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COMPARATISM AND ORGANICISM IN THE CRUCIBLE OF THE EUROPEAN JURISPRUDENCES. A JUSNATURALIST UROBOROS ON AN ENDLESS COLIMASON

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MOTTO:
1. *Le comparatisme est véritablement analytique seulement sur le terrain fondamental des sources sapientogenes de tous les systèmes de droit (Valerius M.C.)*
2. Ignea quin etiam superum pater arma recondit, / Et Ganimedeae repetens convivia mensae / Pocula sumit ea qua gessit fulmina dextra.

In memoriam Prof.dr.doc. Marțian Cotrău, son of Bihor County, an outstanding personality of Iași

Many scholars of contemporary European legal phenomena assimilate jurisprudentialism almost exclusively to common law as a family of law. There are other families of law which, directly or indirectly, establish in the jurisprudence of judges formal sources worthy of comparison with law or custom; (In which the doctrine gives it the meaning of "jurisprudential art" or Fîkîh, Fiqh, a divided art, grosso modo, on five theoretical levels: Fard, debts, Mandup, recommendations, Mubah, tacit acceptance, Makruh, Immoralities, Haram, Offenses); Also some subfamilies of traditional law systems, from societies that focus their sapiens' spirit of norms rather on the judge's mind than on the legislator's vision.

The theoretical premise that I leave is a bit different, probably because of the doctrinal "deformations" generated by cantoning too much in the sapiential space of Roman law, but also in current European law.

Pax *Europaea* it is a notable resultant of the beneficial comparatism in it’s way of path, method, of instrument of transatlantic juridical acculturation, that succeed to achieve the great normative and institutional convergence, that generate another organic structure of the European law, fixed upon jusnaturalist principles and on the defeatism of the pre-war ultra-positivism. This happened both on nomothetic plan, and on hermeneutical one, as flashes with ardor professor René David.[1] The European competition law, veritable guardian of the European peace is, totally, the best exemplum, it is an argument *per se (secundum ponam casum...*). Comparatism, volunteer juridical acculturation, rational and organicism are, as a rule, works of peace, of the spiral evolution status, in colimason, trying to fix the nomothetic fractures that intervenes in the history squeals.

I’ll start with a categorical affirmation: what we call European Law today, that dominates the European jurisprudences, as well as the national ones that stand below the

[1] René David, *Cours de droit privé comparé*, Tome II, Ed. Les Cours de Droit, Paris, 167-1968, p. 515: “Il ne suffit pas d´avoir des lois uniformes. Encore faut-il que ces lois soient interprétées et appliquées de même façon dans les divers pays qui les ont adoptées.”

principle of the European primacy (Van Gend), it is a right resulted from a "refinement" of the *common law* nature. Practically, the judges from the Institutional European System rationalize and crystallize judicial solutions that become, after that, jurisprudences, from a *modus cogitandi ac operandi* way, like our Anglo-Americans brothers, but in a type a procedure and processual references copied from the French top administrative procedure (dominant in the famous *Conseil d'Etat*).

Let's now "inspect the troops": we have an impressive majority of judges coming from the European continental system (notable exceptions being those coming from the common law, such are the judges from United Kingdom of Great Britain and Northern Ireland, or from Ireland, as well as those coming from the mixed systems, such as: Scottish, Maltese and Cypriotes). Their proportion, among other from all 24 EU member countries is, evidently, very low. Their professional forging to the roman-civils tradition (I'm referring to the continental judges) is, apparently, very different to those of Anglo-American culture. Just apparently, because, as a result of a constant phenomenon of institutional convergence, and one and the other succeed to come closer to the line of epistemological fracture, and even surpass it. We shall come back to this important aspect of the professional training in different juridical cultures, but with the vocation of a certain harmonious synthesis.

In our "inspection" we observe, then, some structure of the process by French administrative canons: two distinct phases of the process, named (slightly abusive, what is right) the "written phase" and, respectively, the "oral phase". The first phase it is extremely time-consuming, taking place on the diptych: action (*requête*, as an Court introductory act) – statement defense (*mémoire en defense*), respectively, replica (*mémoire en replique*) – duplica (*mémoire en duplique*). I always wondered, why not, triplica (*mémoire en triplique*)?

Here we observe a certain semantic drift, of course, with immediate practical consequences concerning: removing the judge from his role as a great supervisor of the trial, because the administration of evidence and the argument dialectics game remain outside its presence (indeed, tradition gives it primacy in the process precisely because of these qualities that make it the great master of factuality, i.e., in legal terms, of probation and of fair processuality, on an equal footing, open, visible or "public").

We record, therefore an "heresy" beside the *constantinian* procedure, like I called (*extra ordinem sau cognitia extraordinaria* generalized)[2] from the Post Classic Roman Era and from the modern trial. Why? I think that, due to some superficial interpretation of the replica signification, of the duplica and triplica. These three exceptions (because of exception we are talking, or we need to talk) there aren't self-standing procedural sequences. They are elements reserved exclusively to the exception plan or, in the case of the last two (replica and triplica), exceptions to exceptions (*exceptio exceptionis causa sive contraria exceptio*[3]).

The whole plan of the usual dispute in the continental trial, including, let's say the exceptions too, is, thorugh a living Roman tradition (starting from *exempli gratia, Fragmenta Vaticana et Collatio legum Mosaicarum et Romanorum* partially recovered in *Leges Romanae Barbarorum* - s.VI[4]**),** the following:

***Convergentia in the judicial debates structure*:**

1. narratio (r.*)/*

[2] Valerius M. Ciucă, "Euronomosofia sous le parapluie du *jus actionum*. Les principes qui donnent la substance de l´*extraordinaria cognitio*, comme héritage ontologique du procès européen modern" en Fernando Reinoso Barbero (coordinador), *Principios generales del Derecho. Antecedentes históricos y horizonte actual*, Thomson Reuters Aranzadi, Madrid, Pamplona, 2014, pp. 1079 *et sq.*

[3] Julius Paulus, *Digesta,* De exceptiis, Liber XLIV. Titulus primus, apud Gaston May, *Éléments de droit romain, à l'usage des étudiants des Facultés de droit,* Ed. VII. Ed. Larose, Paris, 1901, p. 583, in Valerius M. Ciucă, *Drept roman. Lecțiuni,* Vol. I, Ed. Universității "Al.I.Cuza" Iași, 2015, p. 132.

[4] G. May, *op. cit*., p. 581.

2. contradictio (p.*)/*
3. postulatio (r.)/
4. exceptio (nova contradictio, p.)/
5. replicatio (r.)/ (that paralyze *exceptio*)
6. duplicatio (p.)/ (-"- *replicatio*)
7. triplicatio (r.)/ (-"- *duplicatio*).

This plan of the debates must be represented a model, beside *Talmud*, in the development of the dialectical elements from Accursius glosses and Bartolist comentaries, those that fundament our own methodological preoccupation inside the Juridical Hermeneutic Circle "Școala dreptului organic", the nucleus of *Robertianum* Centre of European Private Law. Briefly, this shows like follows:

"I – *primum dividam* (analyse du texte juridique par:

I.1 – *lectura*, la présentation intégrale du texte juridique;

I.2 – *summa*, le résumé du texte;

II – *secundum ponam casum* (casuistique réelle et eidétique, imaginaire, le lien immédiat entre l'abstraction du texte et la réalité conflictuelle);

III – *tertium historia regulae explorabo* (troisièmement, je vais examiner le premier axe de l'investigation comparatiste, l'axe verticale - *Optima enim est legum interpres consuetudo* , „La coutume est une excellent interprète des lois");

IV – *quartum comparabo* (quatrièmement, sur l'axe horizontale du travail de comparaison, je vais inclure, dans l'analyse prospective et exploratoire, des références au texte matriciel d'*Institutionum seu elementorum* (Justinien) et au Code civil napoléonien, à des textes similaires contemporaines.

V – *quintum colligam* [cinquièmement, je ferai une possible exégèse du texte par:

V1 – l'analyse grammaticale – *littera*, comme suit:

V.1.a – *vulgari usu loquendi*: les notions et les locutions sont interprétées selon le sens communs;

V.1.b – *ab etymologia*: le sens original des concepts qu'on opère;

V.1.c – *a rationis legis stricta*: les significations particulières des concepts, définies, *expressis verbis*;

V.1.d – *ab rationis legis*: les significations déductibles au sein de la loi, sa logique de produire des effets juridiques;

V.1.e – *pro subjecta materiae*: les expressions juridiques peuvent, finalement, être interprétées téléologiquement;

V.2 – la contextualisation – *sententia* – qui suppose, dans une analyse excursive - expectative, des recherches de droit romain, sociologie, anthropologie, psychologie juridique;

V.3 – l'identification du sens philosophique et théologique, ainsi que du sens social et politique;

V.4 – l'identification du sens obscur – *sensus* -, c'est-à-dire du quatrième sens.

VI – *sextum opponam et quaestio* (sixièmement, je vais étudier les objections possibles au raisonnement impliqué par le texte et je vais clarifier les contradictions suivant la méthode dialectique);

VI.1 – la thèse – *pro auctoritas*;

VI.2 – l'antithèse – *contra auctoritas*;

VI.3 – la synthèse – *dicta*;

VII – *septimum queram, brocardum et de lege ferenda* [septièmement, je vais examiner les justifications du droit sanctionné par le texte respectif en exposant les arguments et les

exceptions, y compris *exceptio exceptionis causa*, en respectant finalement les principes généraux, des brocarts durables"[5]

Finally, following our inspection, we observe the European judges at the peak of the trial, which is the deliberations phase. Well, related with Augustinian and Tomist tradition[6], we link the deliberations by the idea of harmony (a substitute of the justice concept and, of course, the very substance of the justice, of the equity as a cardinal social ideal, beside freedom. Harmony is a natural connection between the real world, perceived by us and intellect, represented by us (*adaequatio rei et intellectus*). This what is always expected from the judge.

If, the European judges from the member states (they are called national judges but in fact they are European, in respect with the Oliver Wendell Holmes Jr. conception, he himself a judge and savant, that defines the judge through the light of the formal applied sources, not from the geographical point of view...[7]), in their praetorians invoke, invariably, the support of the law (and law' limits, of course, after the fallacious collective prejudice expressed somewhat trivially *Dura lex sed lex*), well, the European judge from Luxembourg invoke, in the first place, the idea of equity[8], with support in the judge' reason and in jurisprudences and, with the natural scrupulosity to not transgress the letter of the law (treaties, regulations, directives etc.).

In other words, in the decisive moment of the trail, *the European judge* (let's call like that) is, apparently paradoxical, paralogical, a *common law judge*[9]: jusnaturalist (little positivist, what's right) and jurisprudencialist as in the Roman Classic Age (with tendency, often, self-referential, for the sake of equity and harmonization of the European rules)[10].

Does the European judge wanted to acquire this profile, illustrated above?

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[5]Valerius M. Ciucă ("Preface"), Codrin Macovei, Septimiu Panainte (coordinators), *Școala dreptului organic. Aplicațiile Cercului de hermeneutică juridică "Școala dreptului organic",* Vol. I, Junimea Printing House, Iași, 2007, pp. 13 *et sq*.; explicative text, resumed circumstantially in various other works and conferences, the latter being presented at the "St. Clement" University in Sofia, at the Congress of the Romanian Society of the Balkans (Societas Jure Romano) in October 2016.

[6]St. Toma d'Aquino: *Veritas est adaequatio rei et intellectus.*

[7] Oliver Wendell Holmes Jr. (8. III. 1841 – 1935), a prominent, influential representative of sociological realism in American law, thinking this way: If you want to know what the judge's evening judgment looks like, look at what he ate at breakfast …

[8] Valerius M. Ciucă, *Euronomosofia, Vol. II, In căutarea substanței ontologice și a palingeneziei dreptului european,* Academic Foundation Printing House AXIS, Iași, 2016, p. 69: " the principle of proportionality (the ancestral principle of applied wisdom, *solomonics*, solidity and fairness, equity – NB! It judges juridical similar relationships with the same unit of measure, and different legal relationships with different measures! -, of common reason, as in *common law*, a principle of judiciary excellence". See also CJUE, Court Decision (Second Chamber), 19 July 2012, „The Sixth Directive TVA – Directive 2006/112/CE – the concept of «economic activity» – Wood supplies to cover the damage caused by a storm – Reverse change scheme – Non-inclusion in the register of the taxable persons – Fine – ***The principle of proportionality***", Case C-263/11, having as object a request for a preliminary rulling under Article 237 TFUE from the Augstākās tiesas Senāts (Latvia), made by Decision of 13th of May 2011, received at the Court on 26th of May 2011, in the proceedings Ainārs Rēdlihs against Valsts ieņēmumu dienests, (...)

[9] Valerius M. Ciucă, *Euronomosofia, Vol. I, Prolegomene la o operă in eșafodaj*, Academic Foundation Printing House AXIS, Iași, 2012, p. 154: "... we can understand how the judge does not break the rule when he saves justice in the face of legalism. The whole jurisprudential European law makes this suppressive work of adapting norms to the requirements of reason and equity".

[10] R.C. van Caenegen, op.cit, pp. 38-39: " On the contrary, the Roman law of the classical period is in many respects closer in character to the English common law than to the modern civil-law systems which are derived from the medieval schools. This is because both classical Roman law, and the common law were developed through opinions and debates among experts, occasioned by particular lawsuits, rather than through general rules laid down by the legislator or theories produced by learned professors. Also in both cases legal development was centred around particular forms of action, i.e. the praetor's formula and the chancellor's writ. The modern civil law, in contrast, was based on university teaching and the academic study of the text of the Corpus iuris; it was, in other words, not case-law but book-law. The civil law is derived from post-Roman (or at least post-classical) Roman law, whereas the early common law unwittingly retraced the steps of the latter."

Of course, not, or, better, not expressly, I'd dare to answer somewhat trenchant, without following a certain palinode to the principle of the non-transgression of the judge, which I referred above.

I don't want to contradict myself, but to stress, referring to an absolutely new, sometimes unusual legal situation in the post-war Europe, a reality that managed to get it out of the self-imposed "logic" of the *national superbia* raised to the rank of false universal criteria. Here appears the mythological figure of *Uroboros*: there is, sometimes, a certain dysfunction in the perfect circularity of the closed model, of the juridical "paradigm"; can he, the European judge *in nuce*, to believe, shortly before Robert Schuman's providential *Statement* in the *Clock's Hall* of the Palace from Quay d'Orsey, that he would soon become something other than "national judge"? In other words, can he expect a projection of the plain circularity on the spiral, on the *colimason of the historical development*, from a*"2D"* in a *"3D" frame*...? I'm afraid not. And so, it happened only in a century, and with the acculturation of the German Law of the Social Security, just in the liberal France or, more evidently, with the acculturation of the American Law of Competition (a "heresy" striking the sky for the liberal fundamentalism in conservative Europe or, worse, in that levelling, uniformist, crypto-slave Soviet type)[11].

As such, I believe, in adopting the new profile, more pronounced "Anglo-American", more jusnaturalist, the European Judge was constrained by the pauperisation of the new European post-war law, being for the moment clouded by the European Law of Legal Values, with all the *palingenesis* and its rebirths.

The same judge was constrained by the complexity of the commercial and social-economic "European" relationships, a complexity unmatched since the Classical and Roman Post-Classical Age, where the in double prism effect, of the *transatlantic* juridical divergences and convergences, did not belong to the rational expectations of the European national judges.

It was constrained, finally, and more than anything else, the rewarding and benevolent jusnaturalism, with its strong moral nucleus, with the expansion of the requirements from rational to temperament and a very good non-rational aspect, one of character and vocation, one of an evidently strong Anglo-American inspiration[12] (though, through our pre-war thinkers like, for example, Simion Bărnuțiu, there were the new commands of good judicial

[11] Jean Monnet, *Mémoires*, Librairie Arthème Fayard, 1976, Nouvelle édition, 2007, pp. 511-512: "Le problème était de briser les concentrations excessives dans la sidérurgie et les charbonnages de la Ruhr où les anciens *Konzerns (Trusts, n.ns.)* qui avaient fait la puissance militaire du Reich se reconstituaient tout naturellement. Les Américains, les premiers, s'y étaient attaqués depuis de longs mois. *Leur philosophie économique et politique n'admettait pas les instruments ni l'exercice de la domination chez eux et chez les autres* (subl.ns.). Ils exigeaient que l'organisation unique de vente du charbon allemand, le fameux Deutsche Kohle-Verk Gesellschaft (DKV), perdît sa structure de monopole et que les industries de l'acier ne possédassent plus les mines de charbon" (...) "C'était une innovation fondamentale en Europe, et l'importante législation antitrust qui règne sur le marché commun trouve son origine dans ces quelques lignes pour lesquelles je ne regrette pas de m'être battu quatre mois durant. Robert Bowie, une fois sa mission terminée ici, rentra aux Etats-Unis où s'étendit sa réputation universitaire. Il devint un conseiller écouté de la Maison-Blanche pour les affaires d'Europe."

[12] Jan M. Broekman, *A Philosophy of European Union Law*, Ed. Peeters, Bruxelles, 1999, pp. 154-155: "(...) modern law admits how non rational elements belong to expectations and that law itself has therefore no season to limit to rationality only. Paul Gewirtz once stressed this point in a fascinating essay, saying: "Myth aside, non-rational elements are central in law today. Consider just a few non-rational aspects of the self that are defining qualities of excellence in a judge: imagination, judgement, courage, compassion, good sense, energy, calmness, open-mindedness, the capacity to listen, eloquence. The American Bar Association, in rating potential judges, calls many of these qualities aspects of "temperament"; Antony Kronman would probably call them aspects of "character". My point is here that they are not usually seen as aspects of rationality, even though most of them are aspects of mind, and that these non-rational aspects of mind have long been seen as vital to the activity of judging. (Gewirtz, P.: On "I know It When I See It", in *The Yale Law Journal*, Vol. 105, Nr 4, 1996, p. 1033)"

deontology)[13] , in the process of the world-wide gigantic juridical acculturation in the post-war period, after the patent failure of positivism, often criminogenic and non-humanist, mirrored in the two ”Creonian”, tyrannical, abusive systems, like two downgraded daughters of *Azrafil*, the demon of death...

It is an illusion that the positivism removes the subjectivity of interpretation and favors the objectivity, the equidistance. On the contrary, as in the comparative law doubled by organiscism, which is based on a ”controlled subjectivity”, as Jean Carbonnier said, after Montesquieu[14], only admitting to subjective law its primordial role in forging the perennial and universal juridical values (idea well defended by Octavian Ionescu)[15], you can trust in the good evolution of the law. I fully share this idea, supported in such a mastery way by comparator Pierre Legrand.[16]

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[13] Simion Bărnuțiu, *Dereptulu naturale privatu*, Tiparul Tribunei Române, Iași, 1868, p. 3: ”Dereptulu naturale presupune conceptele principali dein Psicologia si Antropologia: anume, cumu cà *sufletulu* nostru e facultatea ceea ce *cugeta, sente,* si *voesce* in noi. Dein partea facultatii *cunoscitorie* presupune conceptulu perceptiunii, intuitiunii, sensatiunii, alu fantasiei, alu memoriei, alu reminiscentiei, apoi alu intielesului, alu astraptiunii, reflesiunii si alu ratiunii speculative. / Dein partea facultatii *sensitive* presupune conceptulu sentimentului: esteticu, intieleptuale, sacru, morale, egoisticu, cordiale. / Dein partea facultatii *apetitive* presupune conceptulu instintului, alu arbitriului, alu vointei libere si alu ratiunii praptice. / Pretotendene in aceste trei departamente ale sufletului, ratiunea se areta cá o *facultate a ideeloru*, care cauta se aduca la unitate tote lucrarile nostre si se alunge contradiptiunea de pretotendine.”

[14] Montesquieu, *Scrisori persane.Caiete*, Translated by Ștefan Popescu, Preface and chronology by Irina Eliade, Hyperion Printing House, Chișinău, 1993, p. XXV, in Valerius M. Ciucă, Lecții de sociologia dreptului, Polirom Printing House, 1998, p. 109:” from this angles, the rule of objectivity, as in all areas of social thinking, is in a purely “*controlled subjectivity*”. It is the conception expressed by one of the precursors of the law sociology, Montesquieu, that, after confessing his attachement to the European states he visited for years (1728-1732), a manifest attachement, like that to his own country, he made, still, the effort required to any scientist to *“detach himself from any trace of affectivity (*exaggerated, uncontrolled subjectivity, n.m., VMC*), to look at all peoples in Europe as if they were all in Madagascar”.*

[15] Octavian Ionescu, *La notion de droit subjectif dans le droit privé*, Préface de Georges Ripert, Seconde édition, revue et augmentée, Bruxelles, Bruylant Printing House, 1978, *in integrum*.

[16] Pierre Legrand, *Dreptul comparat*, Lumina Lex Printing House, Bucharest, 2001, pp. 59 *et sq*.: ”The comparison can be considered as an a priori controllable practice of producing knowledge, although it is an approach which, like all the approaches, even scientific, depends on the variations in its instruments and technical procedures, as well as the assertion imposed by the hermeneutical reflection teaches us – that, nonetheless, the comparator is not only a passive object that merely reacts to a situation. Even though the comparator does not do a job of judging, comparing it always means judging

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BRIEF CONSIDERATIONS ON THE EUROPEAN LEGISLATIVE PROCEDURES, WITH PARTICULAR REFERENCE TO PASSERELLE CLAUSES

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ABSTRACT:

The Lisbon Treaty in order to strengthen the EU's capacity to decide, to act and to ensure the legitimacy of decisions taken at the same time, reformed the decision-making process of the EU, particularly by changing the legislative procedures in force.

Among the novelties of the Lisbon Treaty, we must mention the passerelle clauses, which according to the ordinary legislative procedure will be generalized, under certain conditions, in areas which were initially outside its scope.

The treaty nominates two types of passerelle clauses: the general passerelle clause which applies to all European policies and the enabling of this clause will be authorized by a decision of the European Council, acting unanimously; the passerelle clauses specific to certain European policies (MFF, Common Security and Defence Policy, judicial cooperation regarding the family rights- this specific clause is the only one explaining which national parliaments keep their right to oppose; cooperation is strengthened in the areas governed by unanimity or by a special legislative procedure, social affairs, environmental).

The flexibility introduced through a significant number of passerelle clauses in the Lisbon Treaty allows adjustment of the EU quickly and efficiently, depending on punctual developments, without neglecting the guarantees on the sovereignty of member states.

KEYWORDS: *LISBON TREATY, PASSERELLE CLAUSES, THE GENERAL PASSERELLE CLAUSE, THE PASSERELLE CLAUSES SPECIFIC, UNION INSTITUTIONS*.

1. OVERVIEW

The European construction is based on the EU Member States' willingness to work together on common interests. This led to the belief that in some areas the expected results can be achieved only at European level through common policies developed and adopted by the institutions of the EU.[1]

[1] M. Profiroiu, I. Popescu – *European Politics*, Economic Publishing House, Bucharest, 2003, p. 13-14.

The Lisbon Treaty[2] aimed at strengthening the capacity of decision and acting of the EU whilst guaranteeing the legitimacy of decisions taken, reforming especially by amending the legislative procedures in force.[3]

Art. 289 par. 1 and 2 of the Treaty on the Functioning of the EU have introduced two types of legislative procedures - ordinary and special. At the same time, the Treaty of Lisbon has introduced the passerelle clauses which, according to the ordinary legislative procedure should be generalized, under certain conditions, in areas that were initially outside field of application.[4]

2. ORDINARY LEGISLATIVE PROCEDURE

The ordinary legislative procedure replaces the former co-decision procedure, which over time has become the most commonly used procedure.

This procedure is the most legitimate from a democratic point of view.

Art. 294 TFEU governing the ordinary legislative procedure requires the adoption of an act jointly by the European Parliament and the Council, on a proposal from the Commission.[5]

The Lisbon Treaty confirms the trend of the widespread use of this procedure, but changes its name and determines that it is a common law procedure. Moreover, extending the ordinary legislative procedure to new areas of union policy.

Under this procedure occurs a revaluation of the position of the European Parliament from a secondary legislative body into a mainly legislative body on par with the Council since the European Parliament has a right of veto in adopting the legislative act that cannot be removed by the Council unilaterally.[6]

The detailed application of the ordinary legislative procedure are identical to those of the co-decision procedure, being extensively described in art.294 content TFEU.

From the structure of art. 294 TFEU results that the first step is to send simultaneously proposals to the Commission, the European Parliament and the Council, all three being equal in the decision-making process.

The procedure is complex and is structured in three readings, steps being summarized in the content of art. 294 TFEU.

Thus, at first reading[7], the European Parliament is the first to adopt its position and sent it to the Council, which in case they approve the Parliament's position, the act is adopted in the wording which corresponds to the European Parliament's position and in case they do not approve the Parliament's position, the Council will adopt its own position and send it to the European Parliament, informing it on the reasons. In this case, it will proceed to a second reading.

The Commission must clarify its position and inform the European Parliament. At the second reading, if, within three months of such communication, the European Parliament approves the Council's position from the first reading or does not pronounce anything, the act is deemed adopted, according to the position expressed by the Council. If the European Parliament rejects with a majority of its component members, the Council's position from the first reading, the act is deemed as not adopted. When the European Parliament proposes, with a majority of its component members, amendments to the Council's position, the text is

[2] The Reform Treaty signed in Lisbon at 13.12.2007 and entered into force at 1.12.2009.

[3] Previously, there were over 52 legislative procedures in the union law, each used according to legal rules that regulated the development and the adoption of Community legislation (cooperation procedure, the co-decision, approvals, etc.). For more details F. Gyula, *Institutional Law of EU*, Hamangiu Publishing House, Bucharest, 2012, p.188.

[4] I. Gâlea – *EU Treaty. Comments and explanations*, C.H. Beck Publishing House, Bucharest, 2012, p. XIX.

[5] Art. 294 para. 2 TFEU.

[6] F. Gyula, op. cit., p. 190.

[7] Art. 294 para. 3-6 TFEU.

submitted to the Council and the Commission, the latter gives its opinion on these amendments. For its part, the Council has a period of three months from the receipt of the modifications made by the European Parliament and with qualified majority can approve all the changes, the act being considered adopted, otherwise the procedure continues, the conciliation Committee being summoned by the Presidents of the Council and European Parliament.

The role of the Committee referred to in art. 293 TFEU is highlighted in the second reading, because if the proposed amendments have received a negative opinion from the Council, it must decide by unanimity and if it's positive, with qualified majority.

Conciliation[8] is performed by the Conciliation Committee composed of members of the Council or their representatives and an equal number of members of the European Parliament and has the task of reaching an agreement on a joint text within six weeks. The decision is taken by qualified majority of the Council members, not majority of MEPs and The Commission participates in and take initiatives to promote an approach between the positions of the EU. At the end of the six weeks, if they do not reach an agreement, the act is deemed rejected.

At the third reading[9] there is an opportunity to make amendments, the European Parliament and Council may approve within the six weeks the joint text resulting from conciliation.

If one of the institutions rejects the joint or does not approve it, the act is deemed rejected.

An element of flexibility will be applied horizontally concerning the deadlines of three months and six weeks referred to in this procedure, that they may be extended at most one month or two weeks at the initiative of the European Parliament or the Council.[10]

3. SPECIAL LEGISLATIVE PROCEDURES

Special legislative procedures replace the former procedures of consultation, cooperation and assent. The objective is to simplify the decision-making process of the EU, making it clearer and more effective. As the name indicates, these procedures derogate from the ordinary legislative procedures and therefore constitute exceptions.

In special legislative procedures, the EU Council is, in practice, the sole legislator. The European Parliament is simply associated with the procedure. Its role is thus limited to consultation or approval, as applicable.

Unlike the ordinary legislative procedures, the Treaty on the Functioning of the European Union does not provide a precise description of special legislative procedures. Special legislative rules of procedure are therefore defined on an ad hoc basis by the Articles of the Treaty on European Union and the Treaty on the Functioning of the European Union, which provides their implementation

4. PASSERELLE CLAUSES[11]

The Treaty of Lisbon has introduced passerelle clauses to be able to apply the ordinary legislative procedures to areas in which treaties have established a special legislative procedure. Moreover, these clauses allow qualified majority voting to be applied to acts which are to be adopted unanimously.

There are two types of passerelle clause:

[8] Art. 294 para. 10-12 TFEU.
[9] Art. 294 para. 13-14 TFEU.
[10] This rule was introduced by the Treaty of Amsterdam and was accompanied by a declaration annexed to the Final Act, stating that the institutions will strictly respect deadlines and will only resort to the temporal extension when it is absolutely necessary.
[11] http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0016_en.htm; date: 29.04.2015; hour: 19:38.

♦*the general passerelle clause which* applies to all European policies; the activation of this clause must be authorized by a decision of the European Council, acting unanimously. Passerelle clause constitutes a revision procedure of the EU Treaties, as shown in art.48 paragraph 7 TEU.

This clause applies in two situations: a) where the Treaties provide that an act be adopted unanimously by the Council, the European Council may decide to authorize the Council to adopt the decision by qualified majority, except for decisions with military implications or defence; b) where the Treaties provide that an act is to be adopted in accordance with a special legislative procedure, the European Council may decide to authorize such an act adopted under the ordinary legislative procedure.

In both cases, the European Council may adopt the decision unanimously after obtaining the consent of the European Parliament. However, it is noted that national parliaments have a right to object and prevent the activation of the general passerelle clause.

♦*specific passerelle clauses* with respect to certain European policies

The specific passerelle clauses have certain features of procedure regarding the general passerelle clause. For example, national parliaments have generally a right to object, this right is granted to them by the general clause. In other cases, the application of certain specific clause may be authorized by a decision of the Council, and not the European Council as is the case for the general clause. Therefore, the rules for applying the specific terms vary from case to case and are described in the articles of treaties providing for their application.

There are six specific passerelle clauses to be applied to: 1) Multiannual financial framework (art. 312 TFEU); 2) Common Security and Defence Policy (art. 31 TEU); 3) Judicial cooperation concerning family law (art. 81 TEU). This specific clause is the only clause regarding which national Parliaments retain the right to object; 4) Enhanced cooperation in the areas covered by unanimity or a special legislative procedure (art. 333 TFEU); 5) Social Affairs (art. 153 TEU); 6) Environmental (art. 192 of the TEU).

MULTIANNUAL FINANCIAL FRAMEWORK[12]

1. The multiannual financial framework shall ensure that Union expenditure develop in an orderly manner and within its own resources. It is adopted for a period of at least five years. The annual budget of the Union respects the multiannual financial framework.

2. The Council, acting in accordance with a special legislative procedure, adopts a regulation laying down the multiannual financial frame work. The Council shall act unanimously after the approval of Parliament, which shall act by a majority of its component members. The European Council can unanimously adopt a decision authorizing the Council to act by qualified majority when adopting the regulation of the Council under the first paragraph.

3. The financial framework shall determine the amounts of the annual limits on commitment appropriations by category of expenditure and of the annual limits on payment appropriations. The categories of expenditure, limited in number, shall correspond to the main sectors of Union activities. The financial framework shall lay down any other provisions required for the annual budgetary procedure to run smoothly.

4. If the Council Regulation establishing a new financial framework has been adopted at the end of the previous financial framework, the limits and other provisions corresponding to the last year of that framework shall be extended until the adoption of this act.

[12] http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-6-institutional-and-financial-provisions/title-2-financial-provisions/chapter-2-the-multiannual-financial-framework/632-article-312.html; date: 30.04.2015; hour: 12:09.

5. Throughout the procedure leading to the adoption of the financial framework, the European Parliament, the Council and the Commission shall take all necessary measures to facilitate the adoption.

This multiannual spending program, which reflects from a financial point of view, the EU's policy priorities, establishing expenditure ceilings for a certain period of time, from the perspective of the vote, following the insertion of the special passerelle clause, allows the transfer from the rule of the unanimity to that of the majority, leading to a greater flexibility in defining the European financial framework.

COMMON SECURITY AND DEFENCE POLICY[13]

The Lisbon Treaty seeks to strengthen the role of the European Union (EU) on international level. The reforms introduced by the Treaty aim to make the Common Security and Defence Policy (CFSP) of the EU more coherent and to increase visibility.

In this sense, the Treaty of Lisbon introduces two major innovations: *creating High Representative of the Union for Foreign Affairs and Security Policy and the European External Action Service; the development of common security and defence policy.*

The Lisbon Treaty introduces a special passerelle clause regarding this segment, which allows the European Council to decide, by unanimous vote, the extension of qualified majority voting in CFSP.

Alongside these two innovations, the Treaty of Lisbon also introduces other less important changes, particularly regarding procedures for implementing the CFSP.

JUDICIAL COOPERATION REGARDING FAMILY LAW[14]

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and judicial decisions and court settlements. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:(a) the mutual recognition between Member States of judgments and judicial and extrajudicial decisions;(b) cross-border service of judicial and extrajudicial documents;(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;(d) cooperation in the taking of evidence;(e) effective access to justice;(f) the elimination of obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of rules on civil procedure applicable in the Member States;(g) the development of alternative methods of dispute resolution;(h) support the training of magistrates and judicial personnel.

3. Notwithstanding the paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

On a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the

[13] http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0025_en.htm; date: 30.04.2015; hour: 12:39.

[14] http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-3-union-policies-and-internal-actions/title-v-area-of-freedom-security-and-justice/chapter-3-judicial-cooperation-in-civil-matters/349-article-81.html; date: 30.04.2015; hour: 13:15.

ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to national parliaments. If a national parliament within six months from the date of such notification, not the decision. In the absence of opposition, the Council may adopt the decision.

The Lisbon Treaty increases the efficiency of the decision-making process in this area, by extending the vote to qualified majority and by making this procedure, the usual and standard voting procedure, with a limited number of exceptions, as highlighted above.

ENHANCED COOPERATION IN THE AREAS COVERED BY UNANIMITY OR A SPECIAL LEGISLATIVE PROCEDURE[15]

1. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously, the Council, acting unanimously in accordance with the conditions laid down in art. 330, may adopt a decision stipulating that a qualified majority.

2. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council acts in accordance with a special legislative procedure, the Council, acting unanimously in accordance with the requirements of art. 330 may adopt a decision stipulating that it will act under the ordinary legislative procedure. It shall act after consulting the European Parliament.

3. Paragraphs 1 and 2 shall not apply to decisions with military or defence implications.

SOCIAL AFFAIRS[16]

1. In order to achieve the objectives of art.151, the Union shall support and complement Member States' action in the following areas:(a) improvement in particular of the working environment to protect the health and safety of workers;(b) working conditions;(c) social security and social protection of workers;(d) the protection of workers if the employment contract is terminated;(e) the information and consultation of workers;(f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5;(g) conditions of employment for third country nationals legally residing in Union territory;(h) the integration of persons excluded from the labour market, without prejudice to art. 166;(i) equality between men and women with regard to labour market opportunities and treatment at work;(j) the combating of social exclusion;(k) the modernization of social protection systems without prejudice to point (c).

2. To this end, the European Parliament and the Council. :(a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonization of the laws and regulations of the Member States ;(b) may, in the areas referred to in paragraph 1 (a) (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules in each Member State. Such directives are to avoid imposing administrative, financial and legal in a way which would hold back the creation and development of small and medium enterprises.

[15] http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0016_en.htm; date: 30.04.2015; hour: 14:22.

[16] http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-3-union-policies-and-internal-actions/title-x-social-policy/420-article-153.html; , date: 30.04.2015; hour: 15:02.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

The matters referred to in paragraph 1 (c), (d), (f) and (g), the Council decided unanimously in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide that the ordinary legislative procedure applicable to paragraph 1 (d), (f) and (g).

3. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted in accordance with paragraph 2, or, where appropriate, the implementation of a Council decision taken in accordance with art. 155.

In this case, it shall ensure that, no later than the date on which must be transposed or implemented a directive or a decision, the social partners have introduced the necessary measures by agreement, the Member States concerned must take all necessary measures to enable the any time to be able to guarantee the results imposed by that directive or decision.

4. The provisions adopted pursuant to this Article: not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof; I cannot prevent a Member State from maintaining or introducing more stringent protective measures compatible with the Treaties.

5. This Article shall not apply to pay, the right of association, the right to strike or the right to lock-out.

The Treaty of Lisbon strengthens the social dimension of Europe, including in terms of policy content and means of decision making. The extension of qualified majority voting to social services for migrant workers in the EU seeks to facilitate for them the consideration of all these periods of employment, in order to receive the benefits that both the migrant workers and their families are entitled to. Where a Member State considers that such a measure is in contradiction with important aspects of its national social security system, the State may require the Commission to prepare a new project or may make an "appeal" to the European Council.

The unanimity rule is retained on decisions in this matter, on certain issues, mentioned above.

ENVIRONMENTAL [17]

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide on the measures to be taken by the Union in order to achieve the objectives of art. 191.

2. By way of derogation from the decision referred to in paragraph 1 and without prejudice to art. 114, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the European Economic and Social Committee and the Committee of the Regions, shall adopt:(a) provisions primarily of a fiscal nature;(b) measures affecting- spatial, quantitative management of water resources or affecting, directly or indirectly, the availability of those resources, land use, with the exception of waste management;(c) measures significantly affecting a Member State choice between different energy sources and the general structure of its energy supply.

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the European Economic and Social Committee and the

[17] http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-3-union-policies-and-internal-actions/title-xx-environment-climate-change/480-article-192.html, date: 30.04.2015; hour: 15:27

Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first paragraph.

3. General action programs setting out priority objectives to be attained shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

The measures necessary for the implementation of these programs shall be adopted in accordance with the conditions set out in paragraph 1 or 2, as the case may be.

4. Without prejudice to certain measures adopted by the Union, Member States shall finance and implement the environment policy.

5. Without prejudice to the principle that the polluter should pay, if a measure based on paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, such measure shall lay down appropriate form: temporary derogations and / or financial support from the Cohesion Fund set up under art. 177.[18]

The EU action regarding environment protection is based on the need to protect and improve the environment. The Lisbon Treaty recognizes climate change as one of the most important global challenge and identifies the measures through which the EU can respond to it.

In order to achieve the objectives of environmental protection, the treaty introduces a special passerelle clause in art. 192 paragraph 2, stating that through unanimous vote from the Council, on a proposal from the Commission and in consultation with the European Parliament, the European Economic and the Social Committee, it is possible to vote on qualified majority in these areas.

5.CONCLUSIONS

Transformations and deep changes occurring in the European construction, the appearance and essence, quantitative and qualitative, of substance and form were impacted positively by allowing major variations regarding the role and powers of the institutions of union arrangements exercising skills correspondent reaching decision-making procedures and judicial review.[19]

These changes in the European institutional referring to the decision-making procedure we appreciate as being favourable to the reform process's rate and able to objectified conclusion reached by the Laeken Declaration[20] that "*U.E. It is a success story*. "

Flexibility introduced by an important number of clauses in the Treaty of Lisbon walkways allow adjustments to the EU Framework quickly and efficiently, depending on developments punctual, without neglecting the guarantees on the sovereignty of member states.

However, we consider that union efforts institutions expressed these innovative formulations, should be complemented by actions of the Member States responsible.

[18] Art. 177 TFEU.

[19] With regard to judicial review, see A.Tizzano, *Some considerations on the Court of Justice*, Romanian Journal of European Law no. 6/2012, Publisher Wolters Kluwer, Bucharest, p.28.

[20] The Declaration regarding the future of the E.U., December 2001 cit. by J, -C. Piris, *The Lisbon Treaty, A Legal and Political Analysis*, Cambridge University Press, 2010, p.12

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OBSERVATIONS ON PUBLIC INSTITUTIONS AND AUTHORITIES WITH THE PURPOSE OF PROTECTING INDIVIDUALS

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ABSTRACT:

The present work brings to the reader's attention the evolution concerning the regulation of institutions and public authorities with powers in the field of protection of the individual in Romania and, in particular, in the field of child care. Taken from the Family Code, the current tradition of civil code, through article 107, gave the Court the responsibility of guardianship and family proceedings relating to protection of the individual. Subsequently, law No. 71/2011 for the implementation of law No. 289/2009 allowed, on a temporary basis, until the entry into force of the regulation of the Board of Trustees, as courts to delegate, by closing certain tutelary authority powers. As a result of amendments to law No. 71/2011, many duties of the Board of Trustees with respect to the minor or legal forbidden were passed as the tutelary authority task.

On the other hand, the special protection of the child, law No. 272/2004 on the promotion and protection of children's rights confer important directorates-general duties of social work and child protection and child protection committees. These authorities with important powers in matters of protection of the individual have a special quality in triggering procedural active civil action such as revocation of parental rights by a court or taking of a measure of special protection. Law No. 272/2004 has set up a special material competence and liable to give rise to numerous controversies in jurisprudence.

The analysis of the development of institutions and public authorities with powers in this matter confer the opportunity to observe how the powers of the blends and the conflicts they generate in the existing not clear regulations. This article examines and interpreted that the jurisprudence has given legal provisions.

KEYWORDS: Individual, organization, protection, public authorities

1. INTRODUCTORY CONSIDERATIONS

For a correct application of the rules governing the protection of the individual is required the knowledge of the authorities and institutions that have competence in certain subjects. In the legislation, the public authority is defined as any State organ or

administrative-territorial unit acting under State authority, to satisfy a legitimate interest (article 2, point 1, letter b of law No. 554/2004 of the administrative courts)[1].[1]

It is necessary to distinguish the old legislation, especially the family code, and the new legislation starting with law No. 272/2004 on the protection and promotion of children's rights and culminating in the civil code and by the law for its implementation. The presentation of the legal provisions from historical perspective will demonstrate that the current regulation is the fruit of a gradual development of legislation for the purposes of assigned powers in favor of the Court. At the same time, we noticed the hesitation and explicable through a legislative assessment of material resources and unrealistic that resulted in recognition, again, has numerous powers in favor of the tutelary authority.

2. REGULATION PREVIOUS THE LAW. 272/2004 ON THE PROTECTION AND PROMOTION OF THE RIGHTS OF THE CHILD

Under the Family Code, powers relating to measures for the protection of an individual was divided between the guardianship authority and the court stating that the role of the most important has been the tutelary authority. Under art. 158 Fam. Code, the tutelary authority powers belong to the executive bodies and provision of local councils or districts of Bucharest. The powers of the supervisory authority were tutelary, of control and referral to the Court[2].

Of the most significant tasks of the tutelary authority governed by the family code: resolving disagreements between parents regarding the exercise of rights or the fulfillment of parental duties (art. 99 fam. c.), control the way in which parents fulfill their duties regarding the person and property of the child (art. 108 fam. c.), changing the way the enforceability of vocational training institutes to the minor times at the latter's request (art. 102 fam. c.), enforceability of adoption (art. 73 fam. c.), the establishment of guardianship and supervision of the exercise of guardianship (art. 126-141, art. 116 fam. c.), the establishment of special or trusteeship of proper Trusteeship (art. 132, 139, 146, 152 and following Code), the appeal court for the forfeiture of parental rights of the parent (art. 109 fam. c.) or for a person under prohibition (article 143 fam. c.).We observe that the legislature will transfer in time, the most important tasks of the tutelary authority towards the courts of law.

Regarding the taking of the measure in relation to minors in such situations, according to law No. 3 of 26 March 1970 relating to the protection of some categories of minor powers belonged to the Executive Committee of the popular County Councils (CPJ) or of Bucharest by the organ of social work and child protection Commission[3]. Under art. 12 of law No. 3/1970, child protection committees were an addition to the executive committees of councils and County folk of Bucharest. Against the decisions of the Commission for the protection of minors, parents or guardian, the family or the person to whom the minor has been entrusted, the Prosecutor and the guardianship authority, as well as the minor could appeal within five

[1]Relatively recently, the High Court of Cassation and justice, in decision No. 28 of April 24, 2017 prior to issuing a decision to tighten the law issues relating to the notion of "public authority"; According to the High Court, the notion of "public authority", as defined by art. 2 para.1 let. (b) and law no. 554/2004, with subsequent amendments and additions, there is similar to that of "public institution", as provided by art. 2 para. 1, point 39 of the law no. 273/2006 concerning local finances, with subsequent amendments and additions. Decision No. 28/2017 was published in O.M. No. 378 dated May 22, 2017.

[2] I. Albu, The family law, Teaching and Pedagogic Publishing House, Bucharest, 1975, p. 323.

[33]Law No. 3 of 26 March 1970 relating to the protection of some categories of minors had in art. 2 para. 2: "Family Placement is made with the parents' or guardian agreement by the CPJ's Executive Committee or of Bucharest through welfare body '. According to article 3 para 1 of the same regulatory action, "If the juveniles seen in art. and it was not possible to take the measure of the family, as well as placement in the event that the development of physical, moral or intellectual minor is jeopardized, the Commission for the protection of minors can decide to entrust him to a family with his consent."

days of the notification to the Court in whose area the minor resides (art. 17 of the law No. 3/1970).

The Emergency Ordinance No. 26 of June 9, 1997 on the protection of children in difficulty grants powers to the commissions for the protection of the child. In order to establish measures for the protection of children in difficult situations, subordinated to the County Council, the local councils of the sectors of Bucharest, organized and provided the Commission for child protection and the specialized public service for child protection (art. 4 para. 2 of ORDINANCE No. 26/1997).

Under art. 5 of OUG No. 26/1997, the Commission for child protection was the specialty of the local Council or of the municipality of Bucharest' sectors fulfilling the duties provided for in the Emergency Ordinance, relating to the establishment of measures for the protection of children in difficulty and to relations with the specialized public service for child protection. The Commission for child protection have legal powers among and coordination of activity of local public administration authorities in the administrative territory of the County, in the field of tutelary authority and the protection of the rights of the child.

With regard to the protection of the elderly, art. 30 of law No. 17 of 6 of March 2000[4] concerning the social welfare of older persons gave away the jurisdiction of the guardianship authorities, representatives of the local authority Council where the elder person lives and assisting the elderly person residing upon request or ex officio, as appropriate, having in mind the conclusion of a legal act of alienation, whether for a consideration or free of charge, in assets that belong to them, for the purpose of his maintenance and care.

Later, art. 30 of law No. 17/2004 was amended by law No. 270/2008 who issued the obligation of protection authority or, where appropriate, of legal advisers employed by the local Council in whose territorial radius are residing elderly people "to provide, at request, free advice in concluding legal acts of sale, donation or real estate guarantees loans that have as their object movables or immovable property of the concerned elderly person". Also, to the elderly person it is recognized the right to be assisted by a representative of the guardianship of the City Council in whose territorial radius he resides at the conclusion of a legal act of alienation, with consideration of the time free of charge in assets that belong to him, for the purpose of his maintenance and care.

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In the previous law. 272/2004, some limited powers were under the jurisdiction of the courts of law. Thus, the court decided the forfeiture of parental responsibility (article 109 fam. C), resolve the disagreement between the parents regarding the child's home (art. 100 fam. C) and those of the minor and the parents (art. 107 fam. C), entrust the child into the education and growth of one of the parents (art. 42 para. 1 fam. C), amend the measures concerning personal rights and obligations between divorced parents or heritage and children (art. 44 fam. C) the substance of the request, the parents concerning the return of the child from any person holding him without a right (art. 103 fam. C) or an application for judicial

[4]Law No. 17 of March 6th 2000 concerning the social welfare of older persons was published in the Of. M. No. 104 dated 9th of March 2000. The law was subsequently republished in Of. M. No. 157 dated March 6th 2007.

release under prohibition (art. 144 c. fam.). Subsequently, based on article 1 of law No. 11 of 31st of July 1990, the courts had the competence of adoption.

We must mention the amendments which the legislation has suffered concerning the protection of persons with mental disorders. The Decree No. 313 of October14th 1980 concerning assistance to sick mentally hazardous people, allowed taking the measure of compulsory medical treatment by decision of the Commission (art. 9 of the Decree). The legality of the internment was checked, periodically by the Prosecutor's Office (article 23 of Decree) and the measure could be challenged in court (art. 24 of the Decree).

The Decree No. 313/1980 was repealed by law No. 487 of July11th 2002 for mental health and the protection of persons with mental disorders[5]. In the original form of the law, the decision of an individual involuntary internment in a psychiatric service was confirmed by a review of the procedure being subjected to the Auditing Commission and the competent court can be appealed to a court (art. 52-54 of law No. 487/2002). In this first version of the law, the Court was competent to hear the appeal only the patient (or legal representative or the staff thereof) against the involuntary internment. In its current form, republished, internment decision of the Commission shall be subject to confirmation of the Court in whose district the medical unit is located (article 61 para. 6 of law No. 487/2002 republished).

3. LAW NO. 272/2004 ON THE PROTECTION AND PROMOTION OF THE RIGHTS OF THE CHILD[6]

An important step in regulating the authorities in matters of child protection has been made in the year 2004, by law No. 242/2004 on the protection and promotion of children's rights, with value of principle, public authorities with powers in the field of childcare: subordinated to the County Council and the local councils/ of the sectors Bucharest, the Commission for child protection worked as a specialized body, without legal personality, with the following main tasks: determining their classification and school orientation and disability of the child according to the law no. 272/2004, regarding the proposals concerning the establishment of a special protection measures, the settlement on the issue of the certificate of a care assistant and other powers provided by law (article 104 of the law No. 272/2004). Subsequently, the organization and functioning of the Commission's methodology for protection of children is regulated by the Government Decision no. 1437 from September 2nd 2004[7]. The duties of the Commission for child protection have been enlarged by Decision No. 502/2017 regarding the organization and functioning of the Commission for child protection.

Another step was the establishment, in accordance with article 105 para. 1 of the law No. 272/2004, the General Directorate of social assistance and child protection, by reorganizing the specialized public service for child protection, the county councils and subordinate to the local councils of the sectors of the municipality Bucharest, as well as the public welfare of the counties and Bucharest sectors. According to. Art. 105 para. 2 of the law No. 272/2004 the General Directorate of social assistance and child protection is a public institution with legal personality, subordinated to the County Council, the local councils of the sectors of Bucharest, who took over, accordingly, the public service functions of social

[5] Law No. 487 of 11 July 2002 mental health and the protection of persons with mental disorders was published in the Of. M. number 589 dated august 8th 2002. The law was subsequently republished in Of. M. no. 652 dated 13th of September 2012.

[6]Law No. 272/2004 on the protection and promotion of the rights of the child was published in Of. M with the number 557 dated 23rd of June 2004. The law was subsequently republished in Of. M number 159 dated March 5th, 2014. Law No. 272/2004 was amended by law No. 52 of 30th of March 2016 for the modification and completion of the law no. 272/2004 on the protection and promotion of children's rights published in Of. M No. 253 dated 5th of April 2016.

[7]Government decision No. 1437 of 2 September 2004 on the organization and functioning of the Commission's methodology for the protection of children was repealed by Decision No. 502/2017 on organization and functioning of the Commission for the protection of children published in Of. M No. 596 of 25th of July 2017.

assistance from the County and the public service duties of social assistance in the sectors of Bucharest.

According to the framework regulation of 2nd of September 2004 on the organization and operation of the General Directorate of social assistance and child protection, the General Directorate of social assistance and child protection is to ensure the county level respectively at the level of sectors of Bucharest, the implementation of policies and strategies for social work in child protection, family, single persons, senior citizens, people with disabilities, and any person in need (art. 1 para. 1 of the framework regulation).

At central level, monitoring the compliance with children's rights and control of protection and promotion of children's rights was done by the national authority for protection of children's rights, the specialized body of the central public administration, with legal personality, subordinated to the Ministry of labor, social solidarity and family (article 100 of the law No. 272/2004 in its initial form). Subsequently, through art. I, section 70 of the Act no. 257/2013 for the modification and completion of the law no. 272/2004 on the protection and promotion of the rights of the child[8], which was published in the Official Gazette of Romania, part I, no. 607 of September 30th, 2013, the phrase "national authority for protection of children's rights" was replaced with the words "Ministry of labor, family and social protection of older people".

Locally, the Law 272/2004 established powers in favor of the public services of social work organized at the level of municipalities and cities, as well as people involved in the welfare of the local councils and municipal (art. 106). In addition, law No. 272/2004 was setting in art. 102 the obligation of the local Government to guarantee and promote respect for the rights of children in administrative-territorial units, ensuring the prevention of separation of his parents, as well as special protection the child temporarily or permanently deprived of his parents' care.

The Law No. 272/2004 has marked the moment of transmission of some powers in matters of protection of the individual from the tutelary authorities by courts of law. Thus, art. 40 of law no.272/2004 was establishing the guardianship was that "in accordance with the law by the Court in whose territorial jurisdiction the baby was residing and found".

Concerning the establishment of special measures for the protection of minors, the Law no. 272/2004divided powers between the commission for child protection (establishment of the placement measure in accordance with article 61 of the law No. 272/2004 or taking the measure of supervision specializing in accordance with art. 67 para. 2 of the Act), the Director of the General Directorate of social assistance and child protection (placement in emergency regime in accordance with article 65 of the law no. 272/2004) and the Court. The General Directorate of social assistance and child protection has the task of preparation of individualized plan.

The Court, in some circles, had the competence to take a measure of special protection where there is opposition on the part of persons in whose care was the minor (art. 61, para. 2, art. 65 para. 2 and art. 67 para. 2 of the law No. 272/2004). In addition, the Court was competent to rule in connection with the maintenance of the measure as a matter of urgency of the program when it was taken by the Director of the General Directorate of social assistance and child protection (article 66 from Law No. 272/2004).

The Law No. 272/2004 contained in art. 124 (the current art. 133 after republishing) rules derogating from the common law in relation to the jurisdiction of the courts of law. It disposed: "the causes provided for in this Act concerning special protection measures within the competence of the Court of the domicile of the child. If the child's domicile is not known, the competence lies with the Court in whose territorial jurisdiction, the child was found."

[8]Law No. 257/2013 for the modification and completion of the law no. 272/2004 on the protection and promotion of the rights of the child was published in Of. M of Romania, part I, no. 607 of 30 September 2013.

This special jurisdiction laid down in article 124 of the law no. 272/2004 has drawn controversy in the cases that have been resolved through the delivery of the High Court of Cassation and justice of some appeals in the interest of the law. Thus, by decision No. III from 15th of January 2007 the High Court of Cassation and Justice –United Sections, established the material jurisdiction at first instance settlement of the claims to the extent of protection alternative of child guardianship in favor of the court, as a Court of common law, and not the court at the child's home, by virtue of special competence established by law No. 272/2004.

In a separate decision[9], also in connection with the special jurisdiction established by art. 133 para. 1 of the law No. 272/2004, the High Court of Cassation and Justice declared in the interpretation and uniform implementation of the provisions of art. 85 paragraph 2 of law No. 448/2006 on the protection and promotion of the rights of persons with disabilities. The Supreme Court has established jurisdiction to settle in the first instance disputes involving the annulment of decisions of the Commission for child protection of employment grade and type of disability of the child with disabilities in favor of the courts- administrative departments specializing in the matter of the administrative courts and the special jurisdiction provided for by art. 133 of the law no. 272/2004.

According to the High Court, the aspect of that law. 272/2004 includes specific rules with regard to children with disabilities do not justify the conclusion that litigation aimed at challenging the decisions of the Commission for protection of a child's degree of disability shall be subject to the jurisdiction provided in article 133 of the law no. 272/2004, derogating from the common law, in the field of protection and promotion of the rights of persons with disabilities there is a special law which does not differentiate in regard to its scope between children and adults with disabilities.

The fact that only in respect of decisions of the Evaluation Committee, law No. 448/2006 provides that they may be appealed to the superior assessment of adults with disabilities in the structure of the Ministry of labor, family and social protection, under art. 87 para. (5) of law No. 448/2006, and decisions issued by the Commission may be appealed to the superior Department of administrative and fiscal court according to law. 554/2004 [the 902 para. (4) of law No. 448/2006], that means that in terms of decisions contested and issued by the Commission for the protection of children, employment in a degree of disability, the competence of solving would belong to other than the instances of administrative law.

The competence of administrative courts has been established by the High Court of Cassation and Justice and in the case of unsuccessful actions whereby a claim by the Directorate General of social welfare and child protection order of a Council County or local or other general directions of social work and child protection at the costs of maintenance for persons who benefit from the protective measures provided for by law No. 448/2006. In this respect, by decision No. 13 of 22nd of June 2015[10] the High Court of Cassation and Justice has decided regarding the interpretation and application of the provisions of art. 2 para. 1 let. f and article. 10 of the law on administrative courts no. 554/2004, as amended and supplemented, and the art. 94 and 95 of the code of civil procedure regarding the nature and competence of solving these cases.

The Supreme Court ruled that these actions are within the competence of administrative courts. It was noted that the disputes concerned fall within administrative judgments given the quality of the public authorities of the parties, that the object of these actions is the refusal of applications relating to a right provided by law and the legal nature of the rights and obligations of the corrective to finance the social security system, as one of

[9]Decision No. 1 of 30th of January 2017 delivered in an appeal in the interest of the law was published in Of. M. of Romania, part I, no. 223 dated 31st of March 2017.

[10]Decision No. 13 of the High Court of Cassation and Justice delivered in an appeal in the interest of the law was published in the Of. M of Romania, part I, no. 690 of 11th of September 2015.

administrative law; the fact that the object of the dispute is the claim of civilian was not considered definitive, as long as they are not fount in civil legal relationships, but in the law.

4. LAW NO. 287/2009 REGARDING THE CIVIL CODE AND LAW NO.71/2011FOR ITS APPLICATION

The above legislation, that the powers of the Court, reflect the will of the legislator to ensure access to justice as the prerogative of the right to a fair trial.[11] Art. 104 of the law no. 287 of 17th of July 2009 concerning the civil code was: "procedures set out in this code regarding the protection of the person through the guardianship and Trusteeship are the competence of the Court of guardianship and family established according to the law, the Court of guardianship". The text of the law, not just grants the important powers of the courts but also dedicates a new category of specialized courts courts-family and guardianship.

Although the intention of the legislator as expressed through art. 104 of the law no. 287/2009 regarding the civil code was welcomed in order to submit to the judicial control measures of maximum importance for the individual, its implementation has proved not to be possible.

Thus, neither at the date of the adoption of the law No. 287/2009, nor later, at the time of entry into force of the new civil code -October 1st, 2011, have not yet been established by the courts of guardianship. An attempt was made to remedy this shortcoming through law No. 71 in June 3rd2011 for implementation of the law. 287/2009 relating to the civil code. Under art. 229 paragraph 1 thereof, organization, functioning and powers of the Court of guardianship and family were to lay down the law on judicial organization. The text of articles 229 included important provisions applicable before regulation by law of the Organization and functioning of the Court of guardianship. Thus, its powers, provided for in the civil code, were to be met by the courts, departments or, where appropriate, specialized juvenile and family commission. Similar provisions we also see in the article 76of Law No. 76/2012 for the implementation of law No. 134/2010 relating to the code of civil procedure: "to organize family and guardianship courts or, where appropriate, the specialized courts for minors and family will fulfill the role of the Court of guardianship and family, having the competence as established by the civil code, the code of civil procedure, the present law, as well as special regulations in force ".

Pursuant to law No. 71/2011, the authorities and institutions involved in the protection of the rights of the child, the individual, continues to exercise the powers provided for by the regulations in force at the date of entry into force of the civil code, except those given in the Court of guardianship. Also, pending the entry into force of the regulation on the Organization, functioning and powers of the Court of guardianship and family guardianship, the Court may delegate, by closure, some of these guardianship (Law. 71 /2011, its initial form). The text of article 229 para. 3 of the law No. 71/2011 take account of the performance of duties relating to the exercise of guardianship with respect to the assets of the minor or, where appropriate, with regard to the supervision of the way in which the tutor administers the minor's belongings.

The text of article 229 of law no. 71/2011 has undergone several changes that reflect a "setback" for the purposes of that legislation powers which for a long time have been the tutelary authority jurisdiction were under played, gradually modifying texts, in their jurisdiction.

Thus through art. 1 point 22 of law No. 60 of 10th of April 2012 approving Government Emergency Ordinance no. 79/2011 for necessary measures to regulate the entry into force of law No. 287/2009 concerning the civil code is that those powers which had the

[11]The right to a court is the first guarantee conferred any justice maker for the existence of a fair trial-G. Boroi, M. Stancu, The Civil procedure law, Hamangiu, 2015, p. 11.

initial form of the law 71/2011 could just be "delegated" tutelary authority, "incumbent" tutelary authority pending the entry into force of the provisions concerning the Organization and functioning of the Board of Trustees. Guardianship authority[12] takes over the powers of the Court of guardianship law relating to the exercise of guardianship with respect to the assets of the minor or, where appropriate, with regard to the supervision of the way in which the tutor administers the goods.

Later, by article 1, section 2 of law No. 214 of 28th of June 2013 for approving Government Emergency Ordinance no. 4/2013 amending the law No. 76/2012 for the implementation of law No. 134/2010 relating to the code of civil procedure, as well as for the modification and completion of some legal acts related to entrusted guardianship authority take over and the Board of Trustees concerning the exercise of guardianship with respect to the goods forbidden to court, or, as appropriate, with regard to the supervision of the way in which the tutor administers its goods.

The case-law of the courts was not one in terms of the application of the legal provisions relating to the discharge of the guardians. Some courts, after a prior checking by the guardianship authority annual reports presented by tutors, have disposed through court decision, discharge of guardians. Taking into account the transfer under the law to legal duties regarding supervision of the guardian from the courts to the tutelary authorities, we consider as an unlawful sentence the one recorded in the entry in force later, the Law No. 214 of 28th of June 2013, the Court and its jurisdiction, agreed for the report of the year 2013, presented by the applicant regarding the way the guardian-who managed the assets and income of the person placed under ban in Bistrița and requested discharge for the year 2013 to the claimant, as a guardian of that person.[13]

Other court seized by the guardians to receive discharge of management, have ordered reports to be sent to the Guardianship Court in order to grant discharge, because is the competent institution, in accordance with the provisions of article 229 paragraph 3 of law No. 71/2011, to give such a discharge.

There is controversy in the courts and in practice as regards the approval of the closure of certain acts. From this point of view, in a sentence, legally, it was dismissed as inadmissible the application the legal representatives of a minor under the age of 14 years on the approval by the Court of the concluding acts of provision in favor of minors at court that "there are currently no laws under which court to authorize the conclusion of documents available." The solution has been upheld by the Court in Constanța, considering that "from the date of referral to the Court with this application, the Court no longer has jurisdiction to hear and determine any such application, the applicant should address to the authority protection that will proceed to the appointment of special trustee and shall assist or represent the minor at the conclusion of the provision at the request of the public notary, in the latter case there's no need of validation or confirmation by the Court ".[14]

Although the decision rejecting the application for appeal is correct, her recitals are not sheltered from criticism by depicting a regrettable confusion which is sometimes made by the courts of law. Thus, the Court of appeal did not distinguish between the requested authorization for the conclusion of a provision and the demand for appointment of a curator. Trustee appointment specifically for minor aims the minor located in any of the situations

[12]For an in-depth analysis of the duties of the Board of Trustees see **B. D. Moloman**, Considerations relating to the jurisdiction of the guardianship authorities under the auspices of the new legal regulations, Pandectele Române" no. 7/ 31 July, 2014.

[13]Court of Bistrita, Civil Department, the Chamber hearing of the Council of 21st of May 2014, conclusion no. 4168/2014, http://www.rolii.ro.

[14] Court of Constanta, civil department, decision No. 745 of 16 October 2014, http://www.rolii.ro.

referred to in art. 150, 159 or 167 Civ. Code[15].On the other hand, approval is a formality what must be accomplished prior to the conclusion of a legal act by the representative which cannot conclude due to the lack of such formalities, acts of provision (article. 144 Civ. Code). In this case those under age were represented, though it was not necessary, to the appointment of a special curator, authorization being required only by the Trustees. Be prejudicial to this distinction may lead to a solution, not just wrong but funny, in which the father to be named curator of his own child!

Pending the entry into force of the regulation of the Court of guardianship, the law implementation has remained civil code and the rules of law 272/2004 regarding the establishment and monitoring of placement the placement measure, emergency and specialized supervision (article 229 of Act No. 71/2011 Law No. 60/2012). As I mentioned earlier, taking such measures is, according to law No. 272/2004 where appropriate, the responsibility of the Commission for child protection, the Directorate (the Director) of social work and child protection or the proceedings of the Court.

The Law No. 60/10th of April 2012 to tutelary authority and competence for appointing special trustee shall assist or represent the minor at the conclusion of the debate available or inheritance following the procedure, this is to be done as soon as the authority guardianship, at the request of the public notary without needing validation or confirmation by the Court (article. Law No. 66/2012, article 1, point 22). Through art. III point 1 of law No. 54 of 14th of March 2013 approving Government Emergency Ordinance no. 120/2011 concerning the extension of certain time limits and on modification and completion of some legislative acts on these legal provisions are applied properly and if the trustee appointment specifically referred to in art. 167 of the civil code and in the case of need and to the resolution of the request for judicial release under interdiction, to care for and representation of the one whose ban was required, as well as for the management of its assets.

Other measures of protection still remained within the competence of the Court such prohibition or curatorship. In accordance with article 114 Procedural civ. code, if the law does not stipulate otherwise, applications relating to the protection of the individual data of the civil code the Court of guardianship and family court in deciding whose territorial constituency is domiciled or the residence of the protected person. In the case of applications relating to the authorization of the Court of guardianship and family of conclusion of legal acts, when legal document whose approval is sought relates to a building, is also competent the court in whose territorial jurisdiction the property is situated. In this case, the Court of guardianship and family who pronounced the judgment will immediately communicate a copy of it to the Court of guardianship and family in whose territorial constituency is domiciled or resides the guarded one.

Rules establishing jurisdiction in making arrangements for the protection of an individual are the exclusive territorial competence rules. For instance, art. 179 Civ. code which establishes jurisdiction in claims relating to the protection of the individual through the Trusteeship Institute a territorial jurisdiction, depending on the legal assumptions for establishing Trusteeship, provided for in art. 178 Civ. code in favor of the Court of domicile of the person represented, or that of the place where the emergency measures should be taken or the last place of residence in the country of the missing or the disappeared. In the case under a judicial prohibition, jurisdiction lies with the court settlement of Trustees in whose constituency resides.

[15] In the sense that the trustee may be instituted in the case where there are contrarieties of interest between representative and minor but only "simple reasons likely to hinder him to attend/represent the minor" see L.C. Ureche and B.M. Moloman, *The analysis the provisions of paragraphs 2 of art. 150 NCC. The issue of setting up Trusteeship in the situation of the lack of interest among contrary to the minor and his legal representative*, Romanian Journal of Law No. 2 of 30 April 2014.

Having a solution to the conflict between the two powers of justice in a case concerning a person under restraint, the Court of Bucharest established jurisdiction settlement in favor of Sector 3 Court of the domicile of the intimate, not the specialized center where the person was for a specified period. It was considered that it wasn't relevant "that, for a specified period, the person placed in a specialized Centre within the sector cannot be considered a residence nor domicile in fact where the defendant would inhabit actually, to the competence of sector 1 Court".[16] In the settlement of another conflict of jurisdiction in connection with the establishment of the Trusteeship to the Court of Bucharest, the person has noted that "interest in the jurisdiction at the time of introduction of the domicile of the parties, the Court legal action hearing the competent, even though remaining subsequent intervening changes in this respect."[17]Accordingly, the Court in Bucharest determined that, in question, jurisdiction shall lie with the Court in whose area of jurisdiction the main person has his home at the time of the promotion action.

In judicial practice, there were controversies and as regards the complaint against the tutelary authority's refusal to authorize the conclusion of any specific act. In a case of the Court of Timiș[18] the administrative and tax section, has been found negative conflict of jurisdiction between the Courts of Justice in Timișoara, action in which the plaintiff sought an order directing the defendant in Timișoara, Guardianship Authority to give consent in relation to investing some monies of the appellant in the name and on behalf of his minor children in shares in various companies, for the purpose of collection dividends. Guardianship authority previously refused authorization by the Act conclusion, the father saying that the transactions for which the authorization is requested would not pose undoubted benefit for minors whereas it involved a hazardous situation incompatible with the interest of their heritage.

The regional court in Timisoara where was the application that had to formulate an appeal against an act issued by the local public authority, pursuant to art. 10 paragraph 1 of the law No. 554/2004 and therefore within the jurisdiction of the settlement of the case in favor of the Court of Timiș. This, in turn, invoked the exception to disposing of believing that there is a dispute concerning administrative acts issued or entered into by local public authorities and County that handled the background by the administrative courts. The circumstance that the Court in Timisoara has delegated authority guardianship responsibilities of these legal acts, authorizations, does not change anything nor to attract the Court jurisdiction.

5. CONCLUSIONS

The purpose of this brief incursion into the history of regulations in the field of physical protection was not the exhaustion of the issue addressed, but only the illustration of the evolution of the institutions in time and the identification of the sources of numerous controversies. The limited space did not allow us to discuss other related topics such as disputes concerning the authorization required for the conclusion of certain acts by the incapacitated or restricted person. Often, those interested in obtaining an authorization are caught between the misunderstandings between the guardianship authority and the courts, without being able to complete their approach.

As we have shown before, legislative hesitations have led us to a point where sometimes the courts are not guided. This is detrimental both to the individual who often does not know whom to address, as well as to justice.

[16] The Bucharest Court, Civil department, civil sentence no. 27 of the meeting room of the Council from 13.01.2014, http://www.rolii.ro.

[17] The Bucharest Court, Civil department, civil sentence nr no. 1079 from 6.10.2014, http://www.rolii.ro.

[18] Court in Timiș, Section of administrative law and tax, sentence no. 1320/12th of October 2015, http://www.rolii.ro.

We believe it would be beneficial for the attributions in the matter of the protection of the individual to be definitively brought to the competence of the guardianship authorities by giving up the role of the courts with these attributions. And from the point of view of taking a measure with speed, we believe it is desirable that the attributions in the matter of the protection of the person remain, as in the regulation of the Family Code, to the responsibility of the guardianship authorities. Courts should only be given the power to verify the legality and, possibly, the soundness of the measure taken by public authorities to ensure free access to justice.

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THE INSTITUTION OF THE CIVIL PARTNERSHIP

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ABSTRACT:

Currently, within the territory of 21-member states of the European Union, live couples in civil partnership, couples which form families outside the judicial institution of marriage. In Romania as well, around 4% of couples live in a type of civil partnership popularly named "concubinage" and, from their perspective, they form a family, they have children who are recognized by both parents and the patrimonial goods earned throughout their cohabitation represent common property, in a condominium. Although the initiative of the "civil partnership" has been repeatedly proposed, the Romanian Parliament rejected the idea of its judicial regulation, and recently, perhaps due to the legislative harmonization of this aspect with EU law, the Romanian Senate will debate a project of normative act in this domain. The legislative initiative would approve the unit of will of two people who willingly decide to cohabitate, regardless of whether the couples are made up of heterosexual couples or couples made up of people of the same sex.

KEYWORDS: *JUDICIAL INSTITUTION, CIVIL PARTNERSHIP, NORMATIVE ACT, PUBLIC RIGHT, PRIVATE RIGHT, JUDICIAL RELATION, JUDICIAL NORM*

1. THE EVOLUTION OF THE INSTITUTION OF CIVIL PARTNERSHIP

1.1. The institution of civil partnership

The senators will debate publicly an initiative which regulates the civil partnership in our country, a contract between two people who decide to cohabitate although they are heterosexual people or couples made up of people of the same sex. The legislative initiative is based on the argument of the recognition of these families outside the sphere of marriage, a recognition already made by 21-member states of the European Union. The civil partnership, known popularly as concubinage, is situated, from the perspective of its previsions in the field of civil law. The senators say that around 4% of the population lives in such an arrangement according to recent surveys, so it is only normal that these couples should receive rights like any other families. According to the legislative project, the civil partnership is signed by two partners of common agreement, who are of or over the age of 18, in the presence of a public notary from the circumscription of the Court of Apel in the area where at least one of the couple's members lives. If the two people decide to cohabitate in a civil partnership somewhere abroad, the agreement will be signed at the embassy or at the consulate of the respective state. The registrars will register all such contracts in a Register of Evidence of Civil Partnerships. In a period of 3 days after handing in the papers, the registrar will display the personal details of the two partners so that any person who may have anything against the signing of this agreement may contest it.

1.2. The stipulations of the legislative project of the civil partnership

Art. 5

b) at least one of the partners must be a Romanian citizen, or a foreign citizen or apatheid living in Romania

c) neither of the partners should be married or part of another civil partnership
Art. 6 *– The civil partnership cannot be signed if the future partners do not declare that they have mutually communicated their state of health."*

The conditions in which the civil partnership cannot be signed are those from the civil law, namely between relative of up to the fourth degree, between a person who adopts and his/her ascendents or the person who is adopted and his/her children, between a tutor and the person under his/her tutelage, an underaged person, or between people who do not have mental judgement.

Those who agree to sign a civil partnership will have the same rights as those who are married – their incomes will be commonly considerate within the calculus of the minimum guaranteed income, and in the case of contracting a bank loan both incomes will be taken into consideration.

Art. 21
(1) The medical services required by a partner who does not possess medical insurance may be given from the medical insurance of the other civil partner.
(2) If one of the partners is hospitalized, the other partner is considered his/her kin."

Even in the case of the death of one of the partners, the rights of the survivour are in accordance with the Civil Code – he/she will inherit the common goods accumulated throughout the partnership. Moreover, the survivor has the right to a full inheritance if the deceased does not have heirs among his/her relatives. The survivor also has the right to a survivor pension, other rights of social insurance or of the legislation in the field.

A civil partnership may be ended by common accord again at the registrar's or unilaterally within 30 days from the date of the registration of the application of the partner wishing to end the agreement. The common goods are split of mutual accord, and in case of disagreement, the partners will address the court. The court is also the one which will decide in the case of disagreements between partners who have children born during the period of their civil partnership.

2. A MODEL OF CIVIL PARTNERSHIP IN SWISS LAW

2.1. The legal conditions which must be fulfilled by both partners

The civil partnership engages the partners of the same sex or of different sexes to a life of a couple and common responsibilities. They owe each other support and mutual respect. The Swiss law demands the cumulative fulfillment of the following compulsory conditions:

- Both partners should have at least 18 years of age and they must be capable of discernment
- They cannot be already married or in a civil partnership
- The people who are under tutelage must have the permission of their legal representative
- There cannot be a direct parental relationship between the partners. There cannot be a civil partnership between siblings, children and natural or adoptive parents and grandparents
- One of the partners must have a Swiss nationality and must reside in Switzerland
- The partners who do not have a Swiss nationality and do not live in Switzerland either cannot form a civil partnership with people of the same sex.

2.2. The procedure and the documents required by the institutionalization of the partnership

The partners must address the Civil Registry in the town or city where they reside, which will provide them with an application suitable to their request.

Necessary documents

For Swiss citizens

- An individual certificate of registry (it can be obtained from the Civil Registry in their place of origin)

- A permit or certificate of residence (it can be obtained from the Population Records Office)
- A passport or identity card

For foreign citizens

- A permit of residency
- A birth certificate with details about the parents
- A passport or document of origin (obtained from the country of their origin)
- An individual certificate of registry (containing details about their civil state, divorce, the death certificate of the partner or the confirmation of the dissolution of the civil partnership)
- Refugees or people who demand asylum must present, apart from the passport or certificate of origin, a new certificate recently emitted about their status of refugees or solicitors of asylum. The partners prepare the necessary documents and report personally to the registrar where they are eligible to register their partnership. After the partnership has been authenticated, the partners receive the partnership certificate. The registrar demands a fee for the registration of the partnership (preliminary procedures, the authentification of the partnership) and for the delivery of the documents.

A viable partnership contracted abroad is recognized in Switzerland if it is in accordance with the Swiss principles of law. The partnership is registered in the "Infostar" civil registrar if one of the partners has Swiss nationality or resides in Switzerland. The application for recognition must be handed in at the Swiss representance (the embassy or consulate), along with the documents concerning the respective civil partnership.

2.3. The judicial effects of the Partnership

a. Civil status

The civil status must be indicated in the administrative documents, in this case, the civil partnership. If one of the partners dies or if the partnership is dissolute, the new civil status will be "dissolved partnership".

b. The conjugal residence

When they register their partnership, both partners engage in a common life. They decide to live together in one, two or more common homes. Neither of the partners can yield or terminate the home contract without the approval of the other partner.

c. The name

A civil partnership hasn't got an impact on the name of the partners, regardless of their origin. The foreign partners who live in Switzerland may ask the registrar to regulate their name in their country of origin (for instance Germany or the Scandinavian countries). The right of these countries, in accordance with Swiss rights, permits the partners to have the same name.

d. Citizenship and patrimonial goods

In order for a partner to obtain the Swiss citizenship, the law does not state a simple possibility of naturalization, as is the case of foreign spouses of Swiss citizens during marriage.

Each partner has the free right over his/her goods and is responsible for his/her debts. This system corresponds to the matrimonial right of sharing goods. Each partner must inform the other, at his request, about his income, goods and debts. At the request of one of the partners, a judge can force the other partner or a third party to offer relevant information and present the necessary documents.

In case the partnership is dissolved, the partners may convene over a set of specific rules and decide, for instance, that actives are shared according to the norms of the matrimonial regime on participation to acquisitions. As for the contract concerning inheritence, this is viable only if it is authenticated by a public notary. In the case of taxes and succession, the rules of matrimony apply to the civil partnerships. In case one of the partners

dies, the remaining partner has the judicial status of widow/widower when it comes to the insurance offered by the Swiss services and the occupational pension. Anyone living in or owning the common residency of the couple must be informed of the couple's civil status. Hence, in case the renting contract is dissolved, both partners will be informed and the dissolution will be viable.

e. Children

People who are engaged in a civil partnership cannot adopt children and cannot use medical reproduction procedures. Moreover, the children of one of the partners cannot be adopted by the other partner either. In case one of the partners has children, the other must support him/her in the fulfillment of the obligation of diligence and in fulfilling parental authority in a reasonable manner and must represent him/her in case the circumstances demand it (an illness or absence).

f. The dissolution of the partnership

The two partners may jointly demand the dissolution of the partnership. Moreover, each of them may demand it if they live separately for at least one year. As in the case of a divorce, the honoraries of the partners are shared. After the dissolution of the partnership, each of the partners is responsible for his/her alimony. If one of the two partners has not worked or has not exercised a lucrative activity to compensate for chore division, he may ask the other partner for a pension until the moment he/she will be able to support him/herself. Partners registered by a country which is a member of the EU or AELS or a third state receive a residence permit, respectively of residency, in the same conditions as a spouse in the given countries.

2.4. Registered partnerships

In numerous EU countries people may officialize their relationship without getting married by means of a **registered partnership** (also called *civil partnership).* The registered partnership offers the partners the chance to officialized their relationship in front of the competent authorities in their country of residency.

In this field, the law features significant differences from one country to the next – in some states this form of union does not exist or, if it has been officialized in another country, is not fully recognized. When more European countries are involved, for instance because the partnership was registered abroad or because the partners moved away after its registration, they must check the law of the country where the partnership was registered. This will have significant consequences upon the rights and obligations of the partners. In some EU states, the registered partnership is considered **the equivalent of or compatible with marriage**. There are also states whose legislation does not judicially regulate the institution of the civil partnership.

The EU countries whose legislation does not feature registered partnerships:

- Bulgaria
- Letonia
- Lithuania
- Poland
- Romania
- Slovakia

In the countries where the registered partnership is equivalent to marriage, the partners have the same immigration rights: thus, the registered partnership may follow you if you move to one of the given countries. The countries which allow marriages between people of the same-sex also generally recognize the registered partnerships signed in other countries by people of the same sex. In countries where the law provides a form of registered partnership but does not provide same-sex marriages, same-sex couples who married abroad will generally benefit from the same rights as the registered partners. European citizens who are financially dependent on their registered partners must solicit the right of residence from the authorities of the country where the couple settles, based on their right to accompany their

partner. **For citizens of third party countries**, the registered partnership is essential to obtain the right to live in the EU. Couples who settle in a country which does not recognize registered partnerships will be considered as having **a long-term relationship attested accordingly.** Consequently, the authorities of the host-country must facilitate the entrance of the partner and his chances of obtaining the residence permit. **The property and support pension rights** in the case of registered partners do not apply in all EU countries: the rights which derive from a partnership registered in a country may differ significantly in another country.

3. THE RIGHT OF POSSESSION OF GOODS IN THE CASE OF CONCUBINAGE IN ROMANIAN LAW

3.1. The previsions of the new Romanian Civil Code regarding the right of possession of goods in the case of concubinage

In the relationships between concubines the source of coproperty cannot be neither the legal inheritance nor the law (because a special regime which makes derogations from the common right is reserved only to spouses), nor the intrusion, but only the convention of the parties, be it expressed or tacit, but only if it is unequivocal. The inexistence of a convention of common acquisition of goods enunciated in action by the parties in process is not mainly demonstrated by the absence of the probatory instrument in this regard, respectively of a disposition (justly supposing that the close relationship between them has prohibited, from a moral perspective, the preconstitution of certain documents), but by the fact that there hasn't been a certain and undoubted proof that the parties intended to acquire these goods as common property. The concubinage or the consensual union of two people is not reglemented in the Romanian civil code, neither are non-patrimonial personal relationships, nor the patrimonial relationships between concubines. Hence, the judicial regime of the goods acquired by the spouses, namely the condominium property, is not applicable to concubines, regardless of the length of their cohabitation. The presumption of a community of goods stated by art 30 of the Family Code is only applicable to spouses. Thus, in the situation of the concubines and their patrimonial relationships, we are dealing with an eventual situation of relative coproperty in the case of each good commonly acquired, which involves the demonstration, in the case of a separation, of each party's contribution to each individual good and not his/her contribution to the universality of the patrimony, as in the case of spouses. The specific of patrimonial relationships between concubines is the proof of their contribution to each good separately and, cumulatively, their intention of commonly acquiring goods according to art. 1294, art. 1295 corroborate with art. 1171-1173 of the Civil Code, the good are the property of the buyer, attested with the purchase document, in this case selling-buying contracts.

CONCLUSIONS

As a consequence of trying to harmonize legislatively the member states of the EU, the Romanian Senate will debate a project of a normative act in the field of the civil partnership. This legislative initiative would consolidate de union of will of the two people who decide to cohabitate out of common agreement, be them heterosexual or same-sex couples. The civil partnership, commonly known as concubinage, is part of the category of civil law from the perspective of its predispositions. Senators say that about 4% of the population lives in such a way, according to recent surveys, so that these couples should indeed be given rights like any other family. According to the legialative project, the civil partnership is signed by common agreement by two partners who are over 18 in the presence of a public notary from the area of the Appeal Court in whose circumscription where at least one of them resides. If the two people decide to cohabitate in a civil partnership somewhere abroad, the contract will be signed at the embassy or consulate of the given state. The public notary will register these contracts in a Register for the evidence of civil partnerships. Three

days after presenting the necessary document, the public notary will display the personal details of the two partners so that any person who may have anything against the signing of the contract can contest it.

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BOKO HARAM INSURGENCY AND ITS IMPLICATIONS ON THE RIGHTS OF THE FEMALE GENDER IN NIGERIA

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ABSTRACT:

The Boko Haram insurgency in Northern Nigeria and counter-insurgency measures adopted by the Nigerian Government has caused humanitarian crises and wanton destruction, thereby having adverse impact on the Nigerian nation and its citizenry especially the female gender. The situation has aggravated and degenerated into internal displacement, loss of livelihood and criminal acts such as abduction, murder and rape. This paper examines the various human rights violations perpetrated on the female gender as a result of the insurgency and counter-insurgency operations, it highlights the various women and girls' rights instruments and in conclusion, posits that gender equality, economic empowerment for female folks, partnership with foreign superpowers and adopting an effective intelligence network are possible means of putting a stop to the insurgency and reducing its effect on the female gender in the Country.

KEYWORDS: *BOKO HARAM, INSURGENCY, COUNTER-INSURGENCY, NIGERIA, FEMALE GENDER, RIGHTS*

1. INTRODUCTION

The Terrorism can be said to be the antithesis of human rights and the greatest threat to universal peace and stability in contemporary times. The international community's response to terrorism has been the gradual development, since 1963, of a legal infrastructure of 16 terrorism-related conventions and protocols, multilateral treaties, supplemental agreements and series of Security Council resolutions relating to terrorism, many of them adopted under the authority of chapter VII of the United Nations Charter, which empowers the Security Council to adopt resolutions legally binding on all Member States of the United Nations.[1]
Nigeria, the most populous country in Sub-Saharan Africa, with an estimated population of 182,425,202, out of which 90,049,168 are females (49.4 percent of the total population),[2] is

[1]United Nations Office on Drugs and Crime (UNODC); Legislative Guide to the Universal Legal Regime against terrorism (2008). Available at www.unodc.org/terrorism/legislative accessed on 3rd March, 2015.
[2] Available at http://countrymeters.info/en/Nigeria. Accessed on 14th January, 2016.

presently facing terrorism as a result of an ongoing sectarian insurgency, which is spear headed by the *Jama'atu Ahlis Sunna Lidda'awati Wal-Jihadl* sect also known as *Boko Haram*, whose intention is to create an Islamic state in Northern Nigeria, that will address the ills of the society and whose nucleus belief are the strict adherence to the Holy Quran and Hadith and their interpretation by Ahmad ibn Taymiyyah (1268-1328 CE).[3] The insurgency and Nigerian Government's response to it through the use of the military in internal security operations due to the ineffectiveness of the Nigerian police has, left hundreds dead, destroyed human habitations and means of livelihood. It has also caused internal displacement, abduction, rape, physical abuse, human trafficking and forced marriages on the female gender. The insurgency and counter-insurgency operations pose major challenges to the protection of the rights of the female gender in the North-Eastern part of Nigeria as a result of the collapse of social and moral order. These challenges affect the substance of human rights norm and their scope of application. This work in the subsequent sections, will examine the rights of the female gender violated by insurgency and counter-insurgency operations. It also highlights the legal framework for the protection of the female gender and concludes with necessary recommendations.

2. DEFINITION OF KEY TERMS

Gender: is a social construct which is not necessarily synonymous with women but for the purpose of this paper, gender connotes the female gender and it will be used interchangeably with the word "women".

Gender based violence: "is violence directed against women based on their subordinate status in society. It includes any act by males or male-dominated social institutions that inflict physical or psychological harm on women or girls because of their gender. It is violence intended to establish or reinforce gender hierarchies and perpetuate gender inequalities including harmful traditional practices targeting women such as honour killings, acid throwing, female genital mutilation (FGM) and forced marriage"[4]

Insurgency: is **"**an attempt to take control of a country by force."[5]

Reproductive Rights: 'Reproductive Rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence'[6]

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[3] Cook, D; Boko Haram: 'A New Islamic State in Nigeria' Available at www.bakerinstitute.org/.../BI-pub-BokoHaram-121114.pdf accessed on 7th November, 2015. See also Africa Report N*216, *Curbing Violence in Nigeria (II): The Boko Haram Insurgency* (International Crises Group, Brussels, April 2014) 7 cited in Taiwo, E. A; "Boko Haram Terrorism and its Impact on the Right of the Girl-Child to Education in Nigeria" (2013), 2 (1), *Akungba Law Journal*, 16 – 47 at 24. See further Mohammed, K, 'The Message and Methods of Boko Haram' in Perouse de Montclos, M. (ed), *Boko Haram: Islamism, Politics, Security and the State in Nigeria*, West African Politics and Society Series Vol. 2 (African Studies Centre, Leiden and French Institute for Research in Africa, University of Ibadan, Ibadan & Ahmadu Bello University, Zaria, 2014) at 14. Available at https://openaccess.leidenuniv.nl/.../ASC-075287668-3441-01.pdf accessed on 8th September, 2015.

[4] Barkindo, A; Gudaku, B. T & Wesley, C. K; "Our Bodies, Their Battleground; Boko Haram and Gender-Based Violence against Christian Women and Children in North-Eastern Nigeria since 1999" Available at https://www.worldwidewatchmonitor.org/.../…3117403.pdf accessed on 7th November, 2015

[5] Honby, A. S; "Oxford Advanced Learner's Dictionary of Current English" Oxford University Press, Oxford, 7th Edn.

[6] UN Programme of Action adopted at the International Conference on Population and Development (ICPD), Cairo, 5 – 13 September 1994, UN Doc. A/CONF.171/13 1994, Para 7.3. Available at http://www.choiceforyouth.org/information/sexual-and-reproductive-health-and-rights/official-definitions-of-sexual-and-reproductiv. accessed on 7th April, 2016

Rights: can be defined as "a power, privilege or immunity guaranteed under a constitution, statutes or decisional laws or claimed as a respect of long usage."[7]

Terrorism: there is no universally accepted definition of terrorism. However, for the purpose of this paper, terrorism is the 'use of violent action in order to achieve political aims or to force a government to act'[8]

3. THE EMERGENCE AND EVOLUTION OF BOKO HARAM

The terrorists' attacks of 11th September, 2001[9] have led to the worst backlash in the international protection of human rights since the concept was introduced in the UN charter after the Second World War. In contemporary times, terrorist groups have developed from dependence on State sponsorship. Many of them now operate as non-state actors. These non-state actors make use of porous borders, interconnected international systems on finance, communications and transit, thereby reaching every corner of the globe. Some of these groups remain focused on local or national political dynamics, while, others seek to affect global change.[10]

One of these groups is a salafi-jihadi sect by the name, *Jama'atu Ahlis Sunna Lidda'awati Wal-Jihadl*[11] but popularly known as *Boko Haram*.[12] This deadly sect has been waging a sectarian insurgency against the Nigerian State since 2009 though it materialized in 2002. The group started as an Islamic movement under Mohammed Yusuf. It was exemplified by intense speeches of its leader which included verbal attacks on secular authorities.[13]

Vicious altercations between the sect and security forces started in June, 2009, when an encounter between members of the sect and a joint police and military unit known as 'Operation Flush' over the enforcement of a government law that made compulsory, the use of helmets by all motorcyclists, turned violent.[14] As a result, about 17 members of sect were shot and injured by security operatives during the fracas.[15]

Consequently and due to infuriation, the sect resorted to sporadic violent attacks against the police and other Government institutions across the north-eastern states of Nigeria to avenge what they considered as police brutality against its members.[16] Successive conflicts between members of the sect and security forces left more than 800 people dead, including the extra-judicial killing of the leader of the sect, Mohammed Yusuf in July 2009.[17]

The extra-judicial execution of its leader marked a turning point in the radicalization of the leadership, hierarchy and modus operandi of the sect; a more dire and drastic leader in the person of Abubakar Shekau, who was previously Mohammed Yusuf's deputy emerged.

Since then, the sect has changed its *modus operandi* from using low level guerilla tactics to outright warfare by carrying out insurmountable violent and brutal attacks such as bombing of places of worship, suicide bombings, kidnapping, assassinations of individuals and groups

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[7] Isiramen, C. O; "Humanism and Women's Rights in Nigeria" cited in Dada, F. O; "The Justiciability and Enforceability of Women's Rights in Nigeria" (2013), 2 (1), *Akungba Law Journal*, 216 – 232 at 216

[8] Hornby *op cit*

[9] The attacks are also referred to as the 9/11 attacks wherein the twin World Trade Centre in New York and the Pentagon in Philadelphia, both in the United States were bombed by Islamic extremists affiliated with the terrorist group, Al Qaeda.

[10] Council on Foreign Relations. Available at http://www.cfr.org/terrorism/global-regime-terrorism/p25729. accessed on 19th February, 2015

[11] Which means "People Committed to the Propagation of the Prophet's Teachings and Jihad"

[12] Which means western education is forbidden. It is believed that the group took its name or was accorded its name as result of strong opposition to western education and initial withdrawal from the society. See Cook *op cit* at 4.

[13] Mohammed, *op cit at* 9 - 10

[14] Odomovo, A. S; "Insurgency, Counter-insurgency and Human Rights Violations in Nigeria", *the Age of Human Rights Journal*, 2014, pp 46 -62 at 48

[15] Forest, J., *Confronting the Terrorism of Boko Haram in Nigeria*, JSOU Press, Florida, 2012, 63

[16] Odomovo, *op cit* at 48

[17] Forest, *op cit* at 64

especially Christian minorities, prominent politicians and clerics who opposed it, across Northern Nigeria and the Federal Capital Territory of Abuja,[18] which the Nigerian Police could not curtail. This necessitated the deployment of the armed forces and paramilitary security outfits to the affected areas especially in North-East Nigeria.

In addition, the fruition of Boko Haram can be said to have some political undertones. Yusuf was always political and wanted an Islamic government but not in a violent way.[19] According to Taiwo, the swift growth of the sect is associated with political influence and power struggle in the region.[20] Yusuf formed an alliance with Ali Modu Sheriff, a one-time All Nigeria Peoples' Party (ANPP) Governor of Bornu State between 2003 - 2011, who at that time was a serving Senator of the Federal Republic of Nigeria.[21] The aim of the said alliance was to use the large youth followers of Yusuf, who constitute a significant electoral bloc to vote out Mala Kachalla, who with help of Sheriff, became the Governor of Bornu State upon return to civil rule in 1999.[22]

However, the alliance did not come free of charge. Sheriff promised to implement strict Shariah such as criminal punishments; flogging for theft and fornication, amputation and stoning to death for adultery but reneged on this promise upon election into office.[23] Although, Sheriff created a ministry of religious affairs and put a close confidante of Yusuf, in person of Buji Foi in charge of it (in return for the support rendered by Boko Haram to him during the election campaign).[24] This led to a fissure in the above mentioned alliance and Yusuf began to address his sermons at Sheriff, branding him as an apostate and a turncoat.[25] According to Harnischfeger, Yusuf returned from his self-imposed exile in Saudi Arabia after a rapprochement with the state, negotiated by the then Borno State deputy governor, Adamu Shettima Dibal and Sheikh Ja'afar Mahmud Adam, during the 2005 pilgrimage in Mecca, Saudi Arabia.

According to Mohammed,[26] three different but relating stages can be discerned in the evolution of Boko Haram. The first stage is what can be termed as the Kanama phase (2003-05), when a militant jihadist group led by Muhammad Ali, a Nigerian radicalised by jihadi literature in Saudi Arabia and believed to have fought alongside the *mujahideen* in Afghanistan, waged war on the Nigerian state but was repelled with casualties on both sides.[27]

The second stage commenced with the collapse of the Kanama uprising and ended with the suppression of Boko Haram proper in July 2009.[28] This period, which can be dubbed the *dawah* phase, was dedicated to intensive proselytisation, recruitment, indoctrination, and radicalization of its members.[29] This stage involved extensive criticism of the extant secular system; debates with opposing *ulama* (clerics) on the propriety or otherwise of Western education, Westernization, democracy, secularism, unceasing criticism of the corruption and bad governance under the then Governor of Bornu State, Ali Modu Sheriff (2003-2011) in

[18] Notable examples are the bombing of the Police Headquarters and United Nations (UN) offices in June and August, 2011 respectively
[19] Africa Report, *op cit* at 9
[20] Taiwo *op cit* at 24
[21] Africa Report *op cit* at 11. See also Taiwo *op cit* at 24 - 25
[22] *Ibid*
[23] Taiwo *op cit* at 25
[24] Harnischfeger, J, 'Boko Haram and its Muslim critics: Observations from Yobe State' in Perouse de Montclos, M. (ed) *op* cit, 33 – 62 at 40. It should be noted that Foi later resigned as Commissioner for Religious Affairs in 2007 due to protest. See Africa Report *op cit* at 12
[25]Taiwo *op cit* at 25
[26] Mohammed *op cit* at 10
[27] *Ibid*
[28] *Ibid*
[29] *Ibid*

addition to the conspicuous consumption and opulence of the Western-educated elite in the midst of poverty.[30]

The third phase began with the 2009 suppression of the movement and the killing of its leadership in gory and barbaric form by Nigerian security agencies.[31] Mohammed posits further that during this period, Boko Haram went underground, re-organised, and resurfaced in 2010 with a vengeance.[32] The sect not only targeted their perceived opponents, but indiscriminately attacked security officials, politicians associated with the ruling All Nigeria Peoples Party (ANPP) government in Bornu State.[33] As the military crackdown increased, the sect became desperate and more militant, thereby resorting to more desperate measures, which they had despised in the past, such as burning of school buildings, attacking telecommunications base stations, killing and kidnapping of foreigners, slaughtering as opposed to shooting of opponents, and killing of health officials at routine vaccination clinics, as well as random shooting of pupils and teachers at schools.[34]

The drivers of radicalization of Islamic groups include both internal and external developments[35] and the deadly sect is no exception. Although the grievances of Boko Haram are largely local, its major influences have been foreign.[36] Mohammed posits further that the basic message of radical Islam, whether in the Middle East, North Africa, or northern Nigeria, is the same, which primarily is that 'it is the duty of Muslims to revolt against and change apostate rulers and governments in order to help re-establish a proper Islamic state.'[37] He concluded that the main differences among radical groups are in the methods and not the ideals.[38]

4. THE LEGAL FRAMEWORK FOR THE PROTECTION OF THE FEMALE GENDER IN NIGERIA

Though Nigeria has acceded to and ratified various international instruments on the protection of the female gender, it is yet to domesticate most of them. The Nigerian Constitution[39] remains the grundnorm for the protection of the rights of the female gender in the country. Attempt will now be made to highlight the various instruments. Various international and regional instruments that are germane to the rights of the female gender that Nigeria has ratified include; Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), Optional Protocol to the ICCPR concerning Individual Petition, International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), Geneva Convention relative to the Protection of Civilian Persons in Time of War, African Charter on Human and Peoples' Rights, the Beijing Declaration, the Vienna Declaration and Programme of Action amongst a host of others. These instruments oblige states to guarantee non-discrimination and equality (*de jure* and *de facto*) on the basis of gender, sex, sexual orientation and gender identity.[40]

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[30] *Ibid*
[31] *Ibid*
[32] *Ibid*
[33] *Ibid*
[34] *Ibid*
[35] *Ibid* at 21
[36] *Ibid*
[37] *Ibid*
[38] *Ibid*
[39] Cap C.23 Laws of the Federation of Nigeria, 2004
[40] United Nations General Assembly; "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism" 8. Available at www2.ohchr.org/English/…/A-64-211.pdf

These assurances of non-discrimination and gender equality are essential in ensuring the realization of economic, social and cultural rights which are often impacted by terrorism and counter-terrorism operations.[41]

These instruments fall under four general categories.[42] The first category consists of the comprehensive International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, (ICCPR and ICESCR).[43] The second category consist of comprehensive regional conventions such as the African Charter on Human and People's Rights, 1981. The third category consists of conventions dealing with specific wrongs such as genocide, racial discrimination or torture. While the fourth category deals with conventions related to the protection of particular set of people such as women and children. The relevance of some of these instruments will now be considered herein after -

3.3.1 The International Covenant on Civil and Political Rights (ICCPR)

This instrument governs fundamental rights such as; right to life,[44] right to dignity of human person,[45] right to liberty and security,[46] and the prohibition of propaganda of war and of incitement to national, racial or religious hatred.[47]

Consequent upon the foregoing, every citizen of Nigeria, has a right to life and he or she shall not be intentionally deprived of this inherent right unless in the execution of the sentence of a court in respect of a criminal offence of which he or she has been found guilty. Furthermore, every citizen is entitled to respect for the dignity of his person. Therefore, he or she cannot be subjected to inhuman treatment. This is not the scenario in the Boko Haram insurgency. Female victims of the various attacks launched by the deadly sect were deprived of their lives without no just cause. It is pertinent to state that by virtue of this instrument, Nigeria is under compulsion to ensure and protect these rights without any distinction whether as a result of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[48]

3.3.2 International Covenant on Economic, Social and Cultural Rights (ICESCR)

This covenant was promulgated in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family based on the foundation of freedom, justice and peace in the World.[49] It was also promulgated in accordance with the Universal Declaration of Human Rights (UDHR) and in recognition of the ideals of free human beings enjoying freedom from fear and want, which can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.[50]

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[41] *Ibid* at 8 - 9

[42] Brownlie, I, *Principles of Public International Law* (6th Ed, New York: Oxford University Press, 2003) p.536

[43] These covenants were unanimously accepted by the General Assembly of the UNO in 1966 but came into force in 1976

[44] Article 6 of the International Covenant on Civil and Political Rights (ICCPR) 1966 (Entry into force in 1976). This right is also guaranteed in the constitutions of many Nations. For examples, see Constitution of the Federal Republic of Nigeria 1999 s. 33 and Constitution of the Republic of South Africa, 1996 s. 11

[45] Article 7 of the ICCPR. This right is also guaranteed in the constitutions of many Nations. For examples, see Section 34 of the Constitution of the Federal Republic of Nigeria 1999

[46] Article 9 of the ICCPR. This right is also guaranteed in the constitutions of many Nations. For examples, see Section 35 of the Constitution of the Federal Republic of Nigeria, 1999

[47] Article 20 of the ICCPR

[48] Article 2 of the ICCPR

[49] Preamble to the International Covenant on Economic, Social and Cultural Rights (ICESR)1966 (Entry into force in 1976)

[50] Preamble to the ICESR

This covenant guarantees the right to work by all.[51] Furthermore, it guarantees adequate standard of living rights such as rights to food[52], health[53] and shelter.[54]

3.3.3 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)

This convention was adopted in 1979 and can be said to be the principal instrument for the protection of women at the international plane. It enjoins State parties to prohibit discrimination against women by embodying the principle of the equality of men and women in their national constitutions or other appropriate legislation[55] and adopting appropriate legislative and other measures prohibiting all discrimination against women, including sanctions where appropriate.[56] It charges States to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination[57] amongst others. This instrument governs fundamental rights such as; right to education,[58] employment rights,[59] and equal access to healthcare.[60] The convention places on States to take into account problems faced by rural women and the significant roles played by such women in the economic survival of their families.[61]

3.3.4 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

This convention guarantees the right of both men and women not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. Article 4 of the convention charges State parties to criminalize torture with appropriate penalties within their respective jurisdictions. States Parties are also enjoined to afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence that are necessary for such proceedings at their disposal.[62]

The convention further mandate each state party to ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.[63] The convention also obligate states to ensure that, its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.[64] Under the convention, any individual who alleges he or she has been subjected to torture has the right to complain and have his or her case promptly and impartially examined by competent authorities.[65]

States must take steps to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.[66] Each State Party must also ensure in its legal system that the victim of an act of torture

[51] Article 6 (1) to the ICESR
[52] Article 11
[53] Article 12
[54] Article 11
[55] Article 2 (a)
[56] Article 2 (b)
[57] Article 2 (c)
[58] Article 10
[59] Article 11
[60] Article 12
[61] Article 14
[62] Article 9 (1)
[63] Article 10
[64] Article 12
[65] Article 13
[66] *Ibid*

obtains redress and has an enforceable right to fair and adequate compensation, including the means for full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.[67]

Article 16 directs Each State Party to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[68]

3.3.5 Geneva Convention IV and Additional Protocols I and II Relative to the Protection of Civilian Persons in Time of War

The Geneva Conventions which were adopted before 1949 were in respect of Combatants and not Civilians.[69] Although some provisions in respect of the protection of populations against the consequences of war and their protection in occupied territories are contained in the Regulations concerning the laws and customs of war on land, annexed to the Hague Convention of 1899 and 1907.[70] This provision became inadequate during World Wars I and II because of the dangers emanating from air warfare and of the problems relating to the treatment of civilians in enemy territories and in occupied territories.[71] Consequently, the Geneva Convention IV was introduced by the International Committee of the Red Cross (ICRC) in order to improve the situation of war victims.[72]

Two Additional Protocols were adopted in 1977, to extend and strengthen the protections provided in the Geneva Conventions.[73] These treaties form part of the law of armed conflict and contain certain provisions that apply specifically to women.[74]

Examples of these provisions includes but not limited to the protection of women against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.[75]

3.3.6 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (ACHPR) also known as the Banjul Charter is an international human rights instruments for the protection of human rights on the African Continent.[76] The oversight and interpretation of the Charter is within the purview of the African Commission on Human and Peoples' Rights, which was established in 1987, with headquarters now in Banjul, The Gambia.[77]

Article 2 of the Charter enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. While Article 18 calls on all States Parties to

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[67] Article 14

[68] Article 16

[69] International Committee of the Red Cross (ICRC), 'Treaties, States Parties and Commentaries'; Convention (IV) relative to the protection of Civilian Persons in Time of War, Geneva, 12 August, 1949. Available at https://www.icrc.org/ihl/INTRO/380. Accessed on 8th April, 2016

[70] *Ibid*

[71] *Ibid*

[72] Department of Economic and Social Affairs, Division for the advancement of Women, United Nations; 'Sexual Violence and Armed Conflict: United Nations Response' Published to Promote the Goals of the Beijing Declaration and the Platform of Action, April 1998. Available at www.un.org/womenwatch/daw/publication....cover.pdf. Accessed on 7th April, 2016

[73] *Ibid*

[74] *Ibid*

[75] Article 27 of the Geneva Convention IV, 1949. Similar provisions are contained in Articles 76 (1) and Article 4 (2) (e) of the Additional Protocols I and II of 1977 respectively.

[76] African Commission on Human and Peoples' Rights, 'African Charter on Human and People's Rights' available at http://www.achpr.org/instruments/achpr/ accessed on 7th April, 2016

[77] *Ibid*

eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions.[78]

3.3.7 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

This protocol is also known as the Maputo Protocol.[79] State parties to the protocol in furtherance to the provisions of Article 66[80] of the African Charter on Human and Peoples' Rights and in reaffirming the principle of gender equality alongside recognizing the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy agreed to this protocol.[81]

The protocol amongst other things guarantees elimination of all discrimination against women,[82]elimination of harmful practices,[83] and women rights such as dignity,[84] life, integrity and security of person,[85] and equality in marriage.[86] Provisions on access to justice and equal protection before the Law,[87] right to participate in the political and decision making process,[88] protection of women in armed conflicts, [89] right to education and training[90] and economic and social rights[91] are enshrined in the Protocol.

3.3.8 The Beijing Declaration and Programme of Action

The Beijing Declaration and Programme of Action is the outcome of the Fourth World Conference on Women: Action for Equality, Development and Peace organized by the United Nations from the 4th – 5th September, 1995 in Beijing, China.

Governments are mandated to intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people.[92]

Paragraph 232(a) of the Declaration obliges Governments to give priority to promoting and protecting the full and equal enjoyment by women and men of all human rights and fundamental freedoms without distinction of any kind as to race, colour, sex, language, religion, political or other opinions, national or social origins, property, birth or other status.

While, Paragraph 133 of the Declaration states that 'violation of human rights in situations of armed conflict and military occupation are violations of the fundamental principles of international human rights and humanitarian law as embodied in international human rights instruments in the Geneva Conventions of 1949 and the Additional Protocols thereto'

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[78] Article 18 (3)

[79] It was adopted by the African Union on 11th July, 2003 at its second summit in Maputo, Mozambique and came into force on 25th November, 2005, after the ratification of the requisite 15 member nations of the Union.

[80] This Article provides for special protocols or agreements, if necessary, to supplement the provisions of the African Charter

[81] Preamble to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Available at www.achpr.org/files/instruments/women....achpr_instr_proto_women_eng.pdf . accessed on 19th March, 2016

[82] Article 2

[83] Article 5

[84] Article 3

[85]Article 4

[86] Article 6

[87] Article 8

[88] Article 9

[89] Article 11

[90] Article 12

[91] Article 13

[92] Paragraph 32 of the Beijing Declaration and the Platform for Action, Fourth World Conference on Women, Beijing, China, September 4-15 1995, U.N. Doc. A/CONF.177/20 (1996). Available at www.beijing20.unwomen.org/…/…/BeijingDeclarationAndPlatformForAction-en.pdf. accessed on 19th January, 2016

3.3.9 The Vienna Declaration and Programme of Action

The Vienna Declaration and Programme of Action is the outcome of the 1993 UN World Conference on Human Rights held in Vienna. Of particular significance was the recognition that violence against women, such as domestic abuse, mutilation, burning and rape, is a human rights issue.[93] Previously, these acts had been regarded as private matters, and therefore not appropriate for government or international action.[94] Even the Convention on the Elimination of all Forms of Discrimination against Women (Women's Convention), adopted in 1979, has no specific provision on violence against women.[95]

The declaration provides that 'the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights and that the full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.[96]

Article 38 of the Declaration states that "Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response."

3.3.10 Declaration on the Protection of Women and Children in Emergency and Armed Conflict

This declaration was proclaimed by General Assembly resolution 3318 (XXIX) of 14 December 1974 upon the recommendation of the Economic and Social Council contained in its resolution 1861 (LVI) of 16 May 1974. This declaration is as a result of women and children suffering victimization, inhuman acts and serious harm during armed conflict due to suppression, aggression, colonialism, racism, alien domination and foreign subjugation.[97]

Article 1 of the declaration prohibits attacks and bombing of civilian populations, while Article 2 prohibits the use of chemical and biological weapons on civilian populations.

Under this Declaration, states are duty-bound to abide by their obligations under the Geneva Protocol of 1925 and Convention of 1949.[98] The declaration criminalizes all forms of repression and cruel and inhuman treatment of women and children, including imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings and forcible eviction, committed by belligerents in the course of military operations or in occupied territories.[99]

States involved in armed conflicts, military operations in foreign territories or military operations in territories still under colonial domination are mandated to make all efforts to spare women and children from the ravages of war by ensuring that all necessary steps are taken to ensure the prohibition of measures such as persecution, torture, punitive measures,

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[93] Department of Economic and Social Affairs, Division for the advancement of Women, United Nations; 'Sexual Violence and Armed Conflict: United Nations Response' Published to Promote the Goals of the Beijing Declaration and the Platform of Action, April 1998. Available at www.un.org/womenwatch/daw/publication....cover.pdf. Accessed on 7th April, 2016

[94] *Ibid*

[95] *Ibid*

[96] Paragraph 18 of the Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, Austria, June 14-25, 1993, U.N. Doc. A/CONF.157/23 (1993). Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx

[97] Preamble to the Declaration on the Protection of Women and Children in Emergency and Armed Conflict. Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtectionOfWomenAndChildren.aspx. accessed on 20th March, 2016

[98] Article 3

[99] Article 5

degrading treatment and violence, particularly against that part of the civilian population that consists of women and children.[100]

In conclusion, the Declaration provides that women and children who found themselves in emergency or conflict situations should not be deprived of their inalienable and inherent rights such as shelter, food and medical aid, in accordance with the provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration of the Rights of the Child or other instruments of international law.[101]

5. IMPLICATIONS OF THE INSURGENCY AND COUNTER-INSURGENCY ON THE FEMALE GENDER

Hitherto, the female gender has suffered gender discrimination and violence stemming from political, cultural,[102] social,[103] economic[104] and religious[105] reasons in Nigeria in general and in the insurgency-torn areas in particular, which maybe as a result of conception that the major role of a woman is that of *child-bearer, child-raiser and home-maker*.[106] Majority of the female gender in Northern Nigeria are vulnerable and live in poverty.[107] The insurgency has also compounded their problems in that they suffer from ill-treatment and abuse. This

[100]Article 4

[101] Article 6

[102] A trite example is widowhood practices especially among the Ibos of South-East Nigeria, whereby a widow cannot inherit the personal or real estate of her husband. See the case of ***Nezianya v. Okagbue & Ors. (1963) 1 ALL NLR 352***. This is also applicable among the Yorubas of South-West Nigeria, especially in cases where the husband dies *intestate*. See the cases of ***Osilaja v. Osilaja (1972) 10 SC 126***. Other harmful cultural practices include the beating of wives, which is permitted as a form of discipline. See section 55 1 (1) (d) of the Penal Code Act, (Cap P.3), Laws of the Federation of Nigeria, 2004

[103]Women are not permitted to stand surety for bail. Furthermore women are denied tax relief for their dependants unlike their male counterpart, who enjoy tax reliefs by virtue of the married man allowance. Another trite issue is that of Citizenship. Section 26 (2) (a) of the Nigerian constitution denies a woman the right to confer citizenship status on her foreign husband but grants such right to a foreign woman married to a Nigerian man. In addition, the Section 353 of the Criminal Code Act (applicable to Southern Nigeria) provides for the harsher offence of felony and punishment of three (3) years imprisonment for assault committed against a Man by a Woman. While, Section 360 of the same Code, provides for a lesser offence of misdemeanor and punishment of two (2) years for assault committed against a Woman by a Man.

[104] By virtue of sections 55 and 56 of the Labour Act (Cap L.1, Laws of the Federation of Nigeria, 2004), women are excluded from underground work and are restricted from doing certain jobs such as night work in any agricultural undertaking, public or private industrial undertaking or any branch thereof. In addition, Sections 121 - 126 of the Nigeria Police Regulations Act (Cap P.19, Laws of the Federation of Nigeria, 2004), regulates the affairs of women in ways other than that of men. Under the regulations, Women Police Officers are employed for duties that are concerned with women and children only. Married women are not allowed to enlist in the Police Force. Furthermore, a woman in the Nigerian Police must seek the permission of the Commissioner of Police in her area of service before she can marry upon satisfying the conditions precedent of having spent two (2) years in the police and furnishing the police with the particulars of the *fiancé*, who must be investigated and cleared.

In concluding on these regulations, an unmarried pregnant police officer shall be discharged from the force, while a married woman cannot be granted any special privileges because she is married and shall be subject to postings and transfers as if unmarried. These provisions are discriminatory in that they show the notion that women are weaker to men and an affront to the right of a woman to marry and raise a family as enshrined in section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

[105] For example under Islamic Law (Shariah), a woman cannot be appointed as a Judge (Kadi of the Shariah Court of Appeal). Furthermore, in cases of adultery, a man can swear his innocence by denying having had sexual intercourse with a woman and be discharged and acquitted because such statement on oath is deemed as sufficient proof of innocence unless same is rebutted by four independent and trustworthy eye-witnesses. See the case of ***Safiyatu Hussain Titudu v. Attorney-General of Sokoto State (2008) vol. 1 WHRC 309***

[106] Akintola, S. O & Taiwo ,E. A., *Nigerian Woman and Her Child: The Remaining Challenges* (Demyaxs Books, Ibadan, 2004) 3

[107] Cook *op cit* at 5

section will examine the various human rights abuses perpetrated on the female gender due to the Boko Haram insurgency.

5.1 Killing of Members of the Female Gender

The Boko Haram insurgency and counter-insurgency is destroying the lives of females in Nigeria. Nigerian females have been on the receiving end of the brunt of the insurgency as a result of increasing feminisation of terror by Boko Haram in two paradoxical ways vide the use of young girls as both the victims and vanguards of terror.[108] As victims of terror, in the form of abductees, while as vanguards of terror, females are used as bombers in carrying out suicidal attacks.[109] According to Onuoha and George, the bulk of suicide bombings have been carried out by abducted females who hitherto were recruiters and couriers of arms, foodstuffs and money.[110]

This is an affront on the right to life of female folks. The right to life can be said to be the supreme right and the foundation of all rights. This right is guaranteed under Section 33 (1) of the constitution of the Federal Republic of Nigeria, 1999 as amended.[111] Every person whether citizens of Nigeria or not, is entitled to this right which can only be deprived as provided for by the constitution itself.[112]

The first female suicide bomb attack occurred on 8th June 2014, at the 301 Battalion barracks of Nigerian Army in Gombe, Gombe State, which resulted in the death of the girl, who carried the bomb in her hijab and a soldier.[113] This attack was followed by the bombing of an energy depot in Lagos by a female attacker on the 25th of that same month.[114] The nefarious sect continues to use girls as young as eleven years of age as human bombs to wreck havocs and carry out barbaric acts in other cities such as Kano, Yola and Maiduguri.[115] The deadly sect has extra-judicially executed women and children especially those of the Christian faith.[116] A number of women and girls who were forced to marry Boko Haram fighters were killed when the group was forced to retreat by the joint forces, reportedly so that they would not remarry "infidels" or provide information to regional forces.[117] These acts are gross violations of the provisions on right to life as guaranteed under Section 33 (1) of the Nigerian Constitution and Article 6 of the ICCPR.

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[108] Onuoha, F. C & George T. A; "Boko Haram's Use of Female Suicide Bombing in Nigeria" (2015); Al Jazeera Center for Studies. 2. Available at www.studies.aljazeera.net./…/…20153189319985734Boko-Harams-Female.pdf. Accessed on 7th November 2015

[109] *Ibid*

[110] Onuoha, F. C & George T. A *op cit*

[111] Section 33 (1) of the Constitution of the Federal Republic of Nigeria 1999 provides that "*every person has a right to life and no one shall be deprived intentionally of his life, save in execution of a sentence of a court in respect of a criminal offence of which he has been found guilty"*

This right is also guaranteed under International instruments such as Article 6 of the International Covenant on Civil and Political Rights (ICCPR) to which Nigeria has acceded to. In addittion, Article 4 of the African Charter provides that *"Human beings are inviolable. Every human being shall be entitled to respect for his life and integrity of his person. No one maybe arbitrarily deprived of this right"*

[112] Permissible limitations on the right to life are provided for in Section 33 (2)

[113] Onuoha, F. C & George T. A *op cit* at 4

[114] *Ibid*

[115] Boko Haram; Young Female Suicide Bombers kill 15 in Nigeria Market Attack. Available at http;//www.theguardian.com/world/2015nov/18/young-female-suicide-bombers-kill-15-in-nigeria-market-attack. Accessed on 19th January, 2016

[116] Barkindo *et al op cit* at 19

[117] Office of the High Commissioner on Human Rights (OCHR); Report of the United Nations High Commissioner on Human Rights on Violations and Abuses Committed by Boko Haram and the Impact on Human Rights in the Affected Countries. Available at www.ochr.org/.../HRC/.../A-HRC-30-67_en.doc. accessed on 7th November, 2015

5.2 Abduction, Rape, Sexual Violence, Sexual Slavery, Forced Marriages and Breaches of the right to freedom of thought, conscience and religion

Boko Haram abducts women and girls during raids on towns and villages in North-East Nigeria and detained them in Boko Haram's camps and towns under their control. A trite example is the abduction of 276 female students of Government Secondary School, Chibok, Bornu State from their hostel on 14th April, 2014 into the Sambisa forest head-quarters of the sect.[118] It is worthy to note that the Nigerian government successful negotiated the release of 103 of the abducted Chibok school girls in exchange for the release of some top Boko Haram commanders.[119]

According to Amnesty International, Boko Haram routinely rounds up women and girls and detain them in large houses under armed guard.[120] Women and girls that have escaped from Boko Haram reported to Amnesty International that, many were forced to marry Boko Haram members.[121] In a video released on 13 May 2013, the Boko Haram leader, Abubakar Shekau announced that Boko Haram had abducted women and children in response to the arrest of the wives and children of its members. The sect has singled out unmarried women for abduction, forcing them into marriage with its members, claiming that they are religiously obliged to be married.[122] In camps and territories controlled by Boko Haram, women were raped by their new husbands or secretly in the bush by members of the sect.[123]

Women previously detained in Boko Haram camps also informed Amnesty International that Boko Haram had given them religious education classes on Islamic prayers and practices, ordered Christian girls to convert to Islam and to follow Boko Haram's interpretation.[124]

According to the Office of the High Commissioner on Human Rights (OCHR), discussions with psychosocial counsellors in northeast Nigeria confirmed widespread sexual violence against women and girls held by Boko Haram. One counsellor reported that a girl who managed to escape narrated how Boko Haram fighters would sexually abuse her, telling her 'you are the kind of girls we like'.[125] Another interviewee told OHCHR that she witnessed the rape of girls as young as 15.[126]

OHCHR also documented cases of rape emanating from forced marriages to Boko Haram members, during an attack on Bama, Borno state, Nigeria, in September 2014.[127] OHCHR was informed about a Nigerian refugee woman in Niger, who was abducted in Damasak, Borno state, on 28 November 2014, and raped by 40 men.[128] A 14-year-old girl told OHCHR she was raped when Boko Haram attacked Damasak, in November 2014, and that, after killing the men and boys, they took the women and children to a house and selected

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[118] Just as the 276 Chibok Girls were abducted by the Boko Haram Sect, hundreds of yazidi girls were abducted by the deadly terrorist group, Islamic State in Iraq and Syria (ISIS) under similar circumstances. Some of the Yazidi girls have been rescued with the help of western superpowers backed International coalition forces, form the Sinjar Mountains, where some of them fled when ISIS invaded their homes. The Iraqi episode can be said to have ended well as some of the yazidi girls are being rescued and rehabilitated vide training in photo journalism. See further Onyibe, M, 'Terrorism: Comparing Chibok and Yazidi Girls (1)' The Punch Newspaper, Monady, November 2, 2015, 24.

[119] The Vanguard Newspaper Editorial, 'Return of 82 more Chibok Girls' (Editorial The Vanguard, May 12, 2017) Available at www.vanguardngr.com/2017/05/return-82-chibok-girls/. accessed on 13th August, 2017.

[120] Amnesty International; "*Our job is to shoot, slaughter and kill"*, *Boko Haram's reign of terror in North-East Nigeria,* April 2015, 24 available at www.amnesty.org, accessed on 9th September, 2015

[121] *Ibid*

[122] *Ibid* at 63

[123] *Ibid* at 64

[124] *Ibid*

[125] Office of the High Commissioner on Human Rights (OCHR) *op cit*

[126] *Ibid*

[127] *Ibid*

[128] *Ibid*

some 40 girls to marry their fighters. She was forcefully married and raped three times before escaping, during a "wedding", with three other girls.[129]

The Borno Elders and Leaders of Thought pressure group accused the Military JTF of killing innocent young men and raping of married women and young girls though the Military denied the allegations.[130]

These violations are an affront to Paragraph 133 of the Beijing Declaration,[131] right to dignity of person as enshrined in Section 34 of the Nigerian Constitution and Article 8 of the ICCPR respectively. Furthermore, forced marriages are gross violations of the provisions of Article 23 (2) and (3) of the ICCPR.[132] Amnesty International also indicated in its reports that it received information that some abducted girls under the age of fifteen were forced to take active part both in battle and in executions.[133] This act constitutes a war crime and is a flagrant abuse of the rights of the child. The Optional Protocol to the Convention on the Rights of the Child, 1989, which borders on the involvement of children in armed conflict, prohibits armed groups such as the Boko Haram sect from recruiting or using in hostilities persons under the age of 18 years.[134] The Nigerian Child Rights Act also prohibits the use of children in any military operation or hostilities or other criminal activities.[135] The issue of forced religion is a gross violation of the right to freedom of religion as enshrined in Section 38 of the Nigerian constitution.[136] This provision of the constitution is very important in a multi-religious country like Nigeria, where various religious beliefs and practices must be accorded equal opportunity. Thus, no one must be punished for entertaining or professing any religious belief or disbelief. [137]

It is pertinent to state that armed conflicts such as the Boko Haram insurgency do have a devastating and harsh impact on women and girls. Women and girls suffer violations such as rape, forced prostitution, sexual slavery and forced impregnation.[138]

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[129] *Ibid*

[130] *Daily Trust*, 15 July 2011 cited in Mohammed *op cit* at 27

[131] The Beijing Declaration and Platform for Action of the Fourth World Conference on Women, 1995. Available at www.beijing20.unwomen.org/…/…/BeijingDeclarationAndPlatformForAction-en.pdf. accessed on 19th January, 2016

[132] Article 23 (2) and (3) of the ICCPR provides thus;

(2) The right of men and women of marriageable age to marry and to found a family shall be recognized.

(3) No marriage shall be entered into without the free and full consent of the intending spouses.

[133]Amnesty International, "*Our job is to shoot, slaughter and kill", Boko Haram's reign of terror in North-East Nigeria op cit* at 24

[134] Article 4 (1) Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

[135] Sections 34 and 26 respectively, of the Child Rights Act, Cap C50, Laws of the Federation of Nigeria,2004

[136] Sub-sections (1) and (2) of this section provides that:

(1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction ceremony or observance relates to a religion other than his own, or religion not approved by his parent or guardian.

[137] St. Emmanuel, S. A; "Interplay of Humanitarian Law and Human Rights Law in Boko Haram Insurgency" (2015) 3 (1) *Akungba Law Journal*, 213 – 238 at 230

[138] Lindsey, C, 'The Impact of Armed Conflict on Women', in: Durham/Gard, Listening to Silence: Women and War, 2005, 21 cited in European Center for Constitutional and Human Rights (ECCHR),
'Alternative report on the implementation of the UN Convention on the Elimination of Discrimination against Women (CEDAW) - Sri Lanka' *"Women and Armed Conflict"* Berlin/Geneva, January 2010. Available at www2.ohchr.org/English/bodies/cedaw/ECCHR_Sri_Lanka_for_the_session_CEDAW48.pdf accessed on 7th April, 2016

5.3 Displacement and separation from family Members

As a result of the insurgency, many women and girls have fled their ancestral homes, thereby losing their adequate standard of living rights such as health, shelter, water and sanitation. As a result of displacement, many young girls of school age are out of school. Increase in Internally Displaced Persons has resulted in food shortages and the use of children especially the girl child to look for food, thus making them vulnerable to sexual abuse. Furthermore, there are protection issues such as "insecurity, tensions amongst residents, and between them and host communities, and sexual and gender-based violence" across Internally Displaced Persons' Camps in the Country.[139] Displacement also causes separation between family members while fleeing.

5.4 Economic, Social and Cultural Rights

The insurgency has violated the economic, social and cultural rights of women and the girl child in that, provisions of social services are interrupted. Schools, Hospitals and Government buildings have been burnt by the insurgents during raids. Majority of the female children in North-East Nigeria are out of school because of the ban on western education by the sect, fear of abduction and rape, no learning facility due to burnt and destroyed schools. This is a gross violation of the right to education as provided for under international[140] and regional instruments[141] ratified by the Country.

Another right of the female gender violated under this category of rights is the right to work. The right to work signifies means of livelihood and breach of this right amount to loss of livelihood. The North-East part of the country where the deadly sect operates is more of an agrarian society, with many of the female folks living on farming. The fear of insurgency and counter-insurgency has made many women to flee their villages and thus not able to cultivate their farmlands. While the shops of those who are into trading especially Christian women have been looted and destroyed by the sect during raids,[142] thereby reducing income and economic growth and increasing poverty among the affected populace.

5.5 Arbitrary Arrest, Unlawful Detention and Arbitrary Deprivation of Liberty

In towns overran by the sect, women were imprisoned in large houses and not permitted to leave.[143] Nigerian soldiers also committed abuses bordering on mass arbitrary arrest and unlawful detention. The military arbitrarily and indiscriminately carried out targeted arrests of relatives of suspected Boko Haram Members. According to Amnesty International, a senior military official informed it in confidence that the military had arrested women married to senior Boko Haram members and their children. He shared with Amnesty International a document, dated 12 March 2013, which contains a list of 17 women and girls, all apparently married to Boko Haram suspects, who were detained by troops from Operation Restore Order (ORO) III in Presidential Lodge, Damaturu in Yobe state. Eleven of them were detained with their children. The document indicates that most were arrested between September and November 2012. Two of them were girls aged 14 and 16.[144] Under the Convention on the Rights of the Child, 1989, State parties have an obligation to "respect and

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[139] Office of the High Commissioner on Human Rights (OCHR); Report of the United Nations High Commissioner on Human Rights on Violations and Abuses Committed by Boko Haram and the Impact on Human Rights in the Affected Countries. Available at www.ochr.org/.../HRC/.../A-HRC-30-67_en.doc. accessed on 7th November, 2015

[140]See Articles 26 of the Universal Declaration of Human Rights; 13 and 14 of the ICESCR; 10 of CEDAW

[141]See Articles 17(1) of the African Charter on Human and Peoples' Rights; 11 of the African Charter on the Rights and Welfare of the Child

[142] Barkindo *et al op cit* at 19

[143] Amnesty International, "*Our job is to shoot, slaughter and kill", Boko Haram's reign of terror in North-East Nigeria op cit* at 63

[144] Amnesty International, *Stars on their Shoulders. Blood on their Hands, War Crimes committed by the Nigerian Military*, June 2015, 80 - 81. A report by Amnesty International. Available at www.amnesty.org, accessed on 18th July, 2015.

ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.[145] Furthermore, Amnesty International has also documented the arrest and detention of 30 women and girls.[146] The vast majority of arrests carried out by the military and imprisonment on the part of the sect are entirely arbitrary. These arrests contravene the fundamental right to liberty and are clear violations of the rights of the above mentioned women and children not to be subjected to arbitrary arrest or detention, a fundamental right guaranteed under Section 35 of the Constitution of the Federal Republic of Nigeria, 1999,[147] the International Covenant on Civil and Political Rights (ICCPR)[148] and the African Charter on Human and Peoples' Right (African Charter), which Nigeria is a signatory.

5.6 Reproductive Rights

Women also suffer the risk of being infected with sexually transmitted diseases (STDs) and HIV/AIDs by their abductors. For example, members of the sect, after taking control of towns regularly raped women with or without condoms despite the prevalence of HIV.[149]

Some women as a result of been raped by members of the sect, become pregnant with unwanted pregnancies and illegitimate children, thereby suffering rejection from family

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[145] Article 38(1) Convention on the Rights of the Child

[146] Amnesty International, *Stars on their Shoulders. Blood on their Hands, War Crimes committed by the Nigerian Military op cit* at 76

[147] *This section provides that Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law;*

- *(a) In execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty;*
- *(b) By reason of his failure to comply with the order of a court or in order to secure the fulfillment of any obligation imposed by law;*
- *(c) For the purposes of bringing him before a court in the execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as maybe reasonably necessary to prevent his committing a criminal offence;*
- *(d) In the case of a person who has not attained the age of eighteen years for the purpose of his education or welfare;*
- *(e) In the case of a person suffering from infectious or contagious diseases, persons of unsound mind, person addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or*
- *(f) For the purpose of preventing the unlawful entry of any person into Nigeria, or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of the proceedings thereto.*

Provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.

Furthermore, in spite of the imperfections of the Nigerian constitution as regards the above provision, it does not empower the Military to detain individuals without reasonable suspicion and without oversight by the courts. See further, Section 23 of the Terrorism (Prevention) Act as amended in 2013.

[148] Article 9 provides as follows:

1. *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
2. *Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*
3. *Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*

[149] Amnesty International, "*Our job is to shoot, slaughter and kill", Boko Haram's reign of terror in North-East Nigeria op cit* at 64

members and becoming the laughing stock of the society. About 150 women from the Dalori camp, which opened in April 2015 and hosts Internally Displaced Persons from Bama, had given birth after they escaped from captivity.[150]

According to OHCHR, Numerous women and girls gave birth or miscarried in extremely difficult conditions.[151] For instance, during a Boko Haram attack on Gwoza, Nigeria, in September 2014, an interviewee said she gave birth in the bush while fleeing.[152] According to numerous interviews conducted by OHCHR in Nigeria, several women died during childbirth or were forced to abandon their new born babies as they escaped attacks in Baga, Gwoza, and Michika.[153] A woman, who was rescued from Sambisa forest, informed OHCHR that she witnessed births by 10 women while held captive in the various Boko Haram strongholds.[154] These are clear violations of the rights to birth control, access good-quality reproductive healthcare and the right to make education and access in order to make free and informed reproductive choices as enshrined in Article 14 (1) of the Maputo Protocol, which guarantees the health and reproductive rights of women.[155]According to Amnesty International, violence against women violates their bodily integrity because a woman's right to control her sexuality and reproduction is a basic human right.[156]

6. CONSEQUENCES ON HUMAN RIGHTS LAW AND HUMANITARIAN LAW

The various nefarious acts of the sect and counter-insurgency measures by the Nigerian State amounts to gross violations of international human rights law and international humanitarian law as applicable to non-international conflict. Humanitarian law and Human Rights law are closely related. Both have common values, which are primarily those of respect for and dignity of human persons though Humanitarian Law is concerned with the regulation of armed conflict.

In non-international armed conflict such as the Boko Haram insurgency, both human rights law and humanitarian law are applicable. It follows therefore, that the Nigerian state remains bound by its obligations under international human rights law, while all parties to the conflict, including the Boko Haram sect as a non-state armed group, are bound by the rules of international humanitarian law. Thus both parties to the conflict are responsible for violations of international humanitarian law. Serious violations of international humanitarian law constitute war crimes and entail individual criminal responsibility. Certain crimes, when committed as part of a widespread or systematic attack directed against any civilian population (in furtherance of a state or organizational policy), with knowledge of the attack,

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[150]OHCRC *op cit*

[151] *Ibid*

[152] *Ibid*

[153] *Ibid*

[154] *Ibid*

[155] This Article provides that -

(1) States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:

a) the right to control their fertility;

b) the right to decide whether to have children, the number of children and the spacing of children;

c) the right to choose any method of contraception;

d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;

e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;

g) the right to have family planning education.

[156] Amnesty International, USA, 'Sexual and Reproductive Health Rights'. Available at www.reproductiverights.org/sites. Accessed on 7th April, 2016

constitute crimes against humanity, which also warrant and entail individual criminal responsibility.[157]

The female gender is protected under international humanitarian law. Violence to life and persons, inhuman treatment, the taking of hostages, collective punishments, slavery and punishments are prohibited.[158] There are special protections covering particular categories such as the wounded and sick, medical and religious personnel, women and children.[159] It can be garnered that humanitarian law in this context is to mitigate the effect of the insurgency on the female gender.

Furthermore, the protection from human rights violations and security of a person especially that of a member of the female gender is a basic human right that is globally recognized and also a fundamental duty of the State.[160] Consequently, the Nigerian state is required to respect, safeguard and guarantee the human rights of its citizens. It also has a duty to ensure that victims of human rights and humanitarian violations, their dependants and families have a right to reparation, in order to address the damage and pain they have suffered. Such reparation includes restitution, compensation, rehabilitation, medical care and psychological aid. Furthermore, it is also duty bound and obligated under the Rome Statute of the International Criminal Court (ICC) and International Law to bring the violators of human rights and humanitarian law to justice through the investigation and prosecution of crimes committed by both parties to the conflict.[161]

Examples of members of the deadly sect prosecuted and convicted so far, include that of Kabiru Umar *alias* Kabiru Sokoto, a member of the *Shura* (Decision Making) Council of the Boko Haram sect and mastermind of the Christmas day bombing of St. Theresa Catholic Church, Madalla, Niger State in 2011, that killed at least 44 worshippers were killed while 70 others sustained injuries.[162] He was convicted for the offences of murder and terrorism, and subsequently sentenced to life imprisonment on 20th December, 2013 by the Federal High Court.

Another trite example is the prosecution and conviction of three members of the deadly sect in the persons of Ali Muhammed, Adamu Kurumi and Ibrahim Usman. These men were sentenced to twenty-five (25) years imprisonment with hard labour for participating in acts of terrorism, conspiracy to commit terrorism, illegal possession of firearms and being members of a proscribed organization. These offences contravene the provisions of Sections 13(2) and 17(b) of the Terrorism Act, 2013 and Sections 1, 8, 27 (1) (a) and (b) of the Firearms (Special Provisions) Act, Cap F. 28, Laws of the Federation 2004.[163] In this case Seventeen (17)

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[157] ICRC Customary IHL Study, Rule 156. See further the case of *The Prosecutor v. Dusko Tadić,* Case No. IT-94-1-AR72, ICTY Appeals Chamber, 2 October 1995

[158] Articles 75 and 4 of the Additional Protocols I and II to the Geneva Convention of 1949 respectively

[159] Articles 10, 15, 76, 77 of the Additional Protocol I and Articles 7 – 9 of the Additional Protocol II to the Geneva Convention of 1949

[160] St. Emmanuel *op cit* at 219

[161] United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. See also Paragraphs (4) and (6) of the Preamble to the Rome Statute of the International Criminal Court

[162] The Leadership Newspaper, Kabiru Sokoto: Police Reverses Zakari Biu's Dismissal, Promotes 2 CPs to AIGs. Available at http://.leadership.ng/news/458770/kabiru-sokoto-police-reverses-zakari-bius-dismissal-promotes-2-cps-to-aigs. accessed on 31st March, 2016. See also The Nation Newspaper, Xmas Day Bomber, Kabiru Sokoto gets Life Sentence. Available at http://thenationonlineeng.net/xmas-day-bomber-kabir-sokoto-gets -life-sentence/ accessed on 31st March, 2016

[163] The Leadership Newspaper, Court Jails Boko Haram Members 75 Years for Terrorism. Available at http://.leadership.ng/news/385644/court-jails-boko-haram-members-75-years-terrorism. accessed on 31st March, 2016.

suspects were charged to Court by the Lagos State Government but were later reduced to four (4) due to the withdrawal of the case against thirteen (13) suspects.[164]

From the foregoing, it can be deduced that little has been done by the Nigerian State in this regard. In an earlier work, St. Emmanuel posits that victims, their dependants and families have an alternative means of bringing their assailants to justice vide prosecuting the violators before the International Criminal Court.[165]

The International Criminal Court has jurisdiction over the violations of human rights of the female gender by the Boko Haram sect and Nigerian Military because they amount to war crimes and crimes against humanity such as pillaging of towns, displacement of civilian population, rape and other forms of sexual violence.[166] The ICC also has jurisdictions over individuals, whether civilians or military and regardless of rank, who have committed serious violations of international humanitarian law during the conflict. Consequently, violators can be found guilty individually (that is, individual criminal responsibility)[167] and likewise, commanders and superiors for crimes committed under their watch.[168]

A good example here is the ad hoc Tribunal for Former Yugoslavia (ICTY) recognizing a direct form of individual criminal liability which was derived from "committed" and is known as joint criminal enterprise (JCE).[169] In ***Prosecutor v. Kristic,***[170] the ICTY declared that General Kristic was responsible for several cases of murders and rapes as *"there is no doubt that these crimes were the natural and foreseeable consequences of the ethnic cleaning campaign. Given the circumstances at the time the plan was formed, General Kristic must have been aware an outbreak of these crimes would be inevitable given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of the regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection"*[171]

Also in ***Prosecutor v. Blaskic***,[172] the ICTY stated that Colonel Blaskic's liability was based on superior responsibility. He was found guilty of war crimes on the basis that sexual violence was foreseeable when barracking his troops in a school were civilian women were located. He *"could not have been unaware of the atmosphere of terror and rape which occurred at the school."*[173]

According to Sellers, this approach of recognizing the fore-seeability of sexual violence, provides a useful, lucid framework for joint liability, especially for perpetrators who are physically far removed from the locations of sexual assault crimes, including military and political leaders.[174]

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[164] *Ibid*. These other thirteen suspects are Idris Ali, Mohammed Murtala, Kadiri Mohammed, Mustapha Daura, Abba Duguri, Sanni Adamu, Danjuma Yahaya, Musa Audu, Mati Daura, Farouk Haruna, Abdullahi Azeez, Ibrahim Bukar and Zula Diani. The 17th person, Bala Haruna, was discharged by the court on the ground that Lagos State Government failed to prove the allegation of funding of terrorism leveled against him.

[165] St. Emmanuel *op cit* at 236 - 237

[166] Article 5 (1) (c) and Article 8 (2) (e) (iv) of the Rome Statute of the ICC

[167] Article 25 of the Rome Statute of the ICC

[168] Article 28 of the Rome Statute of the ICC

[169] ECCHR *op cit* at 9

[170] Judgement, Case No. IT-98-33-T, 2 August 2001. Sexual violence formed a part of the basis of the conviction of Krstic for persecution as crime against humanity. He was the chief of staff and later commander of a Bosnian Serb army corps cited in ECCHR *op cit* at 10

[171] *Ibid* at para. 615

[172] IT-95-14-T, 3 March 2000. Findings referring to rape committed against civilians in Bosnia Herzegovina were made in the trial judgment. These findings did not relate to specific sexual-violence charges. They included findings on multiple rapes of Bosnian Muslims by Bosnian Croat forces in a vil-lage; multiple rapes of detained Bosnian Muslim women by Croatian forces and police; and a finding that the accused could not have been unaware of rapes at certain school

[173] *Ibid* at para. 732.

[174] Sellers, V, OHCHR, WRGUS, 16 cited in ECCHR *op cit* at 9

Furthermore, it is worth noting that war crimes are crimes under international law because they are directed against the interests of the entire international community, thus the International Criminal Court is empowered to prosecute and punish these crimes, not considering who committed them or against whom they were committed.[175] Though the Nigerian State is yet to domesticate the Rome Statute of the International Criminal Court which it ratified on 27th September, 2001,[176] the International Criminal Court has jurisdiction over war crimes committed on the territory of Nigeria or by its Nationals from 1st July 2002 onwards.[177] There is a pending Bill for an Act to provide for the Enforcement and Punishment of Crimes against Humanity, War Crimes, Genocide and Related Offences and to give effect to certain Provisions of the Rome Statute of the International Criminal Court in Nigeria, 2013 before the National Assembly. This Bill provides *inter alia*; for the punishment of those responsible for international crimes in Nigeria and cooperation between Nigeria and the ICC to ensure the effective investigation and prosecution of criminals.[178] The Bill also provides for a Special Victims Trust Fund (SVTF) to assist victims, their families and survivors of international crimes in Nigeria.[179]

As at 1st of June, 2013, the Office of the Prosecutor of the International Criminal Court received sixty-five (65) Article 15[180] communications pertaining to the Boko Haram insurgency in Nigeria, out of which Twenty-Six (26) were not within the jurisdiction of the court.[181] Five (5) were found to warrant further analysis, while twenty-eight (28) communications were included in the preliminary examinations.[182]

The results of the preliminary examinations were made public on 18th day of November, 2010.[183] The office of the prosecutor has further decided that the preliminary examination of the situation in Nigeria should advance to phase 3 (admissibility) with a view to accessing whether the Nigerian State is conducting genuine proceedings against the perpetrators, because there is a reasonable cause to believe that crimes against humanity such as murder and persecution have been committed.[184] It is also worth mentioning that, crimes under the purview of the ICC are not subject to any statute of limitation.[185]

According to Adeogun-Philips, the trial of members of the Boko Haram Sect and the Military at the ICC should not be the only option open to the Nigerian Government because it is of great importance to the international community that justice must not only be done but

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[175] Werle G, Principles of International Criminal law, T. M. C Asser Press, The Hague, 2005, 58

[176] The Nigerian Government drafted a bill titled 'Crimes against Humanity, Genocide and Related Offences Bill, 2012 to implement the Rome Statute. This Bill passed the first reading and got to the stage of second reading in Mat, 2013. <http://www.pgaction.org/campaigns/icc/africa/nigeria.html> accessed on 4th April, 2016.

[177] Available at https://www.icc-cpi.int/en_menus/iccstructure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/nigeria/pages/nigeria.aspx accessed on 1st April, 2016

[178] Section 2 of the proposed Crimes against Humanity, War Crimes, Genocide and Related Offences Bill, 2012

[179] Section 93 of the proposed Crimes against Humanity, War Crimes, Genocide and Related Offences Bill, 2012

[180] Article 15 (1) and (2) of the Rome Statute of the ICC provides as follows:

1. *The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the*
   jurisdiction of the Court.
2. *The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.*

[181] Available at https://www.icc-cpi.int/en_menus/iccstructure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/nigeria/pages/nigeria.aspx. Accessed on 1st April, 2016

[182] *Ibid*

[183] *Ibid*

[184] *Ibid*

[185] Articles 15 (5) and 29 of the Rome Statute of the ICC

must be seen by all Nigerians to be done., following the magnitude of the insurgency.[186] Adeogun-Philips posited further that this cannot only be achieved by a trial at The Hague.[187] Adeogun-Philips concludes that the Nigerian Government must be given the opportunity to demonstrate its ability and/or willingness to investigate and prosecute members of Boko Haram and the Military for war crimes through the use of a "localised" International Court rather than lean towards an ICC prosecution.[188]

7. RECOMMENDATIONS

Just like in any other society of the world, Nigerian women are attributed with different traditional roles, such as wife, mother and nurturer and as such they are empowered in some instances to be custodians of cultural, religious and social values.[189] Consequently, Fink, Barakat and Shetrat posits that women are in a unique position, which they can use to radicalize, glorify and encourage family members and children to seek martyrdom and keep terrorist organizations viable through support activities such as propaganda, fund raising and recruitment.[190] They posit further that, women can also be powerful preventers, who can partake in innovative endeavours to inform, shape and implement policies and programmes to alleviate the consequences of conflict and violent radicalization.[191] It follows therefore that members of the female gender should be empowered economically to participate in policy development dialogue and programmes because when empowered they will possess more influence in their homes, communities and the nation at large. Sequel to the foregoing, the following recommendations and suggestion are hereby submitted as solutions in protecting the rights of members of the female gender during the ongoing Boko Haram insurgency -

- The Nigerian National Assembly should enact into law, 'A Bill for an Act to provide for the Enforcement and Punishment of Crimes against Humanity, War Crimes, Genocide and Related Offences and to give effect to certain Provisions of the Rome Statute of the International Criminal Court in Nigeria, 2013 (SB 183)
- The Nigerian government should undertake a national security policy that will be gender based and protect the rights of women and girls in order to assess and mitigate the impact of insurgency. A gender perspective should also be adopted into counter-insurgency operations through the increase in the number of female law enforcement practitioners. It is opined that female law enforcement personnel will understand gender sensitivities and will therefore be able to extract intelligence and accomplish results.
- The Nigerian State should also partner and create multinational synergies with world superpowers to facilitate the rescue and return of abducted members of the female gender. In addition, the government should facilitate the rehabilitation and reintegration of such rescued persons.

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[186]Adeogun-Phillips, C, Nigeria: Boko Haram/JTF – Justice must be done and be seen by all Nigerians to be done. Available at http://allafrica.com/stories201408211030.html. accessed on 6th April, 2016.

[187] *Ibid*

[188] *Ibid*. Adeogun-Philips is of the opinion that a good example of a 'localised' international court will be the establishment of an International Crimes Division, as a vital part of the Federal High Court, Abuja Judicial Division. He opines further that the said court should be composed of local judges, investigators, ;registrars and prosecutors appointed from within the local personnel but equipped with proper training on adjudicating and prosecuting cases bordering on the commission of international crimes. Adeogun-Philips also believes that it is the full participation of citizens from affected countries that differentiates a 'localised' international court from other international criminal courts.

[189] Fink, N. C; Barakat, F & Shetret, L; "The Roles of Women in Terrorism, Conflict, and Violent Extremism: Lessons for the United Nations and International Actors" Policy Brief (2013) *Center on Global Counterterrorism Cooperation* 4. Available at www.globalcenter.org/.../NCF_RB_LS_policybrief_1320.pdf. accessed on 16th January, 2016

[190] *Ibid*

[191] *Ibid*

- Furthermore, the Nigerian State should adopt an intelligence approach in combating the insurgency because this will be an effective way to put an end to the insurgency and also a means to mitigate the effect of the insurgency on the female gender.
- The Nigerian State should tackle the causes of the insurgency such as corruption, unemployment, poverty and economic inequality.
- The Nigerian State should independently, impartially and thoroughly investigate the allegations of gross violations of human rights by its military and prosecute those found guilty.
- Both the Boko Haram sect and Nigerian government should abide and comply with their duties and obligations under human rights law and humanitarian law respectively and stop unlawful targeting of women such as torture, killing, abduction, and unlawful detention of women and indiscriminate and proportionate attacks on women.

8. CONCLUSION

This work examined the implications and effects of the ongoing sectarian Boko Haram insurgency and reveals that the Nigerian government has a duty, under International Law to prevent, investigate and punish human rights violations perpetrated by state and non-state actors that is the Nigerian Military and Boko Haram sect respectively. The paper submits that the Nigerian State has disregarded this obligation by not addressing human rights abuses perpetrated on the female gender with impunity by its military and the deadly sect in particular. It submits further that the fight against Boko Haram insurgency should also be a fight for the protection of the rights and dignity of women because it is the women and children who bear the brunt of, and are mostly caught in the web of the insurgency and counter-insurgency measures.

It is trite that before the Boko Haram insurgency, women and girls in Northern Nigeria faced gender inequality, discrimination, high illiteracy level due to antipathy towards the education of the girl child, soaring maternal mortality rate and domestic violence but their rights are still indivisible, universal, inalienable and non-negotiable, hence the need for administrative dexterity and taken of pragmatic steps to ensure women equality and protection of the rights of women. The paper concludes that women should also be involved in peace making processes because there can be no peace without the female gender.

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FIDEICOMMISSUM SUBSTITUTION IN THE CIVIL CODE REGULATION AND ITS PRACTICAL USE

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ABSTRACT:

This paper aims to analyze the fideicomission substitution in light of the change in the New Civil Code in this field and its use in practice. Analyzing the current regulation in the matter of the institution of fideicomission substitution, predominantly French, one can see a change in the legislator's optic in relation to the old regulation where such a legal operation was forbidden. From the point of view of practitioners, however, we have found that they call too little or no such institution.
KEYWORDS: *FIDEICOMISSION SUBSTITUTION, LIBERALITY, TESTAMENT, ESTABLISHED, DISPOSE*

1. SHORT HISTORY

The origin of the fideicomission substitution can be said to be the Roman law where there were two operations that can be considered as precursors to the current fideicomission substitution[1] substitution and fideicomisis. The substitution of heirs consists of a provision whereby the disposer designates another person to take the place of the established heir, when the latter would not have collected the inheritance. In Roman law there were several forms of substitution: vulgar, pupil, quasi-pupil or exemplaris[2].

Vulgar or habitual substitution is identified with that of the current regulation and is a provision contained in a will by which a second legatee is appointed by the agent to receive the property or goods as a subsidiary if the first legatee does not they might or would not want to receive them.

Pupil substitution consists in appointing a person who would come to the inheritance instead of the institution if the latter would have died before puberty.

Quasi-pupil substitution is the provision that allowed the parents of the family to choose an heir to the child who, due to his state of mind, was unable to be tested[3].

The Fideicomis was a provision contained in a testament that provided a gratification request to preserve and transmit the good received to a second gratificated[4].

[1] J. Kocsis, P. Vasilescu, *Drept civil. Succesiuni*, [Civil law. Succession], Editura Hamangiu, Bucureşti, 2016, p.189.
[2] A.N. Gheorghe, *Manual de drept succesoral*,[Manual of succession law] Editura Hamangiu, București, 2013, p.130.
[3] Fr. Deak, R. Popescu, *Tratat de drept succesoral*, [Inheritance law]vol. II, Moștenirea testamentară, Editura Universul juridic, București, 2014, p. 219.

In the feudal law, the fideicomission substitution had an important role because it ensures for nobility the intact preservation of wealth, with the obligation to transmit it from generation to generation[5].

The institution of fideicomission substitution was also regulated in the Romanian law (Andronache Donici Code, Calimach Code and Caragea Code), being used until the entry into force of the Civil Code from 1864[6]. Following the model of the Napoleonic Civil Code, the Romanian legislator forbade fideicomission substitution until the current regulation was adopted.

If in the old regulation the fideicomission substitution was forbidden, being hit by absolute nullity, the new regulation allows in certain cases the fideicomission substitution.

2. CONCEPT AND REGULATION

At present, the fideicomisic substitution is regulated in the Fourth Book on Inheritance and Liberties, Title III ”Liberalities”, Chapter I, Section 3, “Substitutions, fideicomisis”, art. 993-1000 Civil Code.

Substitution can be defined as the provision of a liberal (donation or tied), permitted by law, whereby the one who disposes obliges the donor or legatee, called the institution, to administer the goods received and to transfer them at his death to another person, called substitute, also designated by the dispatcher. For example, disponing person A (the trustee) leaves a property for B (set up or strike), with the obligation for B to administer the property, not to alienate it and transfer it to C (the substituted) at his death, which was appointed by dispatcher A.

By broad law, fideicomission substitution was qualified in doctrine as a modo-based liberality made *ab initio* in favor of the institution[7]. The pregnancy pushes on his shoulders, and the pregnant woman is the substitute.

The purpose of recognizing the validity of the fideicomission substitution by the legislator is to protect and preserve some family goods and the possibility that these goods may reach generations to grandchildren, great grandchildren[8].

The French doctrine defines the fideicomission substitution as the disposition by which the dispositor commits the gratification with the task of preserving during his lifetime the goods that are donated or transmitted to him by binding and to transmit, upon his death, to a second person also established by the person who makes the dispositions[9].

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[4] M.D. Bocșan, *Testamentul. Evoluția succesiunii testamentare în dreptul roman*, [The Will. The evolution of the testamentary succession in Roman law] Editura Lumina Lex, București, 2000, p.66.

[5] M.M. Soreață, *Noutăți legislative în materia succesiunilor introduse prin Noul Cod civil*, [Legislative News on Succession Issues Introduced by the New Civil Code] Editura Hamangiu, București, 2013, p. 80;

[6] The 1864 civil code defines the fideicomission substitution, which it prohibited in all cases in art. 803 as follows: Substitutions or fideicomes are prohibited; any provisions by which the donor, erede or the liaison will be entrusted to conserve and hand over to a third person shall be null, even with respect to the donor, the appointed hereditary or the legatee.

[7] J. Kocsis, P. Vasilescu, op.cit, p.192.

[8] I.Popa, *Drept civil. Moșteniri și liberalități*, [Civil law. Heritage and liberties], Editura Universul juridic, București, 2013, p.404.

[9] F. Terre, Y. Lequette, S. Gaudemet, *Droit civil. Les successions. Les Liberalites*, ed. A patra, Ed. Dalooz, Paris, 2013, p.538, citat după I. Popa, *Fiducia și substituția fideicomisară, două instituții care nu și-au justificat*

According to art. 993 The Civil Code, the provision by which a person, called the appointed person, is entrusted with the administration of the property or goods which are the subject of liberty and handing them over to a third party, called the substitute, appointed by the possessor, shall take effect only if permitted by the law.

3. CONDITIONS FOR THE FIDEICOMISSION SUBSTITUTION

a) The existence of two successive liberties that have the same object to two people

Thus, for the existence of the fideicomission substitution, the presence of two liberalities having the same object in favor of two different persons, both appointed by the disposer, liberalities to be performed successively is required. The first liberality is in favor of the institution and can take the form of donation or will. We appreciate that when substitution takes place through the will, it should be authentic, due to the complexity and the effects of this legal mechanism. This first liberality must be in compliance with the substantive and formal conditions required for donation or tied and executed at the death of the testator or at the date of the conclusion of the donation contract. The second liberality will always be mortis causa, it is made in favor of the substitute and will be executed at the death of the instituted.

The conditions of fideicomission substitution are not met if the two liberties are not successive, but they are achieved at the same time as the opening of the inheritance.

In case of fideicomission substitution, it is not about two successive transmissions, but about two liberalities that run in succession, the acquisition being unique and resulting from the person who disposes, both for the established and for the substitute.

The fideicomission substitution implies the existence of a person who dispenses and at least two successive links: the institution and the substitute. Under fideicomission substitution, the institution can only be a person and the substitute can be both a person and a legal entity[10]. The two recipients of the substitution, the institution and the substitute must have the necessary capacity to receive liberties.

Thus, according to art. 994 paragraph 3 Civil Code, the incapacity to dispose is appreciated in relation to the dispatcher and the ones to receive in relation to the institution and the substitute.

The fideicomission substitution may be only one, that is, a single substituent can be established, it can not be **gradual** when the dispenser strikes the first substitute with a substitution in favor of a second, third substituted. In this respect, Art. 996 paragraph 3. The Civil Code provides that "the substitute can not, in turn, be subject to the obligation to

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(încă) utilitatea practică, [Fiducia and fideicomission substitution, two institutions that have not (yet) justified their practical utility] in „5 years the Civil Code. The Notary's perspective", Editura Monitorul oficial, 2016, p.96.

[10] I. Genoiu, *Substituțiile fideicomisare și liberalitățile reziduale în reglementarea noului Cod civil*, [Substitutional substitutions and residual liberties in the regulation of the new Civil Code] in the Romanian Journal of Private Law nr.3/2012.

administer and transfer the goods". Also, fideicomission substitution can not be eternal, that is, to benefit the descendants of the institution at infinity.

b) That the instituted be required to administer the goods received and to transmit, upon its death, to the substitute, also appointed by the possessor;

This task is stipulated in the will of the disposer or in the donation contract concluded between the dispatcher and the established.

It is the duty of the institution to administer the objects of liberty, and he has no right of disposal over them.

The obligation of the institution not to alienate and render the substitute can refer to both universality, a share of a universality (in the case of links) and a determined individual asset.

Regarding this issue, two opinions were expressed in the literature.

In a first opinion, to which we assume, the institution has no right to dispose goods, whether for a consideration or free of charge, can not alienate or strike[11]. Thus, the instituted one is the owner of the goods received, but its right of ownership is seriously limited, by exercising the attributes of a *alieno nomine*, that is, in the name and on behalf of the substituted.

The unavailability of goods in the patrimony of the institution also has consequences for its creditors. Thus, the creditors of the instituted will not be able to track the assets that are subject to fideicomission substitution.

In a second opinion, it is argued that the fideicomission substitution does not presume the unavailability of the assets in the patrimony of the instituted[12]. Thus, for the goods that form the subject of liberality, the substitute is the cause of the orderer and not of the institution, which means that the obligation to transmit must be understood not the obligation to transfer a right by a legal act, but only an obligation to teach a good, the right arising from the act of liberality made by the substituted.

c) The right of the substituted is born only at the death of the instituted

We are in the presence of fideicomisical substitution when the orderer establishes succession order not only for his death but also for the case of the death of the instituted. Until the death of the instituted, the substitute has no current right in respect of the objects of liberty that comprise the fideicomisical substitution, but only possible rights[13].

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[11] În acest sens, a se vedea Fr. Deak, R. Popescu, op.cit., p.233; I. Genoiu, *Dreptul la moștenire în Noul Cod civil*, [The right to inherit in the New Civil Code] Editura C.H.Beck, p. 257;

[12] D. Chirică, *Tratat de drept civil. Succesiunile și liberalitățile*, [Civil law treaty. Successions and liberties Editura C.H.Beck, 2014, p. 157.

[13] D. Chirică, op.cit, p.167.

4. THE EFFECTS OF THE FIDEICOMISSION SUBSTITUTION

The effects of fideocomission substitution are regulated in Art. 995-999 Civil Code.

The subject of fideicomission substitution may be any fixed, mobile or immobile, corporal or intangible, determined or determinable. The goods that form the object of liberality must be identified and exist in nature in the patrimony of the instituted person at his death.

Consequently, if, at the time of the instituted's death, either a part of the goods which formed the object of liberty covered by the charge in question or all of those goods are no longer in its possession, the substitute can not claim them. It can not be imposed on the instituted to give the substituted other goods than those which have been the subject of liberty or their equivalent in case of alienation. This consequence stems from the fact that the fideicomission substitution involves two transmissions with the same object, one in favor of the instituted and the other in the favor of the substituted, but both of the disposer's patrimony without the actual subrogation.

By way of exception, when liberty has as its object securities, the burden also affects the securities that are replacing them. It operates in this hypothesis a real substitution.

If liberty has as its object rights subject to advertising formalities, the task must be subject to the same formalities. In the case of buildings, the task is submitted to the land book.

In order to carry out the task, the person who makes the dispositions may impose on the instituted the provision of guarantees and the conclusion of insurance contracts.

If the instituted is a heir reservist of the disposer, the value of the burden will be imputed only on the available amount of the inheritance of the instituted (Art. 998 Civil Code). Consequently, by the mechanism of fideicomission substitution it is not possible to diminish the inheritance reserve that would benefit the other heirs of the instituted, which will come to the inheritance of the instituted in competition with the substituted.

The provision by which the instituted is obliged to transfer the good of the substituted during his lifetime is not a fideicomission substitution and is subject to the prohibitive provisions of art. 993 Civil Code.

The fideicomission substitution should not be confused with regular or vulgar substitution. The fideicomission substitution differs from vulgar substitution by an essential element: in case of fideicomission substitution, two or more liberalities with the same object are executed successively, at different times, while in the case of vulgar substitution, a liberality is executed in a single moment, namely at the moment of the disposer's death.

Then the fideicomission substitution presupposes, on the part of the dispositor, the determination of the succession order, establishing not only the rules of his own inheritance, but also those of the instituted. In the case of vulgar substitution, the disposer takes only a precautionary measure, assuming the first liaison can not or does not want to collect the inheritance.

5. THE INEFFECTIVENESS OF FIDEICOMISSION SUBSTITUTION

According to art. 1000 Civil Code, where the substituted precedes the instituted or renounces to the benefit of liberty, the property is the property of the instituted, unless it is foreseen that the asset will be gathered by the heirs of the substituted or has been designated a second substituted.

By devoting this solution, the legislator basically recognizes the validity of a vulgar substitution, in the sense that the dispositor obliges the instituted to administer the received goods and to pass them to the substituted's death, and if he does not want or can not benefit from liberality, the orderer establishes a the second gratified to benefit from liberty.

6. CONCLUSIONS

In conclusion, in the case of the fideicomission substitution one can notice a radical change of the legislator's view in relation to the old regulation, where such legal mechanism was forbidden. Thus, inspired by the provisions of the French Civil Code, the New Civil Code regulates the institution of fideicomission substitution, removing it from the prohibition regime established by the Civil Code of 1864.

Nevertheless, the fideicomission substitution remains an institution rarely used in notary practice and its usefulness remains doubtful. On the part of practitioners, there is reluctance to appeal to this institution of the fideicomisial substitution to solve concrete issues. It has been proposed in the doctrine, as a solution for the salvation of this institution by the legislator, that the fideicomission substitution does not affect the inheritance reserve[14].

[14] I. Popa, op.cit., p.113- The author points out what the attractiveness of the substitution would be in relation to a donation a grandfather would do to his nephew if the effects were the same, but the means used would be much simpler and more consolidated, that is, a classic donation contract.

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