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THE DEVELOPMENT OF A "RESCUE CULTURE". INSOLVENCY GLOBALIZATION

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ABSTRACT

We are heading towards a phenomenon of internationalization and globalization of the substantiation of law, due to the fact that Romania is, inevitably, part of the process of integration and reflection of its own identity in a European and global context. Ultimately, law derives from observing the society and analysing its needs, passing through the filter of equity the final legal form in order to ensure the completeness of law, and also the structural coherence of society. Although the continental European legal culture is attached to the "general will", globalization managed to erase many of the symbolical boundaries between the legal culture promoted by the Common-law, the one promoted by our system deeply markedby the Romano-Germanic System, and also the legal system outlined by American Realist trends, thus allowing the law to become the result of the self-adaptation of the society, not just the creation of the State.

KEY WORDS: insolvency, globalization, rescue culture, reorganization, interdisciplinarity, comparative law.

INTRODUCTION

Insolvency law managed to assert itself due to the legislative abundance which has expanded remarkably in the past few years both at national, as well as at international level (cross-border insolvency), due to the legislator's constant concern for the modernization of this field and the need toalign to the regulations prepared by bodies of the European Union, and also by international bodies. We are currently talking about an expansion of the insolvency phenomenon, through Law no. 151/2015[1]*on the insolvency of natural persons, and*

[1] Originally, Law no. 151/2015 on the procedure of insolvency of natural persons, published in the Official Journal of Romania, Part I, no. 464 of 26 June 2015, should have come into force on 26 December 2015. The first postponement was made through Government Emergency Ordinance no. 61/2015 for the date of 31

the insolvency of territorial-administrative units, respectively, regulated by Government Emergency Ordinance no. 46/2013 and approved by Law no. 35/2016[2]*, provisions that reflect and strengthen the current trends at European level and outline a new "architecture" of insolvency in the Romanian legal space, as an undisputable effect of the current economic and social reality. Insolvency has acquired new valences, being legislatively harmonised in the context of the Monist system implemented by the new Civil Code, but also driven, at the same time, in its evolution, by the principles promoted at the level of the European Union and other levels as well.*

The substantiation and promotion of a "culture of salvation" through mechanisms developed in stages by the insolvency right, which tends, it its evolution, towards an independent law[3]*, is reflected in the modern normative purpose aiming at being focused on and prioritizing the judicial reorganization as it is regulated by Law no. 85/2014 on prevention insolvency proceedings and on insolvency procedure, the financial recovery according to the norms of Government Emergency Ordinance no. 46/2013 regarding the financial crisis and the insolvency of territorial and administrative units, approved by Law no. 35/2016, as well as the reinsertion of natural persons in the social environment through a well-deserved fresh-start, as regulated by Law no. 151/2015 on the insolvency of natural persons, passing through the current social and economic filter the importance and need of approaching these mechanisms promoted in the national, European Union and international context.*

1. THE EMPHASIS PLACED ON RESCUE – AN ILLUSORY PHILOSOPHICAL CHANGE OR REALITY?

The provisions of Regulation (EU) 2015/848[4] that have recently come into force (June 2017) paved the way for the stimulation and the consolidation of a legislation focused on debtor rescue mechanisms, as well as proceedings of debt repayment or debt adjustmentin relation to the consumers and to self-employed persons, and this Regulation expands its scope by including of the insolvency proceedings and those providing the early restructuring of a company in a stage where there is only a probability of the insolvency. In Romania, the aforementioned Regulation is directly applied in relation to the regulation of international relations in the field of insolvency in the relationships with the Member States of the European Union, while in relation to non-EU third countries, the rules of private international law contained in Law no. 85/2014 on "Cross-border insolvency" are applicable. Mention

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December 2016, followed byGovernment Emergency Ordinance no. 98/2016, which postponed the date of its coming into force to 1 August 2017, mean while the Methodological norms for the application of Law no. 151/2015 were also approved. Nevertheless, the application of the Law of insolvency of natural persons faced a last postponement of the date of its coming into force, i.e. 1 January 2018, according to Government Ordinance no. 6/2017, published in the Official Journal of Romania no, 614 of 28 July 2017, due to the fact that the complexity of the field regulated by this law was invoked, as well as the viewpoint of the Superior Council of Magistracy which highlights that a rigorous preparation of the administrative capacity of the courts called upon to apply the proceedings of the insolvency of natural persons is required.

[2] Official Journal no. 219/ 24.03. 2016.

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

[4] Regulation (EU) 2015/848 on insolvency proceedings repealed Regulation (EC) 1346/2000 of the European Council, its text being reformed to take into account the evolutions in the legislations of the member countries concerning the insolvency prevention proceedings, as well as the jurisprudence of the Court of Justice of the European Union. The new text is applicable to insolvency proceedings opened from July 2017.

should be made of the fact that the Regulation makes reference, in recital (48), to the principles and guidelines adopted by European and international organizations operating in the field of insolvency law, in particular the guidelines drawn up by UNCITRAL. We can say that Romania has an important role in the consolidation of certain principles and orientations in the field of insolvency, because, together with other 12 Member Countries of the European Union, it is part of the UNCITRAL Working Group V concerning the insolvency, in which aspects are debated in relation to the insolvency proceedings. Consequently, not only at the European Union level, attempts are made to find the best and the most viable solutions concerning the approach of the insolvency phenomenon, but also at *global* level, currently, the United Nations Commission on International Trade Law having in the strategic action plan a project for the improvement of the Model Law in the field of international insolvency.[5]

Ever since 2014, the European Commission has drafted Recommendation no. 135/2014 on a new approach to business failure whose objective is to guarantee and to allow for the access of viable businesses facing financial difficulties, regardless of the place in the Union where they are established, to national insolvency frameworks enabling them to structure their activity at an early stage in order to prevent their insolvency and to maximize the total value for creditors. In this respect, the European Commission recommends to Member States to adopt different liquidation measures for honest entrepreneurs compared todishonest entrepreneurs and to develop accelerated procedures for businesses that have gone bankrupt in an honest way, promoting entrepreneurship, investments and employment for a better functioning of the internal market.[6]

The implementation of the Recommendation of the Commission of 12 March 2014 on a second chance was assessed[7] twice, in 2015, as well as in 2016 respectively, and the conclusion was that the impact desired ay the level of an even chance in all member states was not achieved, i.e. the facilitation of rescue and of a second chance given to debtors in distress. Nevertheless, there is currently a Directive proposal[8] concerning the preventing restructuring frameworks, the second chance and the measures for the increase in the efficiency of the restructuring, insolvency and debt repayment proceedings, meant to amend Directive 2012/30/EU, to consolidate the Recommendation of the Commission of 2014 and to supplement Regulation 2015/848. The Directive is mainly focused on entrepreneurs, natural persons or legal entities, with the possibility to expand the application of the debt repayment mechanisms to individual consumers. Although it was communicated to the Council of the European Union and to the European Parliament in December 2016, and the first meeting of the JUSTCIV Woking Group on this topic took place on 16 January 2017, the proposal remained subject of examination, with the hope that it is however, on the list of priorities and strategic initiatives of the EU bodies and of other organizations, as can be seen by accessing their sites.[9]

[5] *http://www.uncitral.org/uncitral/fr/commission/working_groups/5Insolvency.html*.

[6] Mirela Iovu, *Efectele implementării Recomandării Comisiei Europenenr. 135/2014 privind o nouă abordare a eșecului în afaceriși a insolvenței*, Revista Română de Drept al Afacerilor no. 4/2015, pp. 121-133.

[7] See Marcela Comșa, *Regulamentul privind procedurile de insolvență, Jurisprudența Curții de Justiție a Uniunii Europene,* Universul Juridic, Bucharest, 2017, pp. 353-357.

[8] Available on:

- *http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:52016PC0723&from=EN,*
- *https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/insolvency-proceedings_en#insolvencyinitiative.*

[9] *https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/insolvency-proceedings_en#insolvencyinitiative.*

However, the reorganization and success of the accomplishment of a reorganization plan that gives a second chance to debtors in distress involves many strategies[10] and support, such as, for example, the financing of such companies in distress, taking into account the precarious situation of the self-financing prospects, on the background of eroded own reserves and financial restrictions. This role could be fulfilled by banks themselves, which, in addition to the measures for the restructuring of loans granted to companies subject to reorganization (rescheduling, granting grace periods, expanding maturity dates), can also grant new financing and can conclude partnerships providing for financing strategies for the suppliers, vendors and customers of the companies in distress, measures included and proposed in the reorganization plan that will thus become a much more useful and advantageous tool both for the debtor and for the creditors, and which will lead to a successful reconsolidation of the professional trader. Moreover, this protection for *fresh-money* is an object of interest of the proposal of the new Directive of the European Commission, being part of the content of the second Title "Preventing restructuring frameworks".

