods of the other spouse during marriage, the dissolve of the marriage, the liquidation of the matrimonial regime and the partition of goods in case the marriage ends, the effects of the matrimonial

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[13] European Parliament, Report regarding the suggestion of regulation regarding the competence, the law which applies, acknowledgement or the execution of legal decisions in the matter of matrimonial regimes, A7-0253/2013, 20.08.2013, p. 9-10.

14 European Commission, Suggestion of regulation *regarding the competence, the law which applies, acknowledgement or the execution of legal decisions in the matter of matrimonial regimes,* Brussels, 16.03.2011, COM (2011) 126 final, p. 8.

regime on the legal relation between one of the spouses and a third party, as well as the validity of the matrimonial regime15.

However, some aspects, such as the residence of the family, will continue to be regulated by national law, regardless of the law which applies to the matrimonial regime according to the suggested regulation, as article 22 states that the provisions of the regulation will not have influence over the mandatory provision which must be respected by a certain member state in order to protect its public interests.

As a result, even if the spouses or future spouses who reside in Romania would choose another law for their matrimonial regime, the provisions of the Romanian Civil Code would continue to protect the family residence as the spouse who is not owner will be able to request an annulment of the act by which the other spouse administered the family residence [alignment 4 of article 322 of the Civil Code], even if the law which applies to the matrimonial regime would not state such a sanction.

Much like the law which applies to succession, a choice which can be modified or revoked according to the fourth alignment of article 22 of the Regulation (EU) no 650/2012, the law which applies to the matrimonial regime can be changed at any time during the course of marriage. Thus, as the law is not immutable and the law which applies to matrimonial regimes may not correspond to the legitimate expectances of the spouses, they will be able to choose another law for their matrimonial regime, but the choice is limited to the law of the usual residence at the time the choice was made or the law of a state whose citizen one of the spouses is at the time of making this choice.

Another interesting aspect is that the spouses will be able to modify the law which applies to their matrimonial regime in retroactive, without causing prejudice to the right of third parties which resulted from enforcing the previous law and without affecting the validity of the previous acts concluded based on the law which applied at that certain time16.

Equality between spouses is a legal desiderate rather than a practical reality, as the Commission for women's rights and gender equality recommended a series of amendments17 among which one requires our attention.

Thus, as it is possible that a vulnerable spouse did not make a free and correct matrimonial choice in regard to property due to specific circumstances, like financially depending on the other spouse, a difference in salary, the lack of access to information or legal council or circumstances regarding illness or domestic violence, the choice of the law which applies to matrimonial regime should be preceded by the correct information provided to each of the spouses by legal council, especially in regard to the legal consequences of this

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[15] European Parliament, Report regarding the suggestion of regulation regarding the competence, the law which applies, acknowledgement or the execution of legal decisions in the matter of matrimonial regimes, A7-0253/2013, 20.08.2013, p. 34. Also, according to article 15a, the law will be applies regardless of whether it is the law of a member state or not –*Ibidem,* p. 16.

16 *European Parliament, Report regarding the suggestion of regulation regarding the competence, the law which applies, acknowledgement or the execution of legal decisions in the matter of matrimonial regimes,* A7-0253/2013, 20.08.2013, p. 36.

17 Notice from the Commission for women's rights and gender equality destined for the Commission for legal affairs regarding the suggestion of regulation regarding the competence, the law which applies, acknowledgement or the execution of legal decisions in the matter of matrimonial regimes, 7.05.2012.

choice.

On one hand, we believe that such council is to be desired; however, we believe that it is unlikely that this could effectively prevent the situations in which the vulnerable spouse makes a less fortunate choice in regard to the matrimonial regime. On the other hand, once the Regulation regarding the competence, the law which applies, acknowledgement or the execution of legal decisions in the matter of matrimonial regimes is passed, the spouses or future spouses will be able to plan the patrimonial effects of the matrimonial regime more carefully.

As we have seen, one the Regulation (EU) no 650/2012 is enforced, *de cuius* can choose in favor of another law. Also, after the passing and enforcement of the regulation regarding the free choice of the law which applies to matrimonial regimes, new possibilities will be available in regard to planning patrimonial effects.

As a conclusion, both theoreticians and the practitioners of law within the EU will have to apply not only their national law, but they should also become more familiar with the regulations which are in force in other member states in order to meet the needs of counseling the transnational couples.

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EXECUTIVE POWERS IN RELATIONS WITH THE PARLIAMENT. PART I

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Abstract*: By art. 1 para. (4), Romanian Constitution, republished, enshrined the principle of separation and balance of powers. Therefore, this principle implies the existence of collaboration but also of a mutual control between these powers, including between the legislative and executive power, thus being expressed the balance between these two powers. By constitutional established powers, the two central authorities of the executive power - the President of Romania and the Government - will participate at the observance and application of this principle, including by those duties they perform in their relations with the legislative power.*

Keywords: *head of state, legislative power, convening, dissolution, messages, promulgation*

Introduction

Based on the constitutional provisions in force, we can identify two functions of the Romanian executive, namely the executive one and the administrative one. In our view, the determination of the powers which enable fulfilling these functions it is possible by reporting to the executive structures and, therefore, the specific functions of each of them. Motivation of this allegation is that the powers enshrined in the constitution and laws in the task of these structures, in fact represents their competence, namely of the head of state - the president or monarch, and of the government. So we appreciate as difficult, if not impossible, to talk about the competence of the executive as stand-alone entity, more so as most contemporary constitutional systems have established a dualist executive and not a monocratic one.

Convening of Parliament[1]

According to Article 63 para (3) of our Constitution, republished, the newly elected Parliament convened by the President of Romania, within 20 days from the election[2], but also in his request, the Chamber of Deputies and the Senate can also meet in special sessions.

[1] See O. Şaramet, "Powers of the Romanian President in relations with Parliament. Convening and dissolution of Parliament" in I. Boldea, coordinator, *Debates on globalization. approaching national identity through intercultural dialogue. Studies and article. Section: Social studies*, "Arhipelag Press XXI", Târgu-Mureş, 2015, pag. 721-729.

And so, for the first session after the elections, the constituent legislator has the obligation of the President of Romania, to convene the new parliament, thus making a prerogative – reminiscent of the period in which the monarch was trying to reserve some procedural paths meant to assure a further influence on the new legislative[3], prerogative that was taken by the constitutions of states that have established a parliamentary regime or a semi-presidential one. Starting from the premise that at the time they would meet in their first session after the elections, neither the Chambers of Deputies nor the Senate have designated internal teams of work, so not even their presidents who could take over the attribution from the President of Romania, appreciated by our lawgiver as the latter – authority placed at "the highest level of the hierarchy of executive power"[4], with permanent activity, not knowing a "presidential vacation" similar to the parliamentary one, to be the one to convene the newly elected parliament in its first session. However, taking into account the examples offered by the provisions of constitutions[5], and also the provisions and dispositions of our Constitution

[2] Provisions similar to those in our Constitution we can find in Constitution of Poland, art.109 para.(2), settled the right of the President of Republic to convene the newly elected House of Representatives – Sejm – and Senate, within 30 days from the date of the elections, in their first session. This Constitution was consulted on: https://www.constituteproject.org/constitution/Poland_2009.pdf?lang=en, accessed: 25.10.2015.

[3] See T. Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar*, vol. II, „Lumina Lex" Publishing House, Bucharest, 2000, pag.240. This power of the head of state is found today in the constitutions of countries with constitutional monarchies. Thus, for example, art.35 para.(1) of the Constitution of Denmark, adopted on June 5, 1953, provides that A newly elected Folketing shall assemble at twelve o'clock noon on the twelfth week-day after the day of election, unless the King has previously convoked a meeting of its Members. This Constitution was consulted on: https://www.constituteproject.org/constitution/Denmark_1953.pdf?lang=en, accessed: 25.10.2015. Likewise are the provisions of the Constitution of Norway, adopted on May 17, 1814, the King, according to art.68, can, by reason of extraordinary circumstances, such as hostile invasion or infectious disease, designates another town in the Realm for the purpose, to assemble on the first weekday in October every year in the capital of the Realm. When the Storting is not assembled, it may be summoned by the King if he finds it necessary, according to art. 69. This Constitution was consulted on: https://www.constituteproject.org/constitution/Norway_2015.pdf?lang=en, accessed: 25.10.2015. More than this the Grand Duke of Luxembourg, according to art.72 para.(3) of Constitution of Luxembourg, adopted on October 17, 1868, opens and closes each ordinary session of the Chamber either in person, or in his name by his proxy appointed for that purpose. This Constitution was consulted on: https://www.constituteproject.org/constitution/Luxembourg_2009.pdf?lang=en, accessed: 25.10.2015. Art.62 point b) of Constitution of Spain, entered into force on December 29, 1978, provides the same specifying that the King is the one who summon and dissolve the Cortes Generales and to call for elections under the terms provided for in the Constitution. This Constitution was consulted on: https://www.constituteproject.org/constitution/Spain_2011.pdf?lang=en, accessed: 25.10.2015. We can observe that although some constitutions have provided a certain date when newly elected parliaments can meet, they have recognized that the monarch is still able to convene parliament in extraordinary sessions.

[4]See T. Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar*, vol. II, „Lumina Lex" Publishing House, Bucharest, 2000, pag.240.

[5] Compared to them, we can mention examples from other constitutions. Thus Article 133 c) from the Constitution of Portugal recognizes the President's ability to convene in extraordinary assembly the Republic, only on emergencies, in the same way as the provisions in Article 63 from the Constitution of Argentina, with the specification that in this case it is recognized the President's possibility to extend a regular session. Constitution of Portugal was consulted on: https://www.constituteproject.org/constitution/Portugal_2005.pdf?lang=en, accessed: 25.10.2015. Constitution of Argentina was consulted on: https://www.constituteproject.org/constitution/Argentina_1994.pdf?lang=en, accessed: 25.10.2015. In these cases, the constituent legislator preferred to score a date or a period in which the new elected Parliament to convene its first session, without according this attribution to the head of state. Therefore in Portugal, according to Article 173 para (1), thesis I, the Republic Assembly shall meet on the third day subsequent to the day in which the final results of the election were communicated.

form 1866 and 1923[6], we appreciate that this attribution of the President can be replaced with the institutional obligation imposed by constitutional provisions that the newly elected parliament to convene at a certain time or after a certain amount of time from the established and communicated final result of the elections. An additional argument against this proposal of enactment of the law is, in principle, the fact that in the case where the President of Romania does not convene the newly elected Parliament within 20 days from the elections, there will be a meeting.

Like most constitutions[7], our Constitution recognizes the right of the Head of State to convene the Parliament in an extraordinary session, in certain prescribed conditions, with or without prior consultation of other authorities, as is the Government or internal teams of work of the Parliament or political parties represented by the Legislative. Thus, although the provisions of Article 66 para (3) of our Constitution does specify only that the President of Romania or the permanent office of each Chamber or at least a third of the senators and deputies can demand convening of the Chamber of Deputies and Senate in an extraordinary session, the Regulations of the two Chambers specify the conditions that must be met when such a request is to be taken into consideration. Both Article 81 para (2) and (4) of the Regulations of the Senate[8], and Article 84 para (3) from the Regulation of the Chamber of Deputies[9] stated that any request of convening any extraordinary session, regardless of which of those entitled formulated it, shall be done in writing and need to contain the following: the reason, the proposed agenda, and also the duration of the session. Lack of any of these elements and the rejection of the proposed agenda, by the Chamber, will not allow the extraordinary session to take place. But, while the demand for convening is formulated, for

[6] In this respect, see the provisions of Article 95, para (1), (4), (5), (6), (7) and (8) from our Constitution from 1866, namely Article 90 para (1), (4), (5), (6), (7) and (8) from the Constitution of 1923. The constitutional rules recognize the right of the King to convene the Assemblies in extraordinary sessions, and to dissolve both Chambers and just one of them, to present a message at the beginning of a session, to close the works of the Assembly. It is recognized the right to convene the Parliament – National Representation, only just before the time when the two Assemblies should meet to make the law, namely 15th of October of each year.

[7]For example, the provisions of Article 84 para (2) from the Constitution of Slovenia, they recognize the Republic President's right to request the convening of a special session of the National Assembly – the Slovenian Parliament. Constitution of Slovenia was consulted on: https://www.constituteproject.org/constitution/Slovenia_2013.pdf?lang=en, accessed: 25.10.2015. In exchange, the constituent French legislator recognizes the Prime Minister's, and not the President's, right to ask that the Parliament meet in an extraordinary session, according to Article 29 para (1) from the Constitution, but, if the Parliament does not meet in right, the opening and closing of the extraordinary sessions will be discreetly made by the President of the Republic. Constitution of France was consulted on: https://www.constituteproject.org/constitution/France_2008.pdf?lang=en, accessed: 25.10.2015. Appreciated by the French doctrine as being an attribution, a competence tied to the French President against which his discretionary power could not manifest, not even in a period of cohabitation, practice has imposed modifying this point of view. Thus, presidents like Du Galle or Mitterrand have refused to sign such decree which also had justified the doctrine to assert that the final decision to convene or not in an extraordinary session which, in fact, is the decision of the French President. The amendment of the Constitution in the year 1995 and introducing a unique session of the Parliament has been appreciated in the doctrine as being one of the ways to quit the convening of the Parliament in an extraordinary session, and, implicitly, the possibility of the Republic's President to manifest the discretion, and to avoid possible political conflicts, especially the ones between him and Prime Minister, him and the Parliament. In this regard, see H. Portelli, *Droit constitutionnel*, Dalloz Publishing House, Paris, 1999, pag.204, and also pag.251.

[8] See: https://www.senat.ro/pagini/reg_sen/reg_senat.htm; accessed: 25.10.2015.

[9] See: http://www.cdep.ro/pls/dic/site.page?den=regcd1_1; accessed: 25.10.2015.

example, by the President of Romania, the actual convene, even in an extraordinary session, is a prerogative of the Presidents of the Chambers such as is apparent from both the constitutional rule – Article 66 para (3), and the provisions of the two mentioned regulations – Article 81 para (3) and Article 84 para (4). These texts of the regulations specify the fact that in the case where a request for convening in an extraordinary session does not include the mandatory indications specified above, the Chairman in question has the possibility of not taking it into consideration.

Dissolution of Parliament[10]

The President of Romania does not have the right to give "the start" of a new Parliament in a new legislature or to convene it in an extraordinary session, but to end a legislature before the end of the 4 year mandate, the Constitution[11] recognizing his right to dissolve the Parliament. According to Article 89 from our Constitution, the President of Romania can dissolve the Parliament and not just one of its Chambers, but only if the conditions specified herein are met: the Parliament does not allow the confidence vote for forming the government within 60 days from the first request; rejection in this period of at least two requests; the consultation of the President with both Chambers and the leaders of the parliamentary groups; it should be the first and only dissolution in a year; it should not be about the last 6 month of the President's mandate and it should not be instituted one of the following states: mobilization, war, siege or emergency.

Expression of a political crisis, this "weapon" of dissolution is a direct and personal action of the President against the Parliament, not just a nomination of his competence thereof involves just putting his signature on a decree whose application lies, in fact, to the Prime Minister[12]. In taking this decision the President is only conditioned to consult with the presidents of the two Chambers of Parliament and with the leaders of the groups of parliament, but it is not obliged to take account of their views, the final decision belonging entirely to him. By taking this decision, the President can avoid some institutional or social blockage, particularly, in our opinion, at the time when the Government needs to cohabit with

[10] See O. Şaramet, "Powers of the Romanian President in relations with Parliament. Convening and dissolution of Parliament" in I. Boldea, coordinator, *Debates on globalization. approaching national identity through intercultural dialogue. Studies and article. Section: Social studies*, "Arhipelag Press XXI", Târgu-Mureş, 2015, pag. 721-729.

[11] Most constitutions recognize to the head of state – president or monarch – this right. For example, Article 88 para (1) from the Constitution of Italy provides the possibility that the Republican President to dissolve both or just one of them, after consulting the presidents of the two Houses of Parliament. In exchange, the constituent legislator from Czech Republic has recognized that the Republic's President, according to Article 62 c) just the right to dissolve one of the Chambers of the Parliament, respectively the Chamber of Deputies. Constitution of Italy was consulted on: https https://www.constituteproject.org/constitution/Italy_2012.pdf?lang=en, accessed: 25.10.2015. Constitution of Czech Republic was consulted on: https://www.constituteproject.org/constitution/Czech_Republic_2013.pdf?lang=en, accessed: 25.10.2015. Moreover, the Latvian Constitution, through article 48, gave the President of the Republic just the right to propose the dissolution of the Parliament, based on his proposal will be held a referendum, and if more than half of the votes cast are "for" dissolving, the Parliament will be considered as dissolved. But if, in the case where after the referendum, the Parliament is not dissolved, the responsibility belongs to the President that considers it dismissed, the Parliament choosing another President to fulfill the mandate. Constitution of Latvia was consulted on: https://www.constituteproject.org/constitution/Latvia_2014.pdf?lang=en, accessed: 25.10.2015.

[12] See P. Pactet, *Institutions politiques. Droit constitutionnel*, Masson Publishing House, Paris, 1993, pag.390-392.

the Parliament, the majority of the Parliament is not in favor of the government that becomes minority, provided that the President should be "on the side" of the Government. But the dissolution is seen as a "weapon of government coalition attacks"[13] when the President is not supported in his actions by the majority of the Parliament, thus the Government becomes its exponent.

These meanings identified by the French doctrine gives the French President an active role in the relation between the executive and the legislative, stating that in this system, the President, according to Article 12 from the Constitution, can dissolve just one of the Chambers of Parliament, namely the National Assembly. However, we are not taking into consideration that such role, "fits" on the profile of the President of Romania close to a president of parliamentary republic, than the one from a semi-presidential republic, such as the French one. Nevertheless, we appreciate that exercising this attribution by the President of Romania would be more justifiable in situations where we can talk about an institutional blockage, unless it is cause and effect at the same time, while being just political games. Anyway, if he decides to dissolve the Parliament, the President must fully comply with the conditions established by constitution and classified by doctrine[14] in general terms, namely: the denial of the Parliament's vote of confidence to form the Government within 60 days from the first request; the rejection of at least two requests; the prior consultation of the Presidents of the two Chambers and of the leaders of the parliamentary groups, and special conditions, as well as the rest of them that have been listed above.

Addressing Parliament messages

Another attribution of the President, in his relations to the Parliament, is the possibility or obligation of addressing messages. In this regard, Article 88 from the Constitution provides him the possibility to address messages regarding the main political issues of the nation, thus creating the possibility for the President to communicate with the Parliament, knowing that there is no subordinating relations between these two authorities, but also the fact that the President does not politically respond in front of the Parliament, like the Government. Assessment of the moment, content, form, even the way of addressing or not of the message, belongs only to the President. But the effects that such a message can produce, can not only be political or juridical, the President being unable to impose his own points of view, so as nor the Parliament can force to express its opinion regarding certain problems.

However, the President has the obligation to address a message to the Parliament when there is a case of armed aggression against the country, being forced to take urgent actions to dismiss it, actions that must be immediately communicated to the Parliament. In this case, unlike the former one, the Parliament can debate this message at the same time with the moment of its presentation[15].

Promulgations of laws

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[13] Idem, pag.392

[14] A. Iorgovan, *Tratat de drept administrativ*, vol.I, „All Beck" Publishing House, Bucharest, 2005, pag.305.

[15] In this respect see the Decision of the Constitutional Court no 87/1994 on the constitutionality Article 7 from the Rules of the common sessions of the Chambers of Deputies and the Senate, published in Official Gazette of Romania, Part I, no 292, from October 14th 1994.

The Executive does not limit itself only just to summon, dissolve the Parliament or address it a message through the President, getting involved in the lawmaking process. Thus the legislative initiative and the Government, together with the members of the Parliament, senators or a number of at least 100.000 citizens entitled to vote. In fact, most of these initiatives come from this authority, the legislation projects being submitted to the qualified Chamber to adopt it, according to Article 74, para (3) from the Constitution, as a first notified Chamber, according to Article 75 from the same legislative document. Entrusting the right of legislative initiative of the Government is, in fact, justified by the constitutional role, in the achievement of which, the Government [16] it would be best qualified, knowing its realities and the existent needs in the society, knowing the legal requirements of the state, but also knowing how to promote these towards the Legislature. Both realities and needs of the society will be reflected in the explanatory memoranda that mandatory accompany the legislative projects, according to Article 29 para (1) from the Law 24/2000 on legislative techniques for drafting laws, republished with the subsequent amendments. In consideration of the constitutional provisions, Law 90/2001, with the subsequent amendments, has recognized by Article 11 b), as one of the main tasks of the Government and the initiation of bills and their subjection to the Parliament, but also the one according that the Government prepares the drafts of law on the state budget and of the budget of social insurance (Article 11 e)), as well as the enforcement of powers of the authorities and public administration laws and other legislative provisions adopted in application thereof (Article 11 d)).

Although our Constitution has not recognized the President as having the right of initiative legislature[17], we should mention an exception established by Article 150 para (1) from the Constitution, republished, that states that the two authorities need to collaborate in this regard, conditioned by a proposal made by the Government, and thus the President of Romania can initiate a proposal to revise the Constitution.

If the "birth" of a law is due to mostly the implication of the Government, its publication in the Official Gazette of Romania and its entry into force is conditioned by promulgation[18] by the President. By signing the bill, the President authenticates the text of

[16] The subordinating and the collaborating reports that the Government has with the ministries and other specialized bodies on the public central local administration that are subordinated to or in the subordination of or in coordination of ministries with prefectures and the bodies of public local administration, and also with the autonomous administrative authorities, allow the Government to exercise the legislative initiative including acquiring bills drafted by those authorities. To achieve a good development of the law drafting, the submission for approval, starting with February 1st 2008, entered a new regulation on procedures, at the level of the Government to elaborate, check and present the projects of documents on public politics, of projects on normative acts, and other documents, for adoption/approval, regulations approved by Government Decision 1226/2007 published in the Official Gazette of Romania, Part I, no 716 from October 23rd 2007.

[17] In contrast, the Latvian constituent legislator recognized, through Article 47, the right to legislative initiative of the President of the Republic.

[18] It is one of the recognized attributions by the majority of the modern constitutions. Such provisions are found, for examples, in Article 78 para (6) in conjunction with Article 107 from the Constitution of Estonia; section 99 point 3) from the Constitution of Argentina; Article 91 from the Constitution of Slovenia; article 136 b) from the Constitution of Portugal. One of the constitutions, such as the one of Czech Republic, by Article 62 h) and i), recognize the right of the President to sign laws, and some of the fundamental laws of the constitutional monarchies, although entitle the head of state – monarch to sign the laws and force the ministers or secretaries of state to countersign, as applicable in the case of the Dutch Constitution which enshrined this duty to ministers or

law[19], finding and certifying, practically, the regularity of adoption[20]. The promulgation is not a discretionary measure of the President because, even if it has the possibility of resubmitting it to the Parliament for a review or to the constitutional court to monitor compliance with the Constitution, in no case has the right to refuse promulgation.

By this, the prerogative of the President is to promulgate a law distinguishing it by the prerogative taken up, at a time of monarchs, including our monarch[21], to sanction laws. Basically, the head of the state manifests a reminiscent of absolute monarchy, where the law is a manifestation of royal will[22], through which he would become a co-legislator[23] because confirming, approving the law, it participates in the legislative work, not manifesting a passive attitude of acceptance, in certain circumstances, of the adopted law by the Parliament.

Our actual constitutional provision, namely Article 77, obliges the President to promulgate the law within 20 days after receiving it[24], but it gives the possibility to seek the Parliament only once, reconsidering the law, or to ask the Constitutional Court of Romania to verify the constitutionality of the law. After receiving the adopted law, after reexamination, after receiving the decision of the Constitutional Court confirming its constitutionality, the President is obliged to promulgate the law within 10 days.

As we consider, we appreciate that the President could refer, at the same time, the same law both to the Parliament for reexamination, and the Constitutional Court on the fact that the notifications of the motives are not identical. Thus, the Parliament could be seized only for reasons of parliamentary procedure for adoption of the law, the technical- legal reasons, when the Constitutional Law can be seized for possible inconsistencies in terms of the context between the rules of law and the ones of the Constitution's, in other terms for

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state secretaries in Article 47. Constitution of Netherland was consulted on: https://www.constituteproject.org/constitution/Netherlands_2008.pdf?lang=en, accessed: 25.10.2015

[19] In the doctrine it was appreciated the fact that the promulgating procedure is not a simple "executory force" always necessary for the law to be adopted, appearing more like a term brought in conditions of Article 146 a) from the Constitution, Constitutional Court or it can be brought in Article 77 para (2) from the same law, Parliament. It was also pointed out the fact that in the case where the President does not promulgate the law within the time and under the conditions specified in Article 77, it can appear in the Official Gazette even without being accompanied by the promulgating Act – the Presidential Decree. See in this regard T. Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar*, vol. II, „Lumina Lex" Publishing House, Bucharest, 2000, pag.249.

[20] I. Muraru, S.E. Tănăsescu, *Drept constituţional şi instituţii politice*, C.H. Beck Publishing House, Bucharest 2006, vol.II, pag.216.

[21] Article 93 para. (1) and (2) of the Romanian Constitution ofb1866 recognizes the right of our King to sanction and promulgate laws, or to refuse their sanctioning, similar provisions being found in Article 88 para. (1) and (2) of our Constitution of 1923.

[22] P. Negulescu, *Curs de drept constituţional român*, published by Alex. Th. Doicescu, Bucharest, 1928, pag.395.

[23] Idem, pag.394

[24] A rather large term, in our opinion, compared with other provisions of other Constitutions. For example, the Constitution of Estonia, Article 107 para (2) forces the President to promulgate the law within 14 days of receipt, Article 10 para (1) from the French Constitution offers him a period of 15 days to exercise his power, by Article 91 para (1) from the Constitution of Slovenia, the President is forced to promulgate in just 8 days. Therefore, we believe that this law, this period should be reduced to at least 10 days, the interest being the completion of the legislative procedure and the entry of the law into force as quickly as possible.

reasons of unconstitutionality. But, in order to promulgate the law, the President should wait for responses from both seized authorities in case he proceeded in this way[25].

The possibility of our President to prevent the adoption of a law without respecting the procedures or without being subject to the rules of Constitution is however limited, and on the other hand there is a possibility and an impossibility to refuse the promulgation on the motif of inexistence of the opportunity of adopting it in the context of economy, social and political life, at that time. In contrast, the President of the USA to whom point 2 from the para 7 in the Article 1 recognizes the right to sign, no to pass the bill, but not to approve it, has the possibility to submit his objections to the Chamber where it comes from and that is forced to reconsider, in turn, Chamber which, further will send the reconsiderations to the other Chamber. Both the Senate and the House of Representatives will have to approve the draft law given the objections stated by the President of the state with two-thirds vote from each Chamber.

This complicated procedure, very often with a failure, especially if the majority of the American Congress in both Chamber or just in one is represented by the party to which the head of the state belongs, practically equals indirectly with a right to veto of the President towards the law project leading to its rejection by the President. In this situation it can be about the so called veto message[26] when the action belongs to the President. But the President must express his intentions by signing or returning a bill within ten days, on the contrary the project of law will be promulgated as if he signed it. The Congress, even in this situation can stop the process of adopting a law by preventing the President to resubmit the project of law by suspending the parliamentary session, case where it can be about the veto pocket[27], the action belongs to the members of the parliament through the Congress. Practically by this form of veto right, the Congress tries to cover its law project knowing that the President does not want to promulgate it and hoping that during the parliamentary recess to obtain its approval in advance.

Conclusions

When we are talking about the Romanian government, in the constitutional framework established in 1991 and revised in 2003, we are referring to the two central structures - the head of state and government, in a narrow sense of the term of executive. In this paper we intended to discuss about the most important powers exercised by the Romanian President in its relations with Parliament, and in another article will analyze the powers involving between Government and legislative power. However, we have seen from the powers mentioned above, that when the Romanian President is exercising its powers, either he collaborates with the Prime Minister, such as it is the case with the promulgation of laws, decree of promulgation must be countersigned by the latter, or consults with representatives of the

[25] For more details, pro and con arguments to the solution mentioned see A. Iorgovan, *Tratat de drept administrativ*, vol.I, „All Beck" Publishing House, Bucharest, 2005, pag.306-308.
[26] J.Q. Wilson, *American Government. Institutions and Policies*, Harvard University and University of California, Los Angeles, 1986, pag.341
[27] Idem, pag.342

legislative power, such as it is the case in which the President may dissolve Parliament. Therefore, we appreciate that even as regards of these powers, the Romanian constitutional legislator has chosen a head of state who does not exercise only the function of representing the state, and the function of guarantor of national independence, unity and territorial integrity, but he shall act as a mediator between the powers in the state, by observing of the Constitution and of the proper functioning of the public authorities.

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ABSTRACT

In the sperantian view, the social normativity is seen as being of the individual one and the individual spirit of normativity comes from society, which regulates the people rights from the social point of view. Because man is a living being, creative, having social and spiritual needs, the society creates norms, even if are not all social.

KEY WORDS: *social norms, law, juridical reports, philosophical doctrines*

INTRODUCTION

The law is seen as a entirety of social norms, and the creation of social norms is perceived as a normal action of the social life, after the fundamental „the society creates laws", laws of life ,laws of human mind, sprung from the nature and the conditions of social life. Analyzing the social norms and laws, the author presents three important items: the normativity, which devolves from the laws of life, the mind as a life manifestation, submitted of rigorous norms, but also a norms creator and the society as a general structure of the social life. The social consciousness follows the individual one, and the life normativity is manifested by social norms, written as rules, conventions, norms, laws.

The normativity

The normativity of life is manifested through social norms, written as rules, conventions, norms, laws. The law of the society as a society consciousness has normativity characters, but these can't be confused with Law.[1] The author goes back with the analyze till the 18th century, quating from Christian Thomasius[2], who discuss the reports between: justum, honestum, decorum, viewed as the law, the moral and the polite.

The same Thomasius is credited with the possibility of applying sanctions idea, as the main difference between The Law and Moral. The moral obligations don't suport coercive means, while the juridical ones may be aplied by compulsion[3]. Eugeniu Sperantia returns to Durkheim, developing his observation according to which the social involve coercion, giving many examples in this way.

Eugeniu Sperantia says that the law may be a entirety of social norms, with a fixed and organised punishment, an accepted definition but not satisfactory. The Law in his mature forms, is a rational and intentional product, the punishment not being the essential rate of

[1] E. Sperantia, *Course of Laws Philosophy and Sociology. Juridical encyclopedia lecturers with a historical introduction in The Law's Philosophy*, Publisher Romanian Book Typography, Cluj, 1936.
[2] W. Schreiders, *Christian Thomasius*, 1655-1728, Meiner Publisher, Hamburg, 1989, p. 138. Christian Thomasius lived between 1655-1728 in Germany. He was a well known german philosopher and lawyer. Eugeniu Sperantia refers to the papers: Institutiones iurisprudentiae diviane (1688) and Fundamenta juris naturae at gentium (1705).
[3] E. Sperantia, *op. cit.*, p. 12-13

Law. The Law has an own power, practice a certain authority[4]. The author thinks that the juridical norm, when it is accepted, decreed and applied with convinction, it is based on the claim that she is the best and most fair, remembered and taken characteristics from Thomasius. The justice derives from the *justus* law, being the social norms evaluation of law, which follow the establishment and the keep of the law throuh the justice, being the legal nature of society. Through the same analysis reminds regulations and statutes with partial application, the statutes of different associations or congregations, named functional societies, similar to the legal order. These statutory norms limit the people behaviour and the statutes respecting is punished by guarantee measures, the statutes respecting a fair posture. Beggining of the social organisations and associations, the author develops the idea of legal order which a state, with a well define social organisation, must have and grow it. All private associations supports its existence on the legal authority of a State. A state must ensure the rule of law, a legal order throuh the authority it has to guarantee the rights of religious, cultural associations and those of individuals. The state mustn't accept the existence of another organisation which on the same theritory, to develop parallel duties with the state's, even more juridical.

Proving a true spirit encyclopedic, Eugeniu Sperantia makes a parallel between the sports regulations and lyrical phenomenon, quated Louis Andre Fouret[5]. The sports games and those of the children may anticipate and form a political consciousness, social and juridical, because of the fact that strengthen compliance with certain standards accepted custom and consecrate. Eugeniu Sperantia is the follower logical definitions, not always suitable, but necessary in an inter-disciplinary and encyclopedical. The sperantian erudition enroll in the same coordinates, the author is aware of the writings of jurists and sociologists most important of his time. So Jhering is quated with a law definition: „ Die Form der durch die Zwangsgewalt des Staates beschaffene Sicherung der Lebengsbedingungen der Gesellschaft." Sperantia knows the importance of the german's jurist's definiton, who focuses the social life, meaning that the low not guarantees the right of individual and collective interests. Return to the social norms by juridical point of view, the author is sure that the law's norms don't only move above individual and colective goals, being the society life's conditions cannot guarantee the accomplishment of private and limited goals.

The mind- the life's manifestation, submitted by rigorous norms, but also creator of norms.

Eugeniu Sperantia develops the idea of the standardization, the social modeling of individuals, after some certain social norms. The society is seen as an entirety of individuals submitted to the common norms. On the other hand, in his analysis starts from the law existance premise, by finding and explaining the juridical norm between the other norms of social convention of society. The social reports are seen as exchange processes and of the movement of ideas, just consciousness contents. The endowed ideas with a certain value are appreciate to the extent that the people receive them in their consciousness, something without value doesn's exist. Sperantia grouping the values accepted by people in two great classes: purely conceptual and sensory-motors values. The values' possesions counsciousness consist in the presence in the human consciousness of some mental contents: a scientific truth, a real information, a lyrical comparison, a song, a novel, a religious faith. All these are conceptual values, which cannot exist just in the individuals' mind. The empirical or material values fall under the incidence of senses, the material objects being known or contemplated. Both the action and the senses are attitudes of the human counsciousness. The easiest way is contemplating the physical possession sensory, in sperantian thought. The conceptual possesion is exercised through the intelectual functions, and the sensory-motors possesion is exercised by intellect consciousness, helped by the sensory functions.

[4] *Ibidem*
[5] It is about the article "Social sense", in *Revue de l'Institut de Sociologie* (Bruxelles), 1927, p. 349-359

The society- the general structure of the social life

Talking about the definition of the society in relation ensuring legal rights by the state, the author remembers the ideas of Juan Mariana[6], Hobbes[7] and Rousseau[8] relevating that the social life is a natural fact, and his insurance cannot exist just in acts of care.

The juridical norms are different by the social ones, they can't maintain the life and social order, like the juridical norms do. Eugeniu Sperantia describes the way which defined categories of social and legal norms that maintain legal and social order and stability to a country, to a colectivity and to individuals. The author realizes a distinction between the cardinal juridical norms and adventitious juridical norms, that guarantees the social life existence, respectively the aplicability of cardinal norms „all the legal provisions which having in mind the safety of the state, who are considering organizing and living conditions of the public force, all rules for the administration of sanctions and procurement of materials for the above purposes, all rules that prepared the order soul for maximum safety enforcement cardinal rules of law are all legal rules adventitious."[9]

He also brought to the atention the opinions of the well known Russian sociologist and jurist, G. Gurvitch[10], when he recalls the regulatings and the statutes with partial aplication, the statutes of different associations or congregations, named *functional societies,* analogues to the legal order.

These statutory norms limit the behaviour of the individuals and compliance with statutes is punished by measures to guarantee fair statutes according to a fair posture.

The Law's theme guaranteed by state is discussed and enriched of expectations, taking an idea of one of the leading lawyers and law philosophers of his time, Hans Kelsen[11] who talks about: „Alles Recht ist Staatsrecht, aller Staat ist Rechtstaat"[12].

Eugeniu Sperantia develops the idea of Kelsen, motivating that the Law's hystorical origins can be confused with the State's, because of the fact that the last is an ensemble of creating organs, Law application and guarantee. The Law concept appears in the word State, it cannot talk about a State without the Right which defends and serves.

Conclusions

In the point of view of Eugeniu Sperantia, the social life is also possible without some norms, which are no important anymore in the ensemble collective life. There are social norms, needful to society and there are just useful norms. Their cataloguing is made by the

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[6] A. Soons, *Juan de Mariana*, Twayne Publisher, Boston, 1982, p.21. Juan de Mariana lived between 1536-1624 in Spain, being a Jesuit priest, hystorical and jurist. His work which Sperantia refers to is *De rege et regis institutione,* published in Toledo in 1589.

[7] A. Martinic, *Thomas Hobbes*, St. Martin's Publisher, New York, 1997, p.84. Thomas Hobbes from Malmasbury lived in England between 1588-1679. He was a philosopher and a politician. The most known of his works, which Eugeniu Sperantia refers to is *Leviathan,* published in 1651, considered a foundation stone in the area of political philosophy and the theory of social agreement between the State and the individuals.

[8] C. Bertram, *Rousseau and the Social Contract,* Routledge publisher, London, 2003, p.15, Jean Jacques Rousseau lived between 1712-1778, being born in Switzerland, in Geneva. He is considered one of the great French enlightenments from the 18th century, remembered by Sperantia for his political philosophy. The main work which Sperantia refers to is *Du contract social ou Principes du Droit politique,* published in 1762.

[9] E. Sperantia, op. cit., p.23

[10] P. Bosserman, *Dialectical Sociology: An Analysis of the Sociology of George Gurvitch,* Porter Sargent publisher, Boston, 1968, p. 112. G. Gurvitch lived between 1894-1965, being contemporary with Eugeniu Sperantia. He was a Russian sociologist and jurist, born in France. He was one of the most famous sociologists of that time. He was one of the prominent explorers and the publishers from the 20th century in The Law's Sociology.

[11] R. A. Metall, *Hans Kelsen: Leben und Werk*, Verlag Franz Deuticke Publisher, Vienn, 1969, p.19. Hans Kelsen lived between 1881-1973, in Austria, being contemporary with Eugen Sperantia. He was a Law's jurist and philosopher. Sperantia quated from the empowerment work of the Austrian teacher, titled Allgemeine Staatslehre, supported and published in 1911, at the University of Vienn.

[12] E. Sperantia, *op. cit.*, p.19-20

collective consciousness, which defines a compulsory or coercive character attached to some social norms, potential legal. At the same time with the punishments organisation, there are specified the ways and the agents who must apply the punishments, the most reglementary social norms being those which present the most importance in the collective opinion. The author concludes that the moral is a whole of practical norms which imposed to consciousness and the Law's elaboration cannot remove from the moral judgement. Therefore, at the conception and establishment of rule of law always prevailing principles those who make it up. In the sperantian thought, the Law never can remove of the Moral, because of the fact that the legislature will not settle for other legal provisions that his conscience would not accept for himself.

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HUMAN RESOURCE MANAGEMENT - PRESENT AND FUTURE PROSPECTS

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Abstract
Human resource management consists of all the activities geared towards ensuring, developing, motivating and keeping human resources in an organization in order to achieve its objectives as efficiently as possible and meet the needs of the employees.

Introduction

The human resources of a company play a major part in its development. The concept of human resources is not new. Peter Drucker in his book "The Practice of Management" underpinned the three functions of management: the achievement of economic performance, the leading of managers and the management of workers and labor. Human resources can be defined as one of the most important investments an organization can make whose results become more evident over time. It can be said that human resources are the organization itself.

HUMAN RESOURCES –THE STRATEGIC RESOURCE OF AN ORGANIZATION

The human resources of a company play a major part in its development. The concept of human resources is not new. Peter Drucker in his book "The Practice of Management" underpinned the three functions of management: the achievement of economic performance, the leading of managers and the management of workers and labor. Human resources can be defined as one of the most important investments an organization can make whose results become more evident over time. It can be said that human resources are the organization itself. Given the fact that modern society presents itself as a network of organizations that appear, develop or disappear, people are a shared resource and also a key resource, as well as a vital resource to ensure the survival, development and competitive success of all organizations. Without the effective presence of men who know what, when and how to do things, it is simply impossible for organizations to achieve their goals.(http://hosted.regionalnet.org/asper/managementul_resurselor_umane.html)

Thus, organizations exist because people have different physical and intellectual capabilities as well as the ability to develop the organization. Therefore, organizations involve people and alsodepend on human effort.

Organizations spend significant amounts of money on their employees, and due to the costs involved, staff remuneration as well as staff hiring, retention and development, are some of the most obvious investments in human resources.In conclusion, investing in people has turned out to be the surest way to ensure the survival of an organization as well as its competitiveness and future.

The view that the human factor involves some costs and capital expenditures is opposed to the need highlighted by many human resource professionals to treat the staff as a

capital investment for further development of any organization. We can therefore say that the human resource is the first strategic resource of any organization. Their strategic importance is highlighted by the fact that they are an essential variable in the success or failure of any organization.

Human resources are unique in terms of their potential for growth and development as well as their ability to know and overcome their own limits, meet new challenges,present and future demands.

Human resources are the only endless, original and valuable source of creativity, solutions and new ideas. People have the potential to create material and spiritual goods of a higher value that would satisfy new requirements or respond better to the old requirements. They are the ones who design and make goods and services, perform quality control, provide resources, make decisions and above all establish or develop objectives and strategies. People are considered to be the assets of any organization because their potential, experience, passion, endeavors and development actively contribute to the improvement of the organization's efficiency and effectiveness. This is why organizations need to hire people, gain their services, develop their skills, motivate them to work and make sure that the staff will continue to maintain their commitment to the organization.(Marius Dan Dalotă, 2000: 7)

Convinced that human resources are the main strategic resource of any organization, any leader must give utmost importance to such activities as: attracting and using the human resources, ensuring compatibility between job requirements and competence of staff, training and developing the human resources, managing the careers of the staff, assessing professional performance, motivating staff and last but not least, establishing a system that would bring satisfaction and the opportunity to reconcile personal goals with the goals of the organization.

Human resources are strongly influenced by the time factor which is essential if we are tochange mentalities, customs, behavior, etc. Therefore, the importance of human resources and their management has become greater with time due to the increasing need for organizations to be more dynamic and competitive. From a temporary point of view, the role of human resources and their management is constantly increasing because of the great opportunity to exploit human potential since people are increasingly concerned about improving the quality of their personal and professional lives so that they would better reflect their aspirations.(Emilia Novac, Denisa Pop-Abrudan, 2006: 11)

Therefore we can say that human resources represent the creative, active and coordinating component of all activities taking place within organizations.

In conclusion, from the point of view of human resources management, people are not recruited and selected only to fill certain vacancies but for their important role within the organization. Particularly in an ever-changingand tumultuous environment where a number of variables are beyond control and where the difficulties that organizations face are more and more imputed to human resources and their management.

THEORIES ON HUMAN RESOURCES MANAGEMENT

Human resources management has become distinctive and independent, has limited its object of study, therefore becoming specialized and well-established within the context of general management; however, the human resources management emerges from the general management.

Human resource management is a relatively recent term for what was originally called "personnel handling", "management of personnel activity" etc. In the traditional theory of the

enterprise, employees were assessed by the way they carried out certain predetermined operations in a "disciplined" manner or handle machines and technological devices.

Thus the concept of "labor force" and "manpower" emerged. What mattered was their ability to put into practice decisions of managers and abide by regulations. The concept of "labor force" designated the totality of physical and intellectual skills that man uses in the process of acquiring goods and services. In totalitarian regimes, there was a distinction between "productive work" as creator of material goods on the one hand, and "non-productive work" as well as" unproductive personnel "on the other hand, the latter being associated with those who carried out intellectual activities. Any action to improve labor force was aimed at improving people's ability to work more and better. The concept of labor force used always in the singular designated a whole, a crowd of people. Thus, the individual with a distinctive personality, with specific needs, behavior, and vision were not included in the objectives of the leaders.

Human resource management involves continuous improvement of employee activity in order to achieve the mission and objectives of an organization.
The exercise of such management requires that each manager be a model of behavioral attitude. Thus, the manager must take responsibility for the process, be involved in every action, personally discuss with employees the progress they made and reward good results. The managermust treat each employee as an individual with distinct characteristics. The successful application of human resource management involves a system of performance assessment, of incentives and rewards for good results.
The following table (Table nr.1.1) illustrates the differences between the traditional theory of enterprise and human resource management and their attitudes towards the staff.

Table nr.1.1 Differences between traditional theory ofenterprise and human resource management.

Description elements	The traditional theory of enterprise	Human Resource Management
Concepts used	Labor force, manpower	Human resources
Types of discriminating character	"Productive labor" "Creator of material goods"	
Manager's ways of treating the staff	As a whole, as a crowd of people able to work	As individuals, with distinctive personalities, needs, behavior and vision
The basis for pay	According to the work carried out	According the results obtained
Assessment of performance	Insignificant, formal	Essential
Stimulating the actions of employees	Any action on the part of the employee was thought to undermine the authority of the boss	Actions by employees were supported and encouraged through payment systems

This system seeks a permanent collaboration of the employees in order to improve the quality of the products and services provided by the organization as well as its development and objectives and to ensure long-term viability and profitability in line with requirements.
In literature there is a relatively great number of definitions of human resource management. Currently, theoretical and practical meanings of human resource management were amplified

to such an extent that any attempt at translation or definition would be difficult to achieve.

Trying to overcome existing difficulties, specialists have defined human resource management as follows:
- The function that enables the most efficient use of people in order to achieve individual and organizational objectives;
- The function that enables organizations to fulfil its objectives by achieving and maintaining an effective workforce;
- A strategic approach to acquiring, motivating and developing the key resources of an organization;
-It establishes aims in relation to men, achieving and controlling them in a logic of the system;
- It involves all management-related decisions and practices that directly affect humans or human resources working in the organization;
- It involves multiple decisions that affect the relationship between employers and employees and other stakeholders;
- It involves multiple decisions concerning the employment relationship which influences the effectiveness of the employees and of the organization;
- All the activities geared at the human factor seeking to acquire, make optimal use of, maintain and develop human resources;
- All activities meant to ensure the optimal use of human resources for the benefitof the organization, the employees, and the community as a whole;
- All decisions affecting the relationships between the main social partners (employers and employees) meant to ensure increased productivity and efficiency of economic activity;
- A system of interdisciplinary measures concerning the recruitment, selection, classification, use of staff in the context of ergonomic labor, material and moral stimulation, until cessation of employment;

These are just some of the definitions of human resource management, and although most of the definitions presented can be considered fair, some of these cannot be considered as being comprehensive enough if we consider the extremely complex nature of human resource management. The definitions referred to are not contradictory, but complement each other, each definition giving an insight into the concept of human resource management. Therefore, we can say that at present there is no universally accepted definition on human resource management. It may be noted that the definitions referred to do not contain conflicting elements but elements that complement each other, each helping to enhance the concept of human resource management.

Human resource management contributes to increased economic and social efficiency of a company, by taking to a higher level the business activities of a company in the context of the national market and economy, based on economic criteria, fact which results in absolute and relative savings in the areas of manpower and materialized labor which benefit both the economic unit and the systemsin which it is integrated.

The contribution of human resource management is not limited to the economic side; social efficiency isparticularly important, which involves aspect that cannot be measured directly, but which have multiple consequences for all those involved in the activities of the company and, above all, for the human factor. We highlight some elements of social efficiency: the quality of internal climate; the fluidity of hierarchical relations which depends on the level of communication within the organization; the intensity and content of personnel motivation; intensity of the feeling of belonging to the organization etc.

Effective management of human resources is essential for a company’s success. If human resources are neglected or poorly managed the company ceases to be prosperous and may even regress.

The efficiency ofhuman resource management within a company can be approached from two points of view:

- From a limited point of view, it depends on the direct efforts of the company to make the management system work and to improve it as well as on its direct effects. By comparing the two terms we can assess the effectiveness of the human resource management based on its direct consequences;

- The second point of view looks atthe efficiency of the human resource management in a broader sense as determined by the efforts and results arising from the activity of the organization as a whole. The premise underlying this approach lies in treating the management as an essential means- if not the most important- for the success and profitability of the company.

Whichever approach you may be using, the effective human resource management takes two forms in terms of the means of expression and measurement:

- Quantifiable efficiency concerns quantitative measurement and expression in the form of value, usually, of the inputs and outputs of a company;

- Unquantifiable efficiency refers to those functional and qualitativeaspects relating in particular to the human factor and behavior and interactions that can be measured fully or very roughly and which can negatively impact the economic performance of the company.

Although HR has continuously enriched its contents and broadened its scope; the increasinginternational competition and globalization reinforce the importance of human resource management, and make us take consider more thoroughly its international dimension.

STAGES OF DEVELOPMENT OF HUMAN RESOURCE MANAGEMENT

Over time, the management of human resources has had different periods or stages of development which have generated some different opinions, arguments and polemics.

For full understanding of the current concept of human resource management, it is necessary to understand its historical evolution. One type of periodization presented in literature and accepted by many experts in human resources management comprises the following stages:

- The empirical stage

- The welfare or prosperity stage

-Staff handling

- Personnel management-the development phase

- Staff management–the mature phase

I - Human resources management - first phase

- Human resources management - the second phase.

The empirical stage - has its beginnings in ancient times and lasted until the late 19th century. It is the stage where the owner, as sole holder of the capital, had a dual role and status and as a sole owner he had to solve all tasks including the organization of work. He was led by intuition, common sense, tradition and experience, and staff-related activities particularly targetedthe technical and organizational side and occasionally managerial aspects as success was considered the exclusive result of certain personal qualities.

The welfare and prosperity stage- its founder is Frederic W. Taylor. This stage is characterized by a process of halving, as the technical and organizational side of the business is left to officials of the capital, which usually have no capital, while the owner remains the only direct subject of social-economic management. It's the boom period of capitalism, where owners are increasingly concerned with improving working conditions and providing facilities for employees (canteen, medical programs).

Staff handling- is the stage of development of the staff position, which, in time, may be located in between the two world wars and the new demands in human resources from the increased size and complexity of the activities of organizations. The development of trade unions and labor legislation of the 1930s has led to an increasing involvement of organizations in collective bargaining and resolved claims of employees. The school of human resources, represented by Mayo stressed the importance of people's social needs and psychological variables. Concerns regarding the study of environmental factors, the organization of work and rest regime, and the implementation of a participatory leadership style increased.Staff compartments were created in companies which contributed to the development of the staff position.

Staff management - development phase - is the stage belonging to World War II and the 1950s, when postwar reconstruction, the rapid expansion of organizations, the technological change and internationalization of the economycreated favorable conditions for the development of the HR position. There was a labor shortage. All these issues have led to a certain priority in the areas of staff recruitment, remuneration, and restructuring of services provided by the staff, marking the beginning of modern staff management.

Staff Management - mature phase - this phase is specific to the years 1960's-1970's and is characterized by a comprehensive approach to human resources issues through greater involvement of staff managers in human resource strategy and strategic problems of an organization. Human resource planning methods developed whileselection, training and assessment methods and techniques undergo a continuous process of improvement.

Human resources management - first phase - is characteristic of the 1980s entrepreneurial period when in American universities the concept of human resource management appears while the staff position is given the same status as the other positions of the organization. The concerns of this period are increasingly oriented towards determining the human dimension of organizational changes and the integration of human resource strategies into the overall strategy of the organization.

It is the period when due to many influences and challenges, including the Japanese phenomenon, the concept of human resource management emerges and the staff positions is given the same status as the other positions of the organization. There is a new restructuring of the staff position with new activities such as planning and career development, staff motivation, reward based on performance, safety and health of employees being included in this position.

Human resources management - the second stage - was triggered in the early 1990s and appears as a reaction to the unsupported features of organizational culture: individualism and greed which highlighted the need to promote the benefits of teamwork and organizational climate. We can note the importance attached to issues of motivation and communication, as well as to relatively new concepts, for example, reward management, culture management, etc. This continuous development of human resource management led to its gradual transformation from a strictly defined and narrow area to a strategic position. Therefore, at this stage the particularly important contribution of staff activities and human resource strategies and policies to the success of the organization is revealed as well as the importance of training specialists in the field.

FACTORS AFFECTING THE HUMAN RESOURCE MANAGEMENT

The factors which influence the human resource management are: the motivational structure of employees and collaborators; their values and oscillation; internationalization; the political and social context; the labor market; the level of information; the organization; the market dynamics; developments in technology.

The preoccupation for human resource management started primarily with themotivational structure of current and future collaborators, structure resulting in:

- The accuracy of tasks;

- The attitude towards work: as a dominant mechanism of individual fulfillment or not.

There can be serious consequences on human resource management caused by changes in the labor market, namely:
- Structural displacement regarding supply;
- Changes in the demand.

The labor market is an important factor affecting the work of the staff of an organization. If the organization fails to realize in time the structural changes in the labor market and therefore to react with appropriate measures difficulties cannot be presented. Therefore it is not surprising that the organization firstly investigates the fluctuations in the labor market and is interested in long-term reports and projects.

Market, technology and organizationdynamics substantially influences the human resource management. Regardless of changes in quality, only quantitative market changes can lead to increased market dynamics. This has a direct influence on an organization's human resource management.

Changes in markets inevitably lead to a new demand of staff, both qualitative and quantitative, and with this to a change of the methods to get more staff as well as increased expectations towards the evolution of staff.

Increased international interdependence and globalization of markets has led to an internationalization of the activity of organizations. As a result of this internationalization organizations must face a number of problems such as:

• Integrating commitments to foreign countries;
• management of the organization;
• control of daughter companies abroad;
• International fiscal policy.

Human resource management has to solve a lot of operative problems such as: selection, training, guidance and reintegration of foreign labor. The human resource management is further faced with problems of different cultural systems. These particular elements will have great influence even in the future over the international human resource management.

Another influence on human resource management is that of values and their oscillations. Values are preferential individual cognitive structures that act as elements in a decision, finally determining the employee's behavior.

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Although values refer exclusively to an individual, organizations are interested in them, because they may turn out authentic, change or cause conflicts within a group. Precisely because of this, an organization must pay attention from the beginning to all signals indicating values and their change. Therefore, we are increasingly witnessing a change in the attitude towards work, free time and pay.

The causes of these changes are very controversial. On the one hand, they say it's the education and the media; on the other hand it's the search for and discovery of other forms of self-fulfillment such as the use of leisure time by the employee.

The main consequence, with an impact on human resource management, is that more and more partners require more interesting and variedactivities, which will influence the decisions. Because of this, human resource management must have a value-oriented staff policy, and this policy must begin with a thorough staff selection.

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THE HOLOGRAPHIC TESTAMENT

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Abstract: *Ad validitatem, the holographic testament must be handwritten, dated and signed entirely by the testator. The testator entirely handwriting the testament is seen as a guarantee of freedom to express the last will. The dating of the testament must be done by the testator in person. The date must meet two requirements: to be complete and to be exact. As a novelty in the Romanien New Civil Code, we find the need to fulfill a formal procedure subsequent to drawing up the testament and opening the inheritance. Steps to be taken in this regard assume, first, endorsing it for proof of non-alteration. The next stage in opening the holographic testament implies drawing up by a notary public or by the representative of the diplomatic mission, where testaments are drawn up abroad of the record of findings concerning the condition of the testament.*

Key words: *holografic testament, handwritten, date, signature, formal procedure.*

Introduction: The Romanian New Civil Code stipulates in art. 1041 that, under the penalty of nullity, the holographic testament must be written entirely handwritten, dated and signed by the testator[265]. The provisions of the Romanian New Civil Code do not differ from the previous ones of French inspiration[266].

Compared to the legal provision, we can therefore define the holographic testament as the solemn act, upon death, entirely handwritten, dated and signed by the testator him/herself.

Nothing prevents, however, that a written testament, signed and dated by the testator be certified by a lawyer, in what concerns the identity, content and the date on which it was issued, this statement supplying the shortcomings of the handwritten form, bringing the holographic testament to the same probative value as the authentic testament.

The advantages and the disadvantages[267]

[265] This type of testament is not accepted in the Netherlands and Portugal, where the authentic form is required in all cases, nor in the common-law jurisdictions where the testament assisted by witnesses is specific. The latter may be written by the testator personally, typed or handwritten by a third party, the essential part being only the simultaneous presence of two witnesses at the signing of the testament, the confirmation of the testator's signature and their signing the testament.

[266] Art. 859 of the Romanian Civil Code of 1864 provided that "the holographic testament is not valid unless it is written throughout, dated and undersigned by the testator"

[267] Ioana Nicolae – „*Drept civil. Succesiuni. Moștenirea testamentară”,* Hamangiu Publishing, București, 2014, *p. 40-42*

The holographic testament presents a number of advantages in that it is accessible to anyone who can write, it may be drawn up anywhere and anytime, ensuring the absolute secrecy of the testator's last will, does not imply costs and can be reversed easily by the testator.

The disadvantages of this type of will are mainly related to the fact that it can be stolen, forged or more easily contested than other forms of testament. Moreover, the testator's lack of knowledge and experience can determine the use of certain terms subject to interpretation, with the risk that the testamentary will be invalidated or altered.

Ad validitatem, the holographic testament must be handwritten, dated and signed entirely by the testator. Assuming that the three conditions are met, the testament produces legal effect without requiring its authentication[268]. The three conditions imposed by the legislature must be met cumulatively under absolute nullity[269].

In the French doctrine, it was considered that in addition to these formal requirements that the holograph testament must meet, a basic condition must also be filled, namely the existence of the intention to test (animus testing), this being the one that differentiates the testament from a simple project without legal value[270].

Special conditions of form of the holographic testaments

1. The holographic testament must be entirely handwritten by the testator

The testator entirely handwriting the testament is seen as a guarantee of freedom to express the last will. Therefore, the testament written by another person shall be invalid even if it faithfully reflects the deceased person's will. Assuming the testament drafted by a third party by guiding the hand, help determined by the author's physical inability to write alone, the doctrine appreciated that it is valid if it meets two conditions: - it contains the testator's handwriting done personally and only with the material assistance of a third party, and it represents the testator's single will[271]. The testament drawn up by the author but on a model drawn up by a third party, who may be a lawyer or other person without legal training, was also considered to be valid, as long as the author understood the legal significance of the text and the will was absolutely free[272].

As for the support of the manifestation of will, this can be of any type (paper, canvas, wood, glass etc) [273]. The writing can be done with any tool (pencil, ball-point pen, pen, chalk,

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[268] C. de Apel Suceava - dec. no.120 / 25.01.2005 viewed on address http://legeaz.net/spete-civil/plangere-legea-18-1991-testament-120-2005 on 11/08/2014 - the so-called "authenticated holographic testament" is null if it is not written, signed and dated by the author in person

[269] The literature expressed the point that "in the testamentary matters, a rational formalism must be applied: neither the specific stiffness of the instinctive formalism about which I wrote above, but nor a total liberalism to deprive the formal conditions of any role" - M.D. Bob - *"Testamentul olograf și ponderea formalismului: un studiu aplicat pe problema datei"* in the STUDIA magazine, Universitatis Babes-Bolyai - Jurisprudentia series, no.2/2012

[270] Ph. Malaurie, L. Aynes - "*Les successions. Les liberalites*", 4eme ed., Defrenois Publishing, Paris, 2010, p. 260

[271] B. Beignier - "*Liberalites et successions",* Montchrestien Publishing, Paris, 2012, p. 115

[272] The same opinion was also embraced in the practice of courts - Gorj Court, dec. no. 321a / 29.08.2007 viewed on address http://legeaz.net/spete-civil/nulitate-testament-art-859-cod-321a-2007 on 11/08/2014

[273] C. of Appeal, sect. Civ IV., in dec. no.898 / R of 14 June 2010 viewed on the address http://legeaz.net/spete-civil/testament-olograf-scris-pe-hartie-898-2010 on 11/08/2014- "The expertise concluded that the testament of 11 June 2007 has been written, dated and signed by A.N. The fact that the text of the contested document, the date and name that follow it, rendered in capital letters are inserted using black indigo and the testator's signature is made in the original, directly with the writing instrument, indicates the possibility for the holder to have extracted the copying paper from among the copies of the testament at the time of its signing. Given the circumstances indicated as well as

paint etc) in any language and any script. The typed document comprising dispositions for the cause of death will not be considered as will, as the requirement of exclusively handwriting the will is not met, the sanction being absolute nullity.

The law does not condition the validity the holographic testament by the use of sacramental formulas[274], which is why this type of testament is accessible to anyone.

Also, its validity is not affected even if the testament contains additions, modifications, deletions made by the testator, whether they are signed and dated by the author or not. It is alleged that they are integral with the testament and shall be considered as such. It is irrelevant whether the author's intervention has been precisely when the testament was drafted or later. But if this intervention changes the previous testamentary dispositions, they are seen as a new testament which bears the name of codicil. This must meet the conditions of validity of any holographic testament respectively be handwritten, dated and signed by the testator, regardless of the fact that it is written on the same act (meaning instrumentum) or compiled as a separate document. If the subsequent provisions are not amended, but contradict the previous ones, then we are no longer in the presence of a codicil, but we have a new testament.

The emergence of a different writing in the testament, which is related to the testamentary dispositions and of which the testator was aware, all will attract nullity. If, however, the writing is not related to the contents of the will, or the testator had no knowledge about the occurrence of this writing, the legacy will be valid and the different writing will be ignored.

2. The testament must be dated by the testator in person

The dating of the testament must be done by the testator in person. The date must meet two requirements[275]:

- to be complete by indicating the year, month and day. The requirement is considered to be fulfilled if the dating is done by indicating an event. If the date is incomplete, it may be determined by the court based on the intrinsic elements of the document, or even extrinsic ones, to the extent that the latter is based on the intrinsic ones;
- to be exact, the fraudulent backdating or postdating being sanctioned by absolute nullity, without admitting the rectification of the date. An inaccurate date, which does not allow the precise determination of the time when the testament was drafted attracts nullity[276]. The proof of its falsity can be done by any means, even if only extrinsic[277]. Uncertainty regarding the date entails the nullity of the testament, the same as the total lack.

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the legal provisions mentioned, the Court found that the law courts correctly stated the validity of the testament, this being entirely written, dated and signed by the testator, the fact that he used copying paper lacking any legal relevance, the law not providing limitations regarding the writing instrument and the material support. "

[274] Cass 1 re civ., 11.01.2005, in the Civ.Bul. I, no. 24 in B. Beignier - *op cit.*, p. 118

[275] D. Văduva - *"Moștenirea legală. Liberalitățile în Noul Cod Civil "*, Universul Juridic Publishing House, Bucureşti, 2012, p. 155

[276] Cass. 1 re civ. 11 FeV. 2003 in *"Recueil Dalloz"* no. 10/2003, p. 669

[277] F. Terre Y. Lequette - *"Droit civil. Les successions. Les liberalites*" Dalloz Publishing, Paris, 1997, p.306; M. Grimaldi - *"Droit civil. Liberalites. Partages d'ascendants* ", Litec Publishing, Paris, 2000, p. 84

Related to the fact that the total lack of the date entails absolute nullity, we consider that in order for the testament to be valid, it is necessary that another condition be met, namely that the date be found[278]. A null testament for the lack of date can not be confirmed by a subsequent testament[279].

The date can be located anywhere, at the beginning or end, but when it is contained in the testament, the court will be called, based on the rules of interpretation, to determine whether it refers only to the provisions which precede it or and the subsequent ones, too[280] .

Complete and accurate dating of the testament is of particular importance because according to it, one can determine whether or not the testator had the ability to test[281] [17]. The date may contain even only the year of drafting, and it will be valid if the testator has been unable or did not draft revocatory provisions[282]. In case of a plurality of testaments containing contrary or incompatible provisions, depending on the date of each, it can be determined which one is the last, this revoking the previous ones[283]. The doctrine[284] found that the specification of the date is relevant, also animus testandi, it allows the identification of the circumstances in which the will was written, which may be useful to the interpretation of the doubtful clauses.

In the literature, the view that dating would not be such a matter of importance as writing or signing the will by the testator has been expressed. In this regard, it was considered that the date has no significance in itself, as a formal element, but only as an element of proof when it comes to the revocation resulting from the existence of successive testaments whose provisions exclude each other, "or as a matter of ability or unwillingness resulting from a mental disability or a rape or fraudulent deceit to which the testator fell victim"[285] . In our opinion such a claim can not be accepted because the Civil Code does not distinguish between the legal effects which the lack or falsity of the date arises or the legal consequences which the lack of testator's writing or

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[278] In practice, the view that the non-compliance with the provisions of the Civil Code in terms of not dating the codicil of the testament is grounds for relative nullity, which can be invoked by the parties and those entitled under or legal heirs, as the interest protected is personal, particular, and not general - see C. of Appeal, sect. Civ IV., in civ. dec. no. 367 of 10 March 2005, *C.P.J.C.C.A. Bucharest*, 2005, p. 56

[279] G.L. Nouel - *"Testaments et Donations"*, Delmas Publishing, Paris, 1992, p.3 6

[280] In relation to the fact that the Romanian legislator in 1864 had imposed the condition that the testament be undersigned, the absolute nullity should affect any disposition made before October 1, 2011 in case the signature would appear somewhere other than at the end - M.D. Bob - "*Probleme de moșteniri în vechiul și noul Cod civil",* Universul Juridic Publishing, Bucharest, 2012, p. 156; C. Hamangiu, I. Rosetti- Bălănescu, Al. Băicoianu - "Tratat de drept civil român", Vol.III, All Beck Publishing, Bucharest, 1999, p. 518

[281] C. of Appeal, sect. III civ., in dec. no.102 / 07.02.1995 viewed on http://legeaz.net/spete-civil/succesiune-testament-olograf-actiune-prin-102-1995 address on 11/08/2014 - "In case the incorrect date of such a testament is due to the an inadvertent mistakes of the testator, the testament will be valid if it is possible that the date be completed or corrected by court order. For the holographic testament, if the testament is entirely written and signed by the testator, conditions which ensure that the document represent the free will of the testator, the date involuntary incorrect or incomplete is not likely to attract nullity because it now performs the function of protecting the testator's posthumous wish"

[282] Court de Cassation Civ. 1 ere, 06.07.2006, cts Belliard, et.al, bull.civ 1, no. 301, D. 2006 IR 1706 in I. Popa - *"Drept civil. Mosteniri si liberalitati*", Universul Juridic Publishing, Bucharest, 2013, p. 305

[283] C. of Appeal Craiova, in civ. dec. no. 376/2010 viewed on http://portal.just.ro/54/Lists/Jurisprudenta/DispForm.aspx?ID=706 address on 11.08.2014

[284] Ph.Malaurie, L. Aynes - "*Les successions. Les liberalites* ", op cit, p. 256

[285] M.B. Cantacuzino - *"Elemente de drept civil",* All Educational Publishing S.A., Bucharest, 1998, p. 350

signature issues, stating that all three conditions are provided ad validitatem under the penalty of nullity. From the wording of the legislator, a classification in terms of value of the three conditions does not follow, or a subordination of one to the other, or, ubi lex non distinquit nec nos distinquere debemus.

3. The testament must be signed by the testator

Similar to writing and dating, the testament must be signed by the testator in person. It is a substantial form that can not be replaced in any way or by extrinsic factors, even intrinsic to the testament[286].

The signature can be placed anywhere within a testament, usually at the end of it, and it attests that the testament is the ultimate manifestation of the deceased's will, made with the intention of producing legal effects, and that it emanates from him. The will signed on the margins or which does not contain a signature at the bottom of the document is considered void[287].

Regarding the signature appended only on the envelope in which the testament is sealed, the doctrine expressed several opinions. Thus, some authors have argued that the signature on the envelope is not valid because it would allow anyone to replace the testament[288]. Other authors have argued the opposite[289]. Finally, there were also views that the signature on the envelope is valid as far as a link between this and the contents of the envelope can be established with certainty, any possibility of substitution of the testament being excluded[290]. *We rally the latter opinion on the grounds that the interpretation of a legal document must always be in the sense of it becoming effective, and not on the contrary.*

The signature may include the name and surname of the testator or may take the form commonly used by him/her[291]. The only condition required by the law is that it is actually written by the testator, sealing or putting a finger in case of the illiterate being equivalent to the signature. Also, the mere utterance of the name does not represent a signature, the requirement being that it is sufficiently detached from the text in order to mark its approval[292].

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[286] Cass. 1 re civ., 16 mars 1995 Obs.J. Hauser, Defrenois, Paris, 1993, art. 356 629 in D. Chirică - *"Tratat de drept civil. Succesiuni si liberalitati",* C.H. Beck Publishing, București, 2014, p. 261

[287] D.C. Florescu - *"Dreptul succesoral in Noul Cod civil",* Universul Juridic Publishing, Bucharest, 2013, p. 83

[288] D. Chirică - *"Drept civil. Succesiuni",* Lumina Lex Publishing, Bucharest, 1996, p. 100-101

[289] C. Hamangiu, I. Rosetti - Bălănescu, Al.Băicoianu - *op cit*, p. 518

[290] Fr.Deak - *"Tratat de drept succesoral",* Universul Juridic Publishing, Bucharest, 2002, p. 190; Ilioara Genoiu - "*Dreptul la moștenire în noul Cod civil"*, C.H. Beck Publishing, București, 2012, p. 164

[291] By the civil sentence no.1224 / 1.06.2012 of the Medias County, unpublished, it was settled that "the document was written on one sheet of paper, double - sided, the date of 14.02.2011 being inscribed in its final phrase. In order to identify himself in the contents of the document drafted, the deceased used the phrase "your uncle C." using as a mark the degree of relationship to the two grandchildren, to whom the document is addressed, whom he describes as those who nursed him during his state of helplessness due to illness. Although the deceased used his first name and did not apply a signature in the technical sense of the word, the phrase "your uncle C." is sufficiently clear so that there is no doubt that the document bears in a legal sense, the signature of the deceased. Therefore, the court finds that the document reviewed represents the holographic testament of the deceased D.C., keeping to the conditions of validity prescribed by art.859 Civil Code. "

[292] M. Grimaldi - "*Droit civil.Liberalites. Partages d'ascendants*", *op cit.*, p. 277; in the same effect Cass. 1 re civ., 14 Janvier 2003 Obs. F. Boulanger, in J.C.P. no. 10/2004, p. 404 ff. in D. Chirică - *"Tratat de drept civil. Succesiuni și liberalități*", *op cit*., p. 261

Opening the holographic testament and the probative value of the holographic testament

As a novelty in the New Civil Code, we find the need to fulfill a formal procedure subsequent to drawing up the testament and opening the inheritance. Steps to be taken in this regard assume, first, endorsing it for proof of non-alteration. In this regard, art. 1042 in the New Civil Code provides that before being drawn up, the holographic testament will be presented to a notary public in order for it to be endorsed for proof of non-alteration. Meeting the procedure involves marking by the public notary of the words "endorsed for proof of non-alteration" on the text, followed by his/her signature and stamp. This procedure is fulfilled only by a notary public or, in case it was drawn up abroad, representatives of Romania's diplomatic missions. In the doctrine it was held that compared to the expression of the legislature, the endorsement for proof of non-alteration may be made by any notary public, and not just the one competent to perform the notary succession procedure[293]. The lack of formality is not punishable by law, so the holographic testament will be effective even if it was not presented to the notary public[294].

The next stage in opening the holographic testament implies drawing up by a notary public or by the representative of the diplomatic mission, where testaments are drawn up abroad[295], of the record of findings concerning the condition of the testament.

In the inheritance procedure, the notary public shall, under the special law, open and validate the holographic testament and file it into the inheritance. The validation involves summoning all legal and testamentary heirs, and is achieved by two methods: - recognition of the testament by the heirs or, in case of it being contested, by expertise. Those interested can get, after the endorsement for proof of non-alteration at their expense, legalized copies of the holographic testament. After the completion of the succession procedure, the original of the testament is handed to the legatees upon the agreement between them, and in its absence, the person designated by the court, who upon the wording of the text can be a legatee or any other person designated by the court.

Conclusions

This kind of testament although a solemn act is materialized in a document under private signature, so the provisions of art. 273 in the Romanian New Code of Civil Procedure are incident. Regarding the date of the testament, the presumption of validity is applied to the extent in which the validity of its writing and signature was ascertained, therefore the burden of proof falls on the one who invokes its absence or falsity[296]. The data entered by the testator in the

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[293] C.S. Ricu, G.C. Frenţiu, D. Zeca, D.M. Cigan, T.V. Rădulescu, C.T. Ungureanu, G. Răducan, Gh. Durac, D. Calin, I. Ninu, Al.Bleoancă - *"Noul Cod civil. Comentarii, doctrină și jurisprudență*", vol. II, Hamangiu Publishing, Bucharest, 2012, p. 168

[294] L. Stănciulescu - "*Curs de drept civil. Succesiuni*", Hamangiu Publishing, Bucharest, 2012, p. 104; but there are opposing views in that the presentation of the testament concerning the endorsement for proof of non-alteration is not a mere formality at the discretion of the parties, it is a mandatory procedure that has the character of a preliminary procedure - see Daniela Negrilă - "*Testamentul în noul Cod civil. Studii teoretice și practice",* Universul Juridic Publishing, Bucharest, 2013, p. 121

[295] The possibility of the diplomatic missions to prepare the records of findings regarding the condition of the holographic testament established in UNNPR - *"Codul civil al României – Îndrumar notarial"*, Official Gazette, Bucharest, 2011, vol. 1 p. 377; for the contrary opinion, see Daniela Negrilă - *op cit.*, p. 131

[296] C. of Appeal, sect. IX civ. and propr.. int., in dec. no.521 / R of 8 December 2009 viewed on the address http://legeaz.net/spete-civil/testament-semnatura-apartinand-testatorului-expertiza-133a-2009 on 08/11/2014 - "Regarding the criticism on the fact that the testament was not or could not be signed by V.M., the Court found that,

contents of the testament is presumed to be true under the double condition that it be complete and not contradicted by the intrinsic elements of the document[297]. The locus standi to seek the annulment of the testament for reason of not being dated by the testator is held only by the deceased person's legal successors who could claim a harm caused by the fact that he disposed of his property by a liberality upon death[298]. The proof of the date can be completed or corrected based on the intrinsic or extrinsic elements of the document, but only to the extent that the latter is derived from the intrinsic elements and contribute to strengthening the indications arising from the content of the last will document. It can produce evidence to clarify an incomplete or erroneous involuntary date applied by the testator on the testament, but not in the absence of this crucial assumption regarding the nonexistence of this essential element for the validity of the document[299]. In matters of the holograph testaments, the date must not meet the conditions of a a certain date.

If you can not prove the holographic testament, but there is a mention of it in an authentic document, mentioning which is corroborated by testimonies, the court may consider that there was evidence of the testament.

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UNNPR - *"Codul civil al României – Îndrumar notarial",* Official Gazette, Bucharest, 2011, vol. 1

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as correctly appreciated by the first instance and the court of appeal, the graphoscopic expertise established that the signature on the testament belongs to the deceased V.M., and the appellant has not made any further evidence to exonerate the conclusions of the mentioned expertise. The mere fact that V.M. had an advanced age is not likely to lead to the presumption that he could not sign. Also, the weakening of his eyesight does not eliminate the possibility that he signed the papers."

[297] C. Turianu - *"Curs de drept civil. Dreptul la moștenire",* Fundaţiei România de Mâine Publishing, Bucharest, 2000, p. 69

[298] C. of Appeal, sect. civ IV., in civ. dec. no. 367 of 10 March 2005, *C.P.J.C.C.A. Bucharest*, 2005, p. 56

[299] C. of Appeal Craiova, in civ. dec. no. 376/2010 viewed on the address http://portal.just.ro/54/Lists/Jurisprudenta/DispForm.aspx?ID=706 on 11.08.2014

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The importance of the fair competition in the market economy

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Abstract

For proper functioning of the competitive market, Romania has regulated the Competition Act prohibit agreements, the abuse of dominance and control of economic amalgamation. Therefore, competition law establishes a set of rules applicable to the enterprises and the guarantee of compliance with competition policy, a guarantee in achieving a free and vibrant internal market.

Keywords: *economy, unfair competition, Competition Council*

Introduction

Starting from the common concept of the competition notion which has a rivalry and competition meaning in an industry where the participants are at least two individuals or legal

entities that have the same advantage or results, we can say that the competition manifests itself in every field. The term competition comes from Latin concurrere, meaning to confront.

According to the Explanatory Romanian Dictionary, the competition means the essential feature of the market economy, reflecting in the rivalry, disputes between economic agents from production and sales of similar or substitutable goods and services in the most advantageous form for them.

In the legal sense, we understand the confrontation between economic competition of the same or similar activities, exercised in open areas to win market and customer conservation in order to allow the cost conservation in order to allow the cost effectiveness of the company [300].

From the economic point of view, we can say that there is competition if the customer can choose the most favourable to his preferences[301].

Thus, some authors define competition as a feature of commodity production that reaches its full expression, free, at the state of industrialized economy, the machinist production factory. The competition, in economic terms, means an antagonism between the participants in the act of sale, a balance of power between them, the opposition is clearly visible especially in the market of production factors[302].

For some authors, competition is, regarded as baseline, in which there is a free showdown, complete and accurate information between all economic operators both in the supply and demand of goods and services, production of goods and equity[303].

Economic development and competition exert a positive and a negative influence. Thus the competition offers advantages that include:

- The stimulation of the whole/general process, leading to innovations which were implemented, favours the economic increasing of the efficiency, the economy of resources and a better satisfaction of needs;

[300] O. Căpâțână, Dreptul concurenței comerciale (concurența onestă), Lumina Lex Publishing House, Bucharest, 1992, p. 86, I. Băcanu, Libera concurență în perioada de tranziție spre economia de piață, în Dreptul, no. 9-12, P. 50.
[301] T. Moșteanu, Concurența – abordări teoretice și practice, Economică Publishing House, Bucharest, 2000, p. 31.
[302] I. Tomiță, A. Bandoi, Prețuri și concurență, PrintXpert Publishing House, Craiova, 2008, p. 30.
[303] Y. Bernard, J. C. Colli, Vocabular economic și financiar, traducerea E. Theodorof, I. Theodorof, A. Crăințu (coord.), Humanitas Publishing House, Bucharest, 1994, p. 117.

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- Makes differences between operators, supporting the most creative and astute entrepreneurs and eliminating the weaker;

- It differentiates and diversifies the supply and reduces the production cost and the price of the asset;

- It offers the customer the possibility to find the best supplier with goods and cheaper.

When competition in the market is not regulated, it leads to the following negative effects:

- Waste of economic resources;

- Reduction of quality goods;

- Conflicts in society;

- Discouraging consumers;

- The division of society into rich people and poor people;

- The emergence of negative environmental externalities;

- Destruction of major components.

Depending on the confrontation between the subject of the legal relationship of competition and confrontation market conditions, competition is oftwo kinds:

a) Pure and perfect competition, is a theoretical model and abstract ideal. It is characterized by a large number both among tenderers and that of the applicants.

b) imperfect competition, which is characterized by the fact that atomistic market and reduce the sales drop due to the concentration of capital[304].

In terms of the means used, the competition is divided into:

a) fair competition, considered lawful and involves using the rules imposed by professional ethics;

[304] M. M. Dumitru, Dreptul concurenței, Institutul European Iași Publishing House, Iași, 2011, p. 43.

b) unfair competition considered illicit, which involves the use of unfair means to win the competition.

To better understand the importance and purposes of the competition we will exemplify, in the following paragraphs, some concrete cases of unfair competition:

By the civil sentence no. 1093 / 27.11.2009, issued by Bacau Tribunal was dismissed as unfounded, the action brought by the applicant SC D. SA in contradiction with the defendant SC L. SRL - Suceava, its action immediately cease to use the term TV B. withdrawal from the market of all registration and all the materials bearing the name of TV B.without the will of the applicant, damages of 10,000 euros / day of delay enforcement of the judgment in this case and publication in a local newspaper the decision of the court.

In order to rise that judgment, the court first held that: both the applicant and the defendant provides the broadcast TV business, holding each of them decision allowing for visual and audiovisual licenses (in addition, the applicant has registered mark TV B., the best news Television of the County at O.SI.M. so the mark is protected for 10 years from the date of 29.06.2006).

The dispute between the parties that bear the unfair competition is allegedly committed by the defendant under Law no. 11/1991. The applicant has not asked for annulment of the administrative documents of the audio-visual authorization or audio-visual license issued by CNA for the defendant, although, in its reasoning, relies the auditory, visual and conceptual marks identity and practices trademarks of the European Community Court of Justice, as an Administrative Litigation court. The court did not analyse the reasons in fact and in law, because it was invested as an administrative court for annulment of administrative acts cited above. According to Article 2 of Law no. 11/1991, relied on by the applicant by action, unfair competition is defined as any act or fact contrary to fair practices in industrial activity and marketing of products, works and services by making benefits ".

Appealed against that judgment, in legal terms, the applicant SC D. SA - B. in term dated on 27.05.2010, the court, having regard to the provisions of art. 282, 2821 Criminal Procedure. Civ., reclassified the appeal call in promoted in cause. As grounds for the appeal, the applicant criticized the decision of the first instance, given that the defendant used his post mark 1TV B on television and commercials, incriminated by art work. 83 para. (1) a), b) of Law no. 84/1998 art. 5 paragraph. (1) a) of Law no. 84/1998.

Examining the call promoted for those reasons, the court stated as founded on the following considerations: actions promoted by the applicant was caused by the defendant's use of the broadcasting in County B of the brand 1TV. B which, the applicant is likely to create confusion in the consuming public due to the similarity and visual brand identity TV B., owned by the applicant for their TV station, constituted an act of unfair competition. The court found that elements of identity of the marks used by parties to the case, TV B are significant and overwhelming in terms of the relevance of the content of the mark by reference to the elements of differentiation that would avoid potential confusion, according to the defendant, using 1TV B logo for their TV station. The immediate consequence of a small difference between the two brands is to create false representations to the consignee for a single product that causes harm obvious trader who launched the first product on the market with brand shown, bearing in mind the minimum level of specialization of the public to whom addresses, public consisting of county residents' B with a heterogeneous structure, based on the training, education and her background.

In this context, the fact that the applicant is irrelevant and uses this mark earlier than the defendant - from 1999 - the damages caused by the defendant's activity regarding the turnover of the beneficiaries of his product. The fact that the trademark registration certificate no. 80,865 issued by O.S.I.M. provides that the trade mark - the applicant in this case - does not have exclusive rights above the words TV B. does not amount to recognition as defendant used these words in combination liable to confuse the product and its origin in relation to the TV station applicant. Therefore, the elements of similarity between the marks used to identity the two criteria for characterizing such trading activity carried out by the defendant unfair competition.

Since the act of unfair competition is criminalized both in terms of the criminal provisions of art. 83 para. (1) lit. a), b), art. 86 of Law no. 84/1998 as amended to apply until the time of action and the civil, administrative or criminal law, Law no. 11/1991 with subsequent amendments and completions, the court held that the activity carried the defendant violated its obligation to its activity in good faith, respecting the interests of consumers and unfair competition requirements.

Accordingly, the Court of Appeal b., Commercial Division of administrative and fiscal contentious through decision no. 59 2 September 2010, upheld the applicant's appeal SC D. SA - B., changed in whole the called sentence, meaning that partially upheld the action, immediately ordered the cessation of the use of the claim by the defendant TV B., withdrawal from the market

of all materials bearing the inscriptions and the name TV B. without the will of the applicant and publication in a local newspaper the court judgment, rejected the claim for payment of damages as unfounded.

Against that decision the defendant SC L SRL Suceava appealed as the grounds of illegality in support of its appeal, namely art. 304 Section 9 and 3041 C civil Procedure, which requested its admission and rejection on the merits of the action. By criticisms, the appellant argued that the respondent had not obtained in exclusively the use of the words TV B, the evidences presented certifying that the applicant has registered at OSIM the logo of the post and not exclusivity on those two words. The logo of the defendant is totally different.

The exposure arguments put forward by the appellant in support criticisms of the decision regarding the merits, resulting in evidence that were called into question the substantive issues that go beyond the analysis of the pleas of illegality provided for by art. 304 (pt. 1-9) C. Civil Procedure. The Aces standpoint, the simple presentation of party discontent against the judgment under appeal cannot be subject of judicial review by the court of appeal. Accordingly, for the reasons set out above, aimed at promoting and supporting the conditions for the appeal and the appellants in relation to which alleged groundlessness and not the illegality of the previous solution, according to Article 312 of Criminal Civil procedure., will ascertain the nullity of the appeal.

Noting the trial of the appellant's guilt in triggering the present proceedings, the High Court will grant the application for granting respondent costs, in accordance with art. 274 C Civil Procedure[305].

According to art. 3 of Law 21/1996 on competition, autonomous administrative authority, invested for this purpose under the conditions, procedures and limitations established by this law is the Competition Council.

Competition Council is the National administrative competition authority to enforce the competition law, and where they will be breached will apply sanctions provided by law, thus exerting coercive force of the state[306].

[305] I.C.C.J., S. Com., Decision no. 1777 from May 10th, 2011, unpblished.
[306] M. Dumitru, op. cit., p. 97.

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Order to be able duties established by law, the Competition Council and its adoption develops its rules of organization, operation and procedure and sets up its own system, both centrally and also local.

In the area of state aid, the Competition Council has the role of national contact authority between the European Commission, on the one hand and public institutions, suppliers and recipients of state aid on the other. The Competition Council has also the role to represent Romania in relations with organizations and international institutions and relations with the EU institutions, according to the relevant provisions of EU law, and cooperate with other competition authorities.

The Competition Council adopts regulations and guidelines, issues orders, decisions and formulate opinions, make recommendations and prepare reports pursuant to the provisions laid down in Regulation No. 1/2003 and of Council Regulation (EC) no. 139/2004 of 22 January 2004 on the control of concentrations between undertakings[307].

Art. 27 of Law no. 21/1996 Competition Council does not confer the right to determine the discretionary nature of banned or illegal state aid and even less right to have their recovery when they were granted by laws.

The Law no. 143/1999 concerning State aid, as amended and supplemented, financial support must meet four conditions: it must be granted by the State or through State resources, the measure to be selective, to ensure an economic advantage and distort or threaten to distort competition and affect trade between Romania and Member States of the European Union.

Items identity of the brands used by economic operators are significant and overwhelming in terms of relevancy in content brand by referring to the differentiation that could create confusion. The elements of similarity to the identity of the brands used criteria to characterize activities constitute unfair competition.

[307] Op. cit., p. 102.

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