Nevertheless, we need a collective awareness of the benefit that can be achieved through the insolvency proceedings, especially from the key factors, often with a decisive role in safeguarding or not the debtor, otherwise this dimension of insolvency, so strongly promoted at the Union and international level, risks to remain a pure theory, an illusory philosophical tendency that cannot be materialized into reality. However, there are a legislative support and assistance, both at the Union and international level, as well as at national level. We also take into account practices and examples of successful reorganizations at the level of the European and international jurisprudence, such as American Airlines and General Motors[11], which objectively prove the benefit and the effect of giving a second chance, which is why we need to materialize the theory, the principles promoted internationally and to effectively support debtors in their recovering and stabilization attempts, as the reorganization proves to be a great success in the case of good faith and interest in honest reinsertion in the economic market. Moreover, we believe that it is useful to exchange real success stories identified in different countries, in relation to the legal systems and the specific insolvency norms, the economic and social context, the disturbing factors, which destabilize the business environment, among others, also taking into account natural persons in their quality of consumers, in order to substantiate a integrative and viable legal mechanism of success.

2. WHY RESCUE? IS REORGANIZATION A SPECULATION OF THE DEBTORS OR NOT?

We already know that insolvency has developed in Romania as a result of the financial crisis that has manifested itself progressively from 2008. According to the statistical data of the National Romanian Trade Register Office, between 2008 and 2013, the number of insolvencies grew, reaching in 2013 more than 29,500 companies, i.e. 10% more than the one registered in 2012. However, the number of insolvent companies in 2014 decreased by 30% compared to 2013, and in 2015 it will decrease by 50% compared to the year 2014. Statistics

[10] See I. Didea, D.-M. Ilie, *Direcția extinderii fenomenului „insolvență" – conturare anoului Cod al insolvenței prin filtrul economico-social actual*, in Curierul Judiciar no. 1/2017, p. 16-25.

[11] See Simona-Maria Miloș, Ș. Dumitru, Andreea Deli-Diaconescu, Otilia Doina Milu, *Reorganizarea*, in R. Bufan (scientific coordinator), *Tratat practic de insolvență*, Hamangiu Publishing House, Bucharest, 2014, p. 598.

were in a continuous dynamic. Nevertheless, the number of companies that went bankrupt in 2014 decreased by 30% compared to 2013, and it further decreased by 50% in 2015 compared to 2014. The statistics were followed a continuously dynamical trend. Thus, the number of professionals who became insolvent during the 01.01.2017 - 31.12.2017 period reached a threshold of 9,102, exceeding the number of professionals who had become insolvent in the same period of 2016, respectively 8,371, but not exceeding the number of companies who became insolvent during 2015, more specifically 10,269. In the 01.01.2018-31.08.2018 period, the number of professionals who became insolvent reached the threshold of 5,615, decreasing by a percentage of 2.48% compared to the same period of last year.[12] We can consider that this reduction is an effect of the regulations, measures and mechanisms set up by the new legal norms that support and emphasize the opportunity for bona fide viable borrowers to achieve an efficient and effective business recovery through insolvency prevention proceedings. From the statistical data, it is clear that the triggering phenomenon of insolvency was the financial crisis, which is proved by the fact that, over the years, with the gradual overcoming of the economic crisis, the number of professionals who become insolvent decreased. However, can we still talk about ill-will, speculation and strategy of the debtors to temporarily benefit from the effects of this insolvency procedure and to swiftly consolidate the bases of a new business, misbalancing, in the meantime, an entire chain of interdependent companies, suppliers of goods and service providers, due to the lack of necessary liquidities? In the attempt of reaching an economic rebalancing which is inevitably reflected into the social environment, what do we choose to opt for? Reorganization or bankruptcy? Why recovery? Why common empathy and sacrifice to rescue a company, an individual debtor, or a consumer? If we guide ourselves from statistics, the figure of 4-6% of the total number of pending insolvency cases related to professionals (approximately 35,000 at national level), which represent cases of judicial reorganization, may seem disarming, disappointing, in the sense that the reorganization does not seem to be a successful tool in relaunching the economy by solving the difficulties faced by professionals. Nevertheless, from this huge number of cases, we should exclude the number of those cases directly subject to a simplified procedure, more specifically, going bankrupt, which are in any case prone to fail, by camouflaging fraudulent business, money laundering or tax evasion. Consequently, this direct migration to bankruptcy should aim strictly at businesses that have no chance, thus accepting judicial reorganization as a real means of saving viable, credible companies and avoiding bankruptcy that often triggers "cascade" insolvencies. Currently, statistics show that approximately 200,000 employees work in these companies found, let’s say under the protection of legal insolvency norms, and the taxes and taxes generate significant percentages in the GDP[13]. Moreover, these companies are horizontally interdependent with a large number of stakeholders who also have business potential, and a single bankruptcy generates a chain reaction and a social disturbance, not just an economic one.

It remains to see in what direction the economic system will go,i.e. reorganization or bankruptcy, the debtor in financial distressfacing new legal challenges, as Law no. 85/2014 is to be republished in the Official Journal of Romania, and to receive a new renumbering of the texts after the approval by law of Government Emergency Ordinance no. 88/2018 amending and supplementing certain normative acts in the field of insolvency and other normative acts,

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[12] *https://www.onrc.ro/index.php/ro/statistici?id=252*.

[13] See Gh. Piperea, in Gh. Piperea (coordinator), *Codul insolvenței. Note. Corelații. Explicații*, C.H.Beck Publishing House, Bucharest, 2017, p. 208.

recently published in the Official Journal of Romania no. 840/02 October 2018. Although the stated purpose of this Government Emergency Ordinance is to create "*the premises for the recovery of viable businesses and the faster recovery of claims, including the budgetary ones, being in line with both the budgetary interest and the general economic and social interest of Romania*", avoiding fraudulent insolvencies and implementing "*urgent legislative and administrative measures meant to lead to the recovery companies and keep them in the economic circuit, given that, currently, more than 6,000 companies with an approximate number of 64,000 employees are in insolvency proceedings, the period of observation*", the proof of practice will show whether these provisions really lead to a real recovery of debtors in financial difficulty, or there is a "counterbalance" of rights in favour of the state, and the regulations "conceal" a much more aggressive recovery of budgetary debts, and the companies with debts to the state no longer have access to insolvency under any conditions when faced with financial problems under the new provisions. As a matter of fact, this Government Emergency Ordinance already faces harsh criticism from the business environment and insolvency practitioners, who argue that it breaks the constitutional provisions by not granting equal treatment to creditors in the insolvency proceedings, and, at the same time, the regulations of the European directive that concern the granting of a second chance. Moreover, in the content of the European Union 2020 Strategy, we find as objectives precisely the need to create jobs, reduce unemployment and reduce poverty by stimulating a competitive economy.[14]

3. IS INSOLVENCY VIEWED AS A SYSTEMIC RISK?

Insolvency is also regarded reluctantly by the banking system as a creditor, and especially as a debtor in difficulty, insolvency being perceived as early as 2012 as a systemic risk according to reports on the financial stability of the National Bank. It was thus considered that if these entities go through these insolvency proceedings, with the risk of going bankrupt, this would lead to an absolute imbalance of the economy, based on the *big to let fail* principle. This was also premise used when many countries determined that certain economic operators were too big to be allowed to go bankrupt. Thus, we take into account the need for the survival of systemically important entities, which consequently become exceptionally very large exceptions from the rule, with the ultimate stated general interest goal, in the sense of maintaining an economic balance not only at national level but even at the international one. However, the opinion of the great specialists criticizes this method of total escape from the insolvency law, which involves an orderly and fair approach to a business failure, as a basic rule of competition, the idea of eliminating the insolvency intensely promoted in the circuit of this banking system becoming even dangerous, insolvency being "a pillar of the market economy, an idea opposed to the feudalism of rents and socialism… a condition of competition which must lead to progress".[15] As a matter of fact, we also know the reticence of the banking system concerning the recently adopted consumer protection legislation, considering that all these proposals lead to the creation of a major and severe systemic risk by

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[14] See "Citizens ' dialogues on the future of Europe" - *https://publications.europa.eu/en/publication-detail/-/publication/46f6ae9d-aa40-11e7-837e-01aa75ed71a1?Wt.mc_id=NEWSLETTER_october2017-interested-in-blurbs.*

[15] See Gh. Piperea, *Carecterele sacrificial, colectiv, concursual și necesar în procedura insolvenței*, in Curierul Judiciar no. 7/2017, pp. 400-401.

multiplying consumer protection tools and agglomerating their intersections.[16] Moreover, the World Bank report highlights that "steps must be taken to avoid sacrificing the great general welfare of a system simply because perfection cannot be assured" (World Bank Report on the Treatment of the Insolvency of Natural Persons, p. 42).

Nevertheless, on the other hand, we also take into account the macroeconomic misbalance triggered as early as in 2008 as a consequence of the financial crisis of an entire banking system. Several banks in Ireland, the United Kingdom and Belgium triggered an irreversible domino effect, being forced to resort to governmental financial support strategically set in mutual rescue plans substantiated at Union level, and therefore, from 2009, all the sectors of the economy were touched by the crisis, and the European and international such as the European Commission, the European Central Bank, the International Monetary Fund, and the involved countries mobilized themselves in order to avoid the propagation of the banking crisis on the entire continent and drafted a 200-billion EUR European economic recovery plan financed by the member countries by allocating 1.5% of the GDP. Despite the "injection" of this fabulous amount into the EU economy, in January 2009 statistical data proved the opposite by the increase in unemployment and the decrease in industry, while the countries borrowed increasing amounts and ye public debt became a risk factor for many countries (here we can mention the example of Greece). This context created a sequence of unprecedented crises, starting with the 2008 financial crisis and continuing with the 2009 economic crisis, the 2010 public debt crisis, the euro system crisis and Europe's crisis in the years 2011-2012, and ending with the unemployment crisis in 2013. As a result of this macrosystemic degradation, in 2012 the European Union instituted the European Stability Mechanism (ESM), focusing in the financial sector, and especially in banks, which established strict measures concerning the economic and budgetary policy of the states. This crisis generated a bank Union, by the establishment of a monitoring and supervision of the financial sector of banks, since from September 2014 the European Central Bank has been cooperating with national banking surveillance bodies and insures financial assistance and stability for almost 130 banks in the Eurozone. This single bank supervision mechanism may require corrective measures, and becomes gradually mandatory for other member countries of the European Union besides those in the Eurozone. Moreover, the application of certain "resistance tests" substantiated at the level of the central banks, lead to the establishment of the bases of credit institutions able to avoid scenarios related to a new financial crisis which, as we saw, required a major intervention, and even sacrifice, both from the member countries and from other banks, for the rescue of the banks that would have created a continuous flow of macroeconomic misbalance.[17]

This survival system has created levers of economic recovery that ensure social stability, however, as we have already seen, it has involved a common sacrifice of the Member Countries and of the society in general. Nevertheless, in this context, we accept the fact that bankruptcy, as insolvency proceedings, would indeed represent a systemic risk. However, their strategic reorganization can only represent a means of systemic rebalancing,

[16] M. Isărescu, Raportul asupra stabilității financiare, 7 April 2016, Opening speech at the press conference organized by the National Bank of Romania -*http://www.bnr.ro/Mugur-Isarescu,-guvernatorul-BNR-Raportul-asupra-Stabilita%C8%9Bii-Financiare,-7-aprilie-2016-13892.aspx.*

[17] See "10 answers to the economic crisis in Europe" - *https://publications.europa.eu/en/publication-detail/-/publication/b89e2b0b-dda7-4ea3-936c-37adcf74ce27?Wt.mc_id=NEWSLETTER_october2017-interested-in-banners.*

an effective way of achieving convergence between the economic and social dimensions, a complex integration of security and social rights into the general economic interest of an entity. In such circumstances, an economic shock such as the financial/economic crisis has prompted the emergence of a much-enriched economic, monetary and political architecture of the union, by finding solutions by an equitable coordination of several policies, namely the economic policy, the budgetary policy, the macroeconomic policy and the social policy aiming, among other things, at combating poverty and avoiding social exclusion, unemployment, etc. This mechanism can certainly be assimilated to a successful judicial reorganization, which involves many actors in the economic and social environment, but also a common sacrifice for a much more favourable outcome at a macrosystemic level.

We are mentioning that banking institutions benefit from special recovery regulations, provided by Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, genuine financial restructuring and stabilization mechanisms, which actually represent an equivalent, a "surrogate solution"[18] to the traditional judicial reorganization, which may also involve an "action plan", an equivalent of the judicial reorganization plan, with slight procedural nuances, in the sense that it is carried out under the supervision of the National Bank of Romania, correlated with the higher authority and supervision of the European System of Financial Supervision (ESFS)[19]. Thus, by virtue of its prudential supervisory attributions, NBR may establish three recovery proceedings, more specifically: the special surveillance procedure, the special administration, and stabilization measures. We are in the presence of certain concrete effects of the problems emerged in the world economy, which problems have generated to new measures for the management of the risk of failure of a credit institutions.

4. GLOBALIZATION. PERSPECTIVES. COMPARATIVE LAW

We believe that we cannot limit ourselves to a *stricto sensu* interpretation of the "globalization" of law, of the principles, theories, interferences and influences reflected I the internal legislative systems, but extensively, in relation to a "globalization of insolvency" itself, as a multifaceted institution also placed in the context of the other rights, sciences, branches approached in diversity. Thus, we seek to approach the meaning of "globalization" of insolvency from two perspectives.

Consequently, from a first perspective, we take into account the institution of insolvency outlined in an interdisciplinary manner,[20] through an *in globo* research, due to the fact that it is one of the institutions of law that has evolved remarkably along the history and up to the present, becoming a product of the intersection of legal, social and economic factors, which is heading towards an autonomous law which has filtered its own operating principles and proceedings. Obviously, law, by nature, is the result of the approach of

[18] For details, see S. Târnoveanu, *Falimentul instituțiilor de credit*, in R. Bufan (scientific coordinator), *op.cit.*, pp. 850-855.

[19] The European System of Financial Supervision, comprising the European Systemic Risk Board and the European Banking Authority, supplemented by the Committee of European Banking Supervisors, has the role to supervise financial institutions and prevent systemic risks, all banking institutions exceeding a certain impact threshold set through the Regulation of the European Union being individually supervised by these institutions, NBR cooperating with the European Union in this respect.

[20] *I. Didea, D. M. Ilie, R.-D. Vidican, The interdisciplinarity of the scientific research of law. The insolvency - an integrative area configured and resized by the intersection of the legal, economic and social realities, in Agora International Journal of Juridical Sciences, no. 2/2017, available at - http://univagora.ro/jour/index.php/aijjs/article/view/3155;*

multidisciplinarity, interdisciplinarity and transdisciplinarity, being an essential factor of the organization of life and society that cannot be detached from a historical time, from the economic, political, cultural, organizational state of an age, being redimensioned with the evolution of humanity.

In an rather atypical way, we seek to refer, initially, to the expansion of insolvency, seen as a form of "globalization" of the law institution itself in this case, in an interdisciplinary vision which involves the intersection, synthesis and remodelling of sciences in general, a multiplication of perspectives that synthesizes and interactively creates a complex end “product”, such as in the case of insolvency, which has exceeded the boundaries of the branches of law, by incorporating social, economic, administrative, management factors, as law manifests a flexible legal sizing and management, adapted to the needs required in full economic crisis, global conflicts and problems. We are considering the accelerated legislative expansion in this field, as insolvency becomes a complex system of legal norms harmonized in their turn in a generally fragile context which is under the pressure of globalization, unbalanced by factors such as the economic crisis, unemployment, the refugee crisis, current topical subjects in the implementation of strategies by the bodies of the European Union[21], but also by the international bodies, in order to ensure the security and respect of citizens' rights.

Although it interferes with internal and international normative acts, on labour law, criminal law, civil law, civil procedural law, administrative law, banking law, etc. and it is based on an integrative vision of the branches pertaining to the economy, sociology area, etc., the insolvency law has created its own path in the attempt of achieving its own objectives, being currently harmonized with the monist system implemented by the new Civil Code but also driven, in its evolution, by the principles and guidelines adopted and promoted by European and international organizations active in the field of insolvency law, in particular the guidelines developed by UNCITRAL. In relation to this aspect, we can find, in the specialized literature, a new perspective to approach the insolvency law, more specifically, its incorporation into a more complex law, i.e. the business law[22], in the attempt of re-dimensioning the commercial law by outlining a new law that includes, in addition to the specific norms of the commercial law, other legal norms established in the businessfield (fiscal law, administrative law, procedural law, labour law, etc.). Moreover, such a legal vision seems to be outlined taking into account the initiative of the executive to lay, in the near future, the bases of an economic Code of Romania, viewed as a revolutionary economic and fiscal measure the main objective of which is to improve the business environment, as well as the increase in the welfare of all Romanians. This fusion prospect aims at including all laws specific to the economic field, especially the Fiscal Code, the Code of Fiscal Procedure, the Law on the Establishment of Trading Companies, and he Tax Evasion Law. Nevertheless, an economic law is also Law no. 85/2014 on insolvency and insolvency prevention procedures, but it is understood that the focus of this legislative code is only the category of professional traders.

In our opinion, an effective absorption of the special law regulating insolvency, which tends to establish a complex joint corpus, extending Law no. 85/2014 (viewed, in the

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[21] *Document de reflexion sur la maîtrise de la mondialisation*, 10 Mai 2017, - *https://ec.europa.eu/commission/publications/reflection-paper-harnessing-globalisation_fr.*

[22] See M. Nicolae, *Unificarea dreptului obligațiilor civile și comerciale,*Universul Juridic, Bucharest, 2015, pp. 618-632.

specialized literature as a genuine Insolvency Code, which proposes an integrative vision and includes in a single normative corpus the general legislation applicable to all economic operators, the special legislation applicable to credit institutions and insurance companies, to groups of companies as well as regulations on cross-border insolvency, to which insolvency prevention tools, namely the ad hoc mandate and the arrangement with creditors) are added, by incorporating the other special insolvency laws into a General Insolvency Code cannot be achieved because it would lead to a new dissemination of the normative acts which have been groundedin their evolution on the basis of common Union and international principles and which can only be interpreted in a unitary way in a legislative harmonization logic. Moreover, the absorption of so many specific laws, which already tend towards their own evolutions and resizing, is a difficult legislative step, especially as we already have the example of the unification of the civil and commercial obligations under the monist system, which gave rise to numerous doctrinal controversies, legislative interpretations, and at the same time have put in motion an entire mechanism of legislative correlation and harmonization which can create dangers of legal insecurity. Indeed, this is a form of manifestation of the complexity, of the multidisciplinarity, as the business environment involves an "open frontier" mechanism, which means nothing else but evolution by processes of fragmentation, followed by unification, leading to the combination of various elements in order to create something new, and in this case, we can notice how the disappearance of a branch of law, such as commercial law, has led to the construction of other possible branches, such as in the case of the insolvency law which, in relation to its evolution, manages to become gradually detached as special distinctive law in relation to the civil law and, even more so in relation to the commercial law, unlike the old bankruptcy legislation, and thus insolvency exceeds the narrow sphere of traders, as we are currently talking about the insolvency of the professionals, the insolvency of natural persons, but also the insolvency of the administrative-territorial units, with a normative *corpus* separated indeed, but which could be part of a joint *corpus* in the future, approached indeed in an integrative vision that would be the subject of a true Insolvency Code. Nevertheless, in this context of legislative expansion, we cannot imagine that the insolvency institution would only become a chapter of the Romanian Economic Code, Law no. 85/2014 being redefined by restricting target subjects or simply repealed, as was the case with the Commercial Code. Consequently, we believe that it is useful for such a legal construction, which tends to an autonomous law, the right of insolvency, to preserve its identity and its evolution outlined *in globo*.

We take into account especially an interdisciplinary nature of insolvency, exceeding the multidisciplinarity stage, the insolvency law focusing, in its evolution, on an integrative style that has managed to exceed the boundaries of the traditional disciplines, the boundaries between public law and private law, which thus exceeds civil law, commercial, through integration and intersection with norms of public interest, with emphasis on reorganization, recovery, rehabilitation as procedures extending especially towards the direction of safeguarding the subjects involved, due to a general interest that is required in the economic and social context currently in line with the new objective of the European Commission.

Thus, insolvency tends towards a unified coordination and an integrative vision of these protection mechanisms, which really address distinctive legal subjects, but which have the same main objective reflected in the judicial reorganization regulated by Law no. 85/2014 on insolvency and insolvency prevention procedures, i.e. the *financial recovery* according to the provisions of Government Emergency Ordinance no. 46/2013 regarding the financial

crisis and the insolvency of the administrative-territorial units, approved by Law no. 35/2016, as well as the well-deserved *fresh-start* granted to natural persons, as regulated by Law no. 151/2015 on the insolvency of natural persons.

Insolvency, viewed as a transcendent matter, in the dynamics of an internal globalization process, has claimed its presence in all sectors, both in the public domain and in the private domain, exceeding the boundaries established between the traditional branches and systems of law, and becoming a complex institution, in full expansion that creates a viable "resuscitation" mechanism of the economy and the survival against budget misbalances, which is in the centre of the interest of national, EU and international bodies.

In a second perspective, we are referring to the globalization of insolvency as legal institution expanded at the world legislative level, both as an institution substantiated and dynamized in the internal regulation of each state, depending on the specific economic, political, cultural, organizational state, as well as an institution in the hands of international bodies, which creates the prerequisites for the international legislative harmonization and international unification, identifying viable solutions and guiding principles in the approach of the insolvency phenomenon, and currently the United Nations Commission on International Trade Law has in the strategic plan of action even a project to improve the model Law in the field of international insolvency.

Moreover, the divergences between the national systems related to the restructuring, reorganization and granting a second chance may cause difficulties in assessing investment risks in another country, all the more so as we are considering globalization and its effects, which have become a source of concern for Europeans, especially in relation to the repercussions on the rise of social inequalities and unemployment linked to the economic crisis under the pressure of a globalized world.

In relation to this phenomenon of internationalization and globalization of the foundation of law in general, we consider it appropriate to increase the interest in identifying and absorbing internally the successful practices of other legal systems in creating reorganization strategies for debtors in difficulty, who have already explored and tested the practice of strengthening a "saving culture" outlined from the point of view of insolvency, a vision which is timidly, but surely outlined in our legislation and other legal systems as a result of these inevitable influences.

In this respect, we remind the legislation outlined in the UK, where, since the late 1990s, the law of company insolvency has changed in a way that emphasizes rescue and measures taken in time to address the problems of the company. Moreover, the specialised literature[23] highlights the onset of a new change that emphasizes anticipatory approaches to company problems. Moreover, unlike the reticence of the banking system which is faced by insolvent debtors in Romania, both professionals as well as natural personsin their quality of consumers, as we have seen in the section above in relation to the possibility of triggering a systemic risk through insolvency, in the common-law system, banks are increasingly concerned to solve the problems of the company, subjecting the risk management and control systems used by companies to an external control, and increasingly employing professional independent specialists to evaluate and support those that have poor performance and endanger the company, focusing on audit and review procedures in this respect.

[23] See Vanessa Finch, *Corporate insolvency law. Perspectives and principles*, second edition, Cambridge University Press, Cambridge, UK, 2009, pp. 253-276.

In relation to banking strategies, which aim to shift insolvency from a reactive philosophy to an anticipative philosophy, we have also noticed an additional emphasis on banks' approaches in lending to companies that might have had difficulties. Banks have long used the terms of loan contracts to keep up-to-date with the performance and management behaviour of companies, using restrictive clauses where the borrower agrees not to adopt certain behaviours or not to modify their activity in certain specified ways, positive clauses in order to make sure that the borrower regularly provides the creditor with a variety of information as well as financial (positive and negative) clauses to regulate the various aspects of financial performance such as financial autonomy, liquidity, profitability or indebtedness.

These conditions have provided the main creditors with the opportunity to monitor companies, allowing British banks to react to potential problems of companies at a much earlier stage. This approach is obvious in increasing the rigour with which banks now look at three issues: early warning signals related to company issues, company management quality, and the company performance in managing the trade risks it faces. The new focus on early warning signals is based on a more active data monitoring through the Declaration of Principles in 1997 (reviewed in 2001 and 2005) issued by the British Bankers' Association, clarifying that when banks lend to small businesses and medium-sized businesses, they usually agree what kind of monitoring information will be needed, banks using this information not only to place the borrower in a risk category but also to provide early warning signals related to these problems.

Thus, when difficulties are signalled, the company is usually transferred to a "commercial support team". At this stage, the bank is more actively involved and can arrange an appointment with an accountant for an independent business review -IBR. The bank and the debtor company agree on a way to go further after analysing the recommendations made by the IBR. Under such circumstances, companies heavily rely on the assistance of the bank, which can propose and initiate recovery strategies, using their monitoring skills to gain a competitive edge. This first involves a structured approach to assessing the strengths and weaknesses of the company management and whether or not it is capable of facing the challenges. In such processes, banks and analysis teams do not only pay attention to assessing the likelihood of insolvency or recovery but they also try to determine whether managers can solve the business problems of the company themselves, or whether they need active assistance to manage those risks, which implies, again, a proactive approach to the company's insolvency prospects.

Consequently, the legal system thus built implies a common and assumed role to assist banks or companies in achieving recoveries, developing real professions in this respect such as recovery professionals, company doctors, business recovery professionals, risk consultants, solution providers, debt management companies, and cash flow managers. These specialists offer their services to assist both main creditors and companies when difficulties are encountered. Their role is often double, to control and monitor on behalf of a main creditor, and also to assist in the process of designing and implementing recovery solutions. The increase in their number and importance is a measure of the progress made in the area of the preoccupations to address the risks of insolvency through preventive measures.[24]

[24] See R. Bufan, Gabriela Carmen Sanda, *Regimul fiscal al insolvenței*, in R. Bufan (scientific coordinator), op.cit., 1033.

Mention should also be made of the fact that British banks do not act solely in their own interest, which is aimed primarily at repaying debts whether they are in the recovery phase or in the official procedures of the company's decline, there is increasingly more evidence in support of the fact that, during the intensive assistance procedures, banks are normally prepared to stimulate activities that are meant to strengthen risk management systems and the prospects of companies in distress, instead of merely leading to the early repayment of debt. Moreover, we must highlight that, if banks initiate a "doctor of companies" intervention in the business of a company in distress, the company doctor will be hired, in most cases, not by the bank but by the company, and will be legally and professionally bound to act in the interest of the company and not in the interest of the bank. Moreover, the earlier the Bank's intervention, the lower the default risk to the bank, and the greater the prospect of its recovery.

Consequently, in redefining its role, the bank will build a flexible relationship with a healthy company that can easily take another form when the company faces problems. Company managers stand to gain, because they receive new levels of assistance from independent banks and consultants, thus abandoning the "agony" of the old regime in which a manager in difficulty would be tempted to go through these issues alone and secretly, even with the fear that the bank might find out what is happening and could put an end to the situation by appointing a judicial administrator, a regime that still makes its presence felt in our current economic environment, although the approach of a very transparent system would be more advantageous to the success of a reorganization plan.

The philosophy of redressing and giving a second chance to the debtor in distress was in fact a source of inspiration triggered by the American system of the Bankruptcy Code, due to which the most important principles governing such procedures, including the elimination of a substantial part of the liability in the absence of which the debtor could not become reorganized, the so-called "*hair-cut"*operation, involving the elimination of those creditors who would never have received anything in case of bankruptcy anyway, the premise of this common sacrifice being the maintenance in the commercial circuit of the entrepreneur, with positive macroeconomic effects, by creating jobs, paying contributions, taxes and maintaining a healthy business climate among contractual partners.[25]As a matter of fact, the fundamental stated purpose of the laws of the American state is to provide debtors with a fresh start of business - *a fresh start* – while prioritizing the reorganization over bankruptcy, a procedure governing the American insolvency proceedings[26]. The reorganization category within the American Insolvency Code covers town halls, municipalities, companies and natural persons, individual farmers and regular income individuals, and the reorganization plan becomes a real rescue tool in the sense that, unlike our legislative system, the court has the sovereign power to approve a plan, even in the case of the objections and the negative vote expressed by the creditors, but only if it is convinced that the plan is honest and is drawn up in good faith in identifying a balance of interests between the creditors and the debtor. The absorption of such a measure in our legislation would be auspicious, given the current and obvious reticencein

[25] See Simona-Maria Miloş, Ş.Dumitru, Andreea Deli-Diaconescu, OtiliaDoinaMilu, op.cit.,in R. Bufan (scientific coordinator), op.cit., pp. 583-590.

[26] In a decision of the Supreme Court of the United States, passed as early as in 1934, it is highlighted that the reorganization proceedings "give the honest debtor found in an unfortunate situation, a new opportunity in life and free horizon to its efforts, unmarked by the pressure and discouragement of pre-existent debts." - *Ibidem*.

relation to the general insolvency procedure, despite the efforts to reform the internal legislation. Although we may consider that insolvency is prevented by raising awareness of the causes of difficulty that it generates, the manager restructuring loans/debts in a timely manner or the business and resorting, why not, to extrajudicial methods, such as simple voluntary negotiation, according to the Guide for Extrajudicial Restructuring of the obligations of trading companies, issued by the World Bank, assisted voluntary negotiation - mediation[27](approaches that are rarely used due to the imbalance of forces), namely pre-insolvency procedures, ad-hoc mandate or the arrangement with creditors, procedures increasingly brought to the attention of professional traders with the improvement of regulations and facilitating their access by adopting the Insolvency Code, we cannot deny the reality of the fragile economic context in recent years, characterized by the unpredictability of the business environment dynamics, which certainly affected even the established debtors on the market. We believe, however, that bankruptcy should become an objective, not just of the debtor but also of the stakeholders, only in the case of businesses that have no chance, the exit from the business environment and the debt discharge really representing a benefit to the economic environment in such situations.

Other law systems as well, such as those in Australia and New Zealand, have adopted the American model, giving priority to the recovery and reorganization of the debtor in financial difficulty.[28]

Also, the Chinese law system promotes reorganization to the detriment of bankruptcy, considering that giving a second chance brings added value to the economic environment, while contributing to social stability and prosperity.[29]

CONCLUSIONS

The link between the new worldwide rescue concerns and the awareness of the fact that global financial waves can even hinder fundamentally sound businesses becomes the basis for accepting the judicial reorganization process as a priority and a necessary measure in the current and future internal context. [30]

It is obvious that the development of global financial markets has brought about significant changes in the structure and dynamics of trade relations, the international integration of the economy inevitably leading to the creation of consequences and interdependencies, social and economic, legal interdependencies, forcing national laws and various legal systems to some extent recode and redesign their internal legislation through a coordinated harmonization of international bodies that created the laws and model principles needed to stabilize the new economic arena.

Globalization allows for a transparent analysis of functional insolvency practices and implicitly of reorganization, recovery, debt remittance, offering alternative models in outlining and substantiating a viable right, adapted, however, to the economic, political,

[27] See Simona-Maria Miloş, *Prevenţia insolvenţei prin mijloace contractuale,* in Curierul Judiciar no. 6/2013, p. 337-338.

[28] See Arnd Wiebusch, *Business Rehabilitation. Voluntary Administration in Australia and New Zeeland in comparison to the German Insolvency Plan*, VDMVerlagDr. Muller Publishing House, 2010 - *https://www.morebooks.de/gb/search?utf8=%E2%9C%93&q=insolvency.*

[29] See H. Zhang, *Corporate rescue in Chinese Insolvency Law,* LAP LAMBERT Academic Publishing, 2012 - *https://www.morebooks.de/store/gb/book/corporate-rescue-in-chinese-insolvency-law/isbn/978-3-659-16072-1*

[30] Westbrook, „*Globalisation of Insolvency Reform*" , p. 403, *apud* Vanessa Finch, op.cit., p. 253.

cultural and organizational state of each country, which is why we currently enjoy the cultivation of a law system that has gradually abandoned the autonomous, closed system of hypostasis and has inevitably turned towards an open, flexible, integrative, interdisciplinary, complex system, which are, as a matter of fact, specific features of our century, a century of complexity.

Consequently, an identification and reporting of best practices in the field certainly leads to a qualitative management of insolvency risks, in a more open and preventive way, in this context of globalization, international and EU institutions and bodies outlining a true "palette of rights" that restructured and revolutionized the institution of insolvency in almost every legal system, promoting and developing as a priority a "rescue culture", which leaves the area of exclusive interest of the creditors, balancing social and distributive goals, public and private interests alike, and prioritizing values such as fairness and accountability.

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PRACTICAL REFLECTION ON THE WILL IN TERMSS OF EU REGULATION NO. 650/2012

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ABSTRACT: *This article analyzes the will, in the light of the validity and form of conditions before the entry into force of the EU Regulation no. 650/2012 and after that date, and points out the problems of notarial practice faced by the Romanian public notary. The study presents the testamentary forms known in some European countries and the registers in which they are enrolled.*

KEYWORDS: *will, background conditions, formal conditions, Wills Register, Regulation*

INTRODUCTION

The will is perhaps considered the most important act that a person concludes during his lifetime. It represents the legal pattern that can organize the material and economic aspects of the heirs, establish a new social order of the respective family nucleus, mark with the end of one's life the beginning of another, may attract - by the unfolding of previously unknown facts - or, on the contrary, his resentment[1].

In solving an inheritance with extraneous elements, the Romanian public notary will have to determine the validity of the substance and form of a will. The question of the validity of wills is incident both at the moment of authentication of a will and in the case where a will is invoked in a succession procedure.

1. THE TESTAMENT ISSUED PRIOR TO THE ENTRY INTO FORCE OF THE EU REGULATION NO.650 / 2012

The present study aims to analyze the validity of the will in order to regulate them in the 2009 Romanian Civil Code and the European legislator's vision transposed into EU Regulation no. 650/2012[2].. Consequently, we will study the following assumptions:

- the testament drawn up between 01.10.2011 (date of entry into force of the Romanian Civil Code) and 17.08.2015 (date of implementation of the EU Regulation no. 650/2012);
- the particular aspects relating to the authentication of wills between 16.08.2012 (date of entry into force of EU Regulation No.650 / 2012[3]) and 17.08.2015;

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[1]A se vedeaDaniela Negrilă, *Testamentul în noul Cod civil. Studii teoretice şi practice*, "Universul Juridic" Publishing House, Bucureşti, 2013, fragment extras din prefaţa autoarei.

[2]Regulamentului UE nr. 650/2012 al Parlamentului European şi al Consiliului privind competenţa, legea aplicabilă, recunoaşterea şi executarea hotărârilor judecătoreşti şi acceptarea şi executarea actelor autentice în materie de succesiuni şi privind crearea unui certificat european de moştenitor.

- the particular aspects relating to the authentication of wills between 16.08.2012 (date of entry into force of EU Regulation No.650 / 2012) and 17.08.2015;
- the testament issued after the entry into force of EU Regulation No.650 / 2012.

The substantive conditions regarding the validity of the will are set by the law applicable to the inheritance, as well as the special inability to dispose of or to receive by will, according to art. 2636, para. g) Romanian Civil Code.

The other instances of inheritance, such as inheritance reserve, forced estate, reduction of excess liberties, and the donation are subject to the succession law.

When authenticating a will, the Romanian notary checks whether the will is valid from the point of view of the substantive conditions under the law applicable to the inheritance, but the conclusion of this test is in fact not judicious, because, until the death of the testator, the law applicable to his inheritance may be another, or the inheritance may be settled by another authority in another State which will be guided by its own rules of private international law.[4].

However, we consider that, including the authentication of a will to be used in an international succession, the Romanian notary will verify the substantive conditions necessary for the validity of the will, namely the ability to test, the testator's consent, the lawful and moral cause, licit.[5].

In all cases, the Romanian notary will authenticate a will in the form prescribed by the Romanian law, as a law of the place where the act was drafted, in accordance with the validity of the form of the will governed by Article 2635 of the Romanian Civil Code[6].

With the entry into force of EU Regulation no. 650/2012 and 16.08.2012 respectively, notaries can authenticate wills that are considered valid in the light of the substantive conditions and formalities provided by Chapter III of EU Regulation No.650 / 2012. Just prior to the entry into force of EU Regulation no. 650/2012 in force and 17.08.2015 respectively, it provides[7]for the possibility of drawing up a will considered valid, subject to the death of the testator after 17.08.2015.

If at the debate of an inheritance with extraneous elements the notary is presented a testament drawn up between 16.08.2012 and 17.08.2015, the testator dying after 17.08.2015, the notary will appreciate the validity of the testament:

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[3]Conform art. 84: ”Prezentul regulament intră în vigoare în a douăzecea zi de la data publicării în Jurnalul Oficial al Uniunii Europene.”

[4]A se vedeaIoana Olaru, *Dreptul european al succesiunilor internaționale, Ghid practic*, Editura Notarom, București, 2014, pag.102

[5]Art.1179 Cod civil român enumeră cele patru condiții de fond ale contractului, care în lumina art.1325 Cod civil: ”Dacă prin lege nu se prevede altfel, dispoziţiile legale privitoare la contracte se aplică în mod corespunzător actelor unilaterale” pot fi adaptate la testament.

[6]”Întocmirea, modificarea sau revocarea testamentului sunt considerate valabile dacă actul respectă condiţiile de formă aplicabile, fie la data când a fost întocmit, modificat sau revocat, fie la data decesului testatorului, conform oricăreia dintre legile următoare:
a) legea naţională a testatorului;
b) legea reşedinţei obişnuite a acestuia;
c) legea locului unde actul a fost întocmit, modificat sau revocat;
d) legea situaţiei imobilului ce formează obiectul testamentului;
e) legea instanţei sau a organului care îndeplineşte procedura de transmitere a bunurilor moştenite.”

[7] În art.83 alin.2: ”În cazul în care defunctul a ales legea aplicabilă succesiunii sale înainte de 17 august 2015, această alegere este valabilă dacă îndeplinește condițiile prevăzute în capitolul III sau dacă este valabilă în aplicarea normelor de drept internațional privat care erau în vigoare, la data efectuării alegerii, în statul în care defunctul își avea reședința obișnuită sau în oricare dintre statele a căror cetățenie o avea.”

- either in the light of the conditions set out in Chapter III of EU Regulation No.650 / 2012;
- either in accordance with the rules of private international law in force at the time the provision was made, in the State of the deceased's habitual residence, or in any of the States of which he or she was a national, or in the Member State in which the competent authority is situated succession.

As a matter of principle, for deceased deaths prior to 17.08.2015, which left a testament in the succession proceedings, its substantive validity will be analyzed by the Romanian notary in accordance with the law applicable to the succession and the validity of the form in the light of one of the listed laws by art.2635 Romanian Civil Code.

The multitude of practical difficulties is generated by wills drawn abroad.

Since 2002, the European Network of Testing Registers (RETT)[8]has been established and can be used to identify a testament issued abroad or to verify whether it has been revoked or amended.

Also, on the website of the European Network of Testing Registers[9]there is information on how to contact the National Registers and the wills found in EU Member States.

2.THE WILL ACCORDING TO TO THE EU REGULATION NO. 650/2012[10]

In Chapter III of EU Regulation No.650 / 2012, the rules on wills are laid down in Articles 24, 26 and 27, which only apply if the testator dies after 17.08.2015. We note that once these conditions are met, these provisions apply both to the wills concluded after the date of entry into force of the Regulation (17.08.2015) and to those concluded between the date of entry into force of the Regulation (16.08.2012) and the date of its application (17.08 .2015). [11].

From the norm that is drafted in Article 24 EU Regulation no. 650/2012,[12]we infer that we will appreciate the substantive conditions validating a testament in accordance with the law that would have applied to the successor of the testator if he died on the day of the testament. This rule obliges the Romanian notary to carry out the following checks after 17.08.2015: - if he is asked to authenticate a will, he will proceed to investigate the admissibility and assimilation of the substantive testament conditions, first naming the law

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[8]Rețeaua Europeană a Registrelor de Testamente a luat ființă în baza convenției de la Bâle din 16 mai 1972 referitoare la crearea unui sistem de înregistrare a testamentelor. Inițial interconectarea s-a realizat între fișierele testamentare belgiene și franceze.

[9] https://www.arert.eu/Informations,24.html

[10]Regulamentul UE nr.650/2012 nu cuprinde o definiție a testamentului.

[11]Potrivit art.83 alin.3 Regulament: ”O dispoziție pentru cauză de moarte întocmită înainte de 17 august 2015 este admisibilă și valabilă pe fond și în privința formei dacă îndeplinește condițiile prevăzute în capitolul III sau dacă este admisibilă și valabilă pe fond și în privința formei în aplicarea normelor de drept internațional privat care erau în vigoare în momentul întocmirii dispoziției, în statul în care defunctul își avea reședința obișnuită sau în oricare dintre statele a căror cetățenie o avea sau în statul membru în care se află autoritatea care se ocupă de succesiune”

[12]”Dispoziții pentru cauză de moarte, altele decât pactele asupra unei succesiuni viitoare

(1) O dispoziție pentru cauză de moarte, alta decât un pact asupra unei succesiuni viitoare, este reglementată, în privința admisibilității sale și a condițiilor de fond, de legea care, în temeiul prezentului regulament, ar fi fost aplicabilă succesiunii persoanei care a întocmit dispoziția, în cazul în care aceasta ar fi decedat în ziua întocmirii dispoziției.

(2) Fără a aduce atingere alineatului (1), o persoană poate alege ca lege care să îi reglementeze dispoziția pentru cauză de moarte, cu privire la admisibilitatea și condițiile de fond ale acesteia, legea pe care acea persoană ar fi putut să o aleagă în conformitate cu articolul 22, în condițiile stabilite de respectivul articol.

(3) Alineatul (1) se aplică, după caz, modificării sau revocării dispoziției pentru cauză de moarte, alta decât un pact asupra unei succesiuni viitoare. În eventualitatea alegerii legii în conformitate cu alineatul (2), modificarea sau revocarea este reglementată de legea aleasă.”

applicable to the succession as if the testator had died at the date of the testament. - if a testament in an international succession is invoked, the notary examines the admissibility and substantive validity of the will, in accordance with the law that would have applied to the succession, if the testator died at the date of the testament, and the law applicable to succession its timing.

This legislative novelty generates a double set of law applicable by the notary: [13]: on the one hand it will determine the fictitious that would have been the law applicable to the succession at the date of the testament to verify its validity, on the other hand, will effectively determine the law applicable to the succession with a view to resolving it. In the final conclusion[14]or in the certificate of heir, the results of these determinations shall be mentioned.

Article 26 EU Regulation No.650 / 2012 lists the substantive terms of the death penalty provisions: "1. For the purposes of Articles 24 and 25, the following shall refer to the substantive conditions:

(a) the capacity of the person making the provision for cause of death to draw up such a provision;

(b) special cases which prevent the person making the provision from dispensing for the benefit of certain persons or preventing a person from receiving inheritance from the person making the provision;

(c) the admissibility of representation in order to draw up a provision on the cause of death;

(d) the interpretation of the provision; or

(e) pain, violence, error, and any other matters relating to the consent or intent of the person making the provision.

" Article 26 paragraph 2 contains an important statement as to the testator's ability if the testator has the ability to test according to the applicable law in accordance with Articles 24 or 25, the subsequent change in the applicable law does not affect his ability to modify or revoke such a provision. "As for the form, a written testament is valid if it meets the conditions laid down in one of the laws listed in Article 27 EU Regulation no. 650/2012: "Formal conditions of the death-related provisions drawn up in written form (1) A provision for a cause of death in written form fulfills the formal requirements if the form complies with the law:

(a) the State in which the provision on, or the conclusion of, the succession pact was concluded;

(b) the State of which the testator possesses the nationality or at least one of the persons whose succession is covered by a pact on a future succession either at the time of the provision or the conclusion of the covenant or at the time of death;

(c) the State of residence of the testator or at least one of the persons whose succession is covered by a pact on a future succession either at the time of the provision or the conclusion of the covenant or at the time of death;

[13]A se vedea Ioana Olaru, op.cit., pag.107

[14] Încheierea finală reprezintă actul care marchează finalizarea procedurii succesorale. Ea desemnează momentul în care notarul procedează la "judecarea în fond" a cauzei succesorale.

(d) the State of the habitual residence of the testator or at least one of the persons whose succession is covered by a pact on a future succession either at the time of the provision or the conclusion of the covenant or at the time of death; or

(e) in the case of immovable property, the State in which they are situated. Determining whether the testator or persons whose succession is covered by the pact on a future succession domiciled in a particular State is governed by the law of that State.

2. Paragraph 1 shall also apply to the death penalty provisions which amend or revoke a previous provision. The change or revocation fulfills the formal requirements if it complies with any of the laws under which, under paragraph 1, the provision for the cause of death which was amended or revoked was valid.

3. For the purposes of this Article, any provision of law limiting the permissible forms of death sentence by reference to the testator's age, nationality or other personal circumstances or persons whose succession is covered by a pact on a future successions belong to form matters. The same holds true for the qualifications that the witnesses need to have in order to validate a disposition for the cause of death. "

From a practical point of view, the notary in front of whom a will in an international succession is invoked, will enforce one of the laws provided by art. 27 Regulation, the law provided for in Article 24 being incidents.

For an example of implementing the provisions of EU Regulation no. 650/2012 evokes the following case: A Romanian citizen residing in Cluj, leaves a will on 03.08.2013, and on December 15, 2017 dies, having his habitual residence in Paris. What is the law on which to determine the special inability to receive by will, French law or Romanian law?

We note that according to art. 24 paragraph 1 in conjunction with art. 26 lit. b) of the EU Regulation no. 650/2012, it is the Romanian law that will determine these issues, being the law that would apply if the deceased died at the date of the will, not the French law, which is really applicable to the succession debate.

3. FORMS OF WILL KNOWN IN SOME EUROPEAN STATES

Forms of will known in some European states National wills registers provide information on the existence, revocation or modification of a will and can be consulted directly through the A.R.E.R.T. It is advisable to obtain a certificate provided by the Register of wills in the state of nationality or residence of the deceased when solving an international succession. Knowledge of the testamentary forms used in some European countries is of particular importance, especially since EU Regulation 650/2012 allows the signatory Member States of the Hague Convention of 5 October 1961 [15]on Conflict of Formal Laws of Testamentary Provisions (according to art. .75 paragraph1 of the Regulation) to apply these rules instead of Article 27 of the Regulation.

We note the view of the European legislator in favor of the testamenti[16], namely to give the widest possible possibility that the will is formally valid in order to ensure legal certainty for people who want early succession planning. Paragraph 52 of the Preamble to the Regulation reveals that the alternative enumeration of the laws applicable to the form of the

[15]Pe site-ul Conferinței de la Haga privind dreptul internațional privat (www.hcch.net) este prezentată lista statelor membre ale acestei convenții, convenție la care România nu este parte.

[16]Pentru detalii a se vedea I.-L. Vlad, *Succesiuniinternaționale, Regulamentul nr.650/2012. Tratate internaționale în domeniu*, ”Universul Juridic” Publishing House, București, 2016, pag.103

will conforms to the provisions of the Hague Convention of 5 October 1961 on Conflict of Laws Concerning the Form of Testamentary Provisions.

3.1 In France[17], , the legislator allows the testator to express his last will through four categories of wills:

- handwriting wills, for which the following conditions must be met: be written entirely by the testator's hand, dated and signed by him;
- the authentic will to be considered valid must be drawn up before two notaries or a notary assisted by two witnesses;
- the mystical will, which is validly drafted under the following conditions: to be typed or handwritten by the testator or by another person, signed by the testator and presented closed and sealed before a notary and in the presence of two witnesses;
- the international will, the validity of which must be presented by the testator before a notary and two witnesses, be signed by them and then attached to a certificate drawn up by the notary, which will ensure that it is kept.[18].

For opposing third party effects, French law requires that any will be recorded in an electronic database.

In France, there is the Central File of Testamentary Provisions, in which notaries proceed to the registration of wills and to query the database electronically. A will can only be signed by French notaries, consuls and ambassadors. We note that the French legislator is particularly concerned with the registration of the Holograph testament.

Any person who can prove his status as heir or legatee can consult the Central File of the Testamentary Provisions provided that the death certificate of the person whose will is sought is presented.

3.2 In Italy[19], legislation recognizes the following forms of wills: - the authentic will, drawn up by the notary public - handwriting wills for which validity is required to be written, dated and signed by the testator's hand - the mystical will which is written by the testator's hand or a third person or typed and signed by the testator and involves the procedure of inserting it into a sealed envelope which is handed over to the notary in the presence of witnesses - the international will, which, in order to be valid, must be signed by the testator in the presence of two witnesses and a notary public. Two registers are regulated in Italy: a testamentary register under the administration of the Ministry of Justice and a succession register, which is administered by the Italian courts. In these registers the wills are registered and can be searched electronically. The inclusion of mortis causa provisions in the register is not mandatory, but the importance of registration can not be denied, as it facilitates discovery

[17] Succesiunile - Franța, https://e-justice.europa.eu/content_succession-166-FR-ro.do?clang=ro
Franța a semnat Convenția de la Bâle din 16 mai 1972, referitoare la crearea unui sistem deînregistrare a testamentelor și a ratificat-o la data de 20 septembrie 1974. De asemenea, a semnat Convenția de la Haga din 5 octombrie 1961 privind conflictele de legi în materie de formă a dispozițiilor testamentare, ratificată la data de 20 septembrie 1967 ”sub rezerva pentru Franța de a nu recunoaște, în baza art.10 din Convenție, dispozițiile testamentare făcute în formă orală în afara cazurilor extraordinare de către unul dintre resortisanții săi care nu are o altă naționalitate”. Franța a semnat Convenția de la Washington din 26 octombrie 1973 privind legea uniformă cu privire la forma testamentului internațional și a ratificat-o la 1 iunie 1994.

[18] A se vedea Convenția de la Washington din 26.10.1973 privind legea uniformă asupra formei testamentului internațional

[19] Succesiunile - Italia, https://e-justice.europa.eu/content_succession-166-it-ro.do

of the will. It is the public notary who records the wills in the electronic records and the task of preserving them regardless of the testamentary form used by the testator.

3.3 In Germany,[20], a person can express his or her mortis causa by choosing one of the three forms of writings established by the law[21]: authentic will[22], handwritten testament or successor contract.

The authentic testament and succession contracts are drawn up by a notary[23].

The jurisdiction to resolve a succession belongs to the judge under German law, and since January 1, 2012, a Central Register of Tests administered by the Federal Chamber of Notaries[24]Notaries has been in operation in Germany, having as object the fulfillment of the advertising formalities imposed on mortis causa provisions.

Authentic wills and succession contracts must be filed with the local court. The notary who instructs an authentic testament has the obligation to fulfill the formalities of being submitted to the tribunal. Moreover, the authentic will is subject to registration in the wills register. Succession contracts may be filed with the local court or a notary and may form the subject matter of the entry in the Central Testing Registry. The handwriting test handwritten with the local court will be entered in the Central Testing Registry by the court. A testament made in Germany can be identified in the Central Testament Registry, with the exception of the testament handwriting which has not been deposited with the local court. The wills register can be interrogated only by notaries and judges.

CONCLUSIONS

When solving an international succession, the Romanian public notary investigates the validity and formality of the will in the light of the Romanian Civil Code or the EU Regulation no. 650/2012. The notary also obtains a certificate provided by the Register of wills in the state of nationality or residence of the deceased. The multitude of practical difficulties is generated by the wills drawn abroad, which require the notary to know the testamentary forms used in the European states. We retain the European legislator's view in favor of testaments, namely to allow the widest possible testament to be formally valid in order to ensure legal certainty for those who want early succession planning.

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Codul civil român

[20]Germania este semnatară a Convenției de la Bâle din 16 mai 1972, referitoare la crearea unui sistem de înregistrare a testamentelor, dar aceasta nu a fost ratificată. Germania a semnat Convenția de la Haga din 5 octombrie 1961 privind conflictele de legi în materie de formă a dispozițiilor testamentare, ratificată la data de 20 noiembrie 1965. Germania nu a semnat Convenția de la Washington din 26 octombrie 1973 privind legea uniformă cu privire la forma testamentului internațional.

[21] Succesiunile - Germania, https://e-justice.europa.eu/content_succession-166-de-ro.do

[22]Denumit și "testament public"

[23]A se vedea Ioana Olaru, op.cit., pag. 111

[24] "Bundesnotarkammer"

Regulamentului UE nr. 650/2012 al Parlamentului European și al Consiliului privind competența, legea aplicabilă, recunoașterea și executarea hotărârilor judecătorești și acceptarea și executarea actelor autentice în materie de succesiuni și privind crearea unui certificat european de moștenitor
Convenția de la Washington din 26.10.1973 privind legea uniformă asupra formei testamentului internațional
Succesiunile - Franța, https://e-justice.europa.eu/content_succession-166-FR-ro.do?clang=ro
Succesiunile - Germania, https://e-justice.europa.eu/content_succession-166-de-ro.do
Succesiunile - Italia, https://e-justice.europa.eu/content_succession-166-it-ro.do

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CONSIDERATION ON THE DEVELOPMENT OF JUDICIAL EXPERTISE PRIOR TO 1st OF DECEMBER 1918

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ABSTRACT:
We will approach the history of expertise, in the context of the event of 1st December 1918, by setting forth a few considerations, with particular reference to data which appear to have this specific significance.

KEYWORDS: *history, expertise, justice, 1st of December 1918*

I. CONSIDERATIONS REGARDING THE DEVELOPMENT OF JUDICIAL EXPERTISE WORLDWIDE

Throughout the history of evidentiary systems, the orders to perform expertise and the performance thereof have evolved together and, depending on the historical stages covered, the appearance, maintenance or disappearance of some of its forms followed a certain dynamics.

Some attempts to introduce scientific data in the activity of investigation of criminal acts have been known since ancient times.

One of the oldest methods of document investigation ever mentioned was the *comparison of written documents*. With regard to this method, a law dating back to the times of Roman Emperor Constantine, issued around year 300 A.D., contained a special section on forgery, in which, among the methods listed for the investigation of documents, there is data on the examination of documents through comparative methods, whereas, in the medieval period, all authors, when given the opportunity, write about how the signature of King Charles IX of France was forged. However, these methods were used in an isolated manner, without being enshrined as stand-alone rules[1].

In China, the first forensic medicine treatise was written in year 1248, entitled the *Hei Yuan Lu* Treatise, which contains memorable instructions regarding the investigation of corpses, the variety and complexity of wounds individualized depending on the object used in order to commit the deed. Also, a difference was made between death by drowning and death due to other causes.

[1] Mihuleac Emil, *Expertiza judiciară (Judicial Expertise),* Editura Ştiinţifică (Scientific Publishing House), Bucharest, 1971, p. 93 and foll.

Then, in ancient Greece, medicine developed even more and it seems that forensic medicine was already somewhat known, as it results from Professor Mina Minovici's *Complete Forensic Medicine Treatise*[2].

These trends were continued by other Romanian specialists, such as Andrei Ionescu in the field of dactyloscopy, Henry Stall in the field of graphology, Cantemir Rişcuţia in the field of anthropology, C. Ţurai in the field of trace evidence analysis, as well as other specialists who work in the Forensic Science Institute or in specialized departments of higher education institutions[3].

Although, in the specialized literature[4], law theoreticians and practitioners rightly assert that the Romans (considered as the initiators of legal thinking) did not use expertise as a means of evidence very often, there is, however, data which proves that the opinions of specialists with regard to the evidence were called for, in order to solve various cases, on the basis of the investigations they carried out.

Under Roman law, the known means of evidence were documents (deeds), witnesses and presumptions, then, in feudal law, a feature of the period was that the means of evidence were of a religious nature, for example: the ordeals (the red-hot iron trial by ordeal)[5], the judgment of God, the imprecation.

The institution of medical forensic expertise has been known in Russia since the time of Tsar Peter I, in year 1730 a subsection of forensic and police medicine was established, and in year 1797, the general regulations on the medical forensic examination of corpses and the drafting of forensic certificates were published.

II. REFERENCES TO THE DEVELOPMENT OF JUDICIAL EXPERTISE IN ROMANIA.

The field of expertise has been marked by the existence of the oldest organizational structures and, given the lack of documents, it is assumed that evidence presentation in criminal matters was done by the military chief, and some tasks were performed by the medicine man or, later, by the physician.

While in the Criminal Procedure Code of 1864 the means of evidence were described sketchily, evidence and the means of evidence were extended in the Criminal Procedure Code of 1936. The old documents mainly refer to civil financial operations such as purchases and sales, donations and estate delimitations, and, in court, people relied on such documents.

The first documentary testimonies go back to the 14th century, from which time dates the existence of the High Steward, corresponding to the Interior Minister of today, who was responsible for the security of the princely court and the judgment of all cases at the Court.[6]

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[2] Minovici Mina, *Tratat complet de medicină legală (Complete Forensic Medicine Treatise),* Vol. I, Atelierele grafice Socec (Socec Graphics Workshops), Bucharest, 1928, p. 754, Central University Library "Carol I", Bucharest, book identifier 43528.

[3] Ionescu Florin, *Criminalistica (Forensic Science)*, Editura Universitară (University Publishing House), Bucharest, 2008, p. 14.

[4] Cârjan Lazăr, *Fundamentele criminalisticii (Fundamentals of Forensic Science)*, Era Publishing House, Bucharest, 2006, pp. 17-18; Pop Traian, *Curs de criminologie (Criminology Course),* Cluj, All Beck Publishing House, 1928, p. 254; Stancu Emilian, op.cit., p. 81.

[5] Cârjan Lazăr, *Fundamentele criminalisticii (Fundamentals of Forensic Science)*, op.cit., p. 39.

[6] Cârjan Lazăr, *Fundamentele criminalisticii (Fundamentals of Forensic Science)*, op.cit., pp. 38-39.

Expertise dates back to a long time, the documents of old Romanian law which mention, among other things, the institution of expertise being revealing in this respect: Ipsilanti's Code, Caragea's Law (Caradja's Law), the Calimach Code.

As proof of the application of the written law, the first official expertise was carried out during the period of enforcement of the aforementioned codes, in year 1832, and it was a forensic expertise referring to a suspicious death case. From the documents of the time, it follows that in the old Romanian law, experts and their opinions had a greater power of conviction than testimonies, which fact was materialized in the stipulation that "in the situation where some experts assert something and others deny it, those who are most numerous and best-qualified shall be believed, and, if they are equal, evidence shall be resorted to".[7]

The beginning period was dominated by doctor Alexandru Şutzu (1837-1919), the physician of our incomparable poet Mihai Eminescu. An innovative psychiatrist, he published, in 1877, in Bucharest, a valuable monograph of forensic psychiatry – "*Alienatul în faţa societăţii şi a ştiinţei*" *(The Mental Patient in Relation to Society and Science),* a pioneering work in the field, which proposed a new attitude towards mental patients who, until then, had been kept bound in chains at monasteries in Bucharest, Iaşi and the Neamţ Monastery, proposing that they should be freed and treated scientifically by psychiatric medicine in sanatorium-type institutions. Along with his predecessor, physician George Bogdan (1859-1930), a reputed specialist, he represented with honour the school of forensic medicine of Iaşi, being the creator of new investigative techniques, author of a *Collection of Forensic Medical Reports* of particular interest. He published an extensive forensic medicine treatise, designed to comprise six volumes, of which only four appeared, as of year 1921[8].

In the first half of the 20th century, the phrase "the Minovici Brothers" "*became well-known both in Romania and in other parts of the world as an emblem of the audacity of some pioneers who dedicated their entire lives to the grubbing of arid areas of science. Few people know, however, that they are considered to be among the founders of the new science which sprang from Forensic Medicine at the end of the 19th century, namely, forensic science*".[9]

Doctor Mina Minovici (1858-1933)[10], organizer of the Romanian Forensic Medicine School, a scholar of European repute, correspondent member of the Medical Academy of Paris, was appointed in 1890 as forensic expert (physician) of Bucharest, and in 1924 he organized the "Forensic Medicine Institute" in the capital of Romania, which was among the first in the world to be founded. In 1897, he was appointed holder of the first forensic medicine specialty departments in Romania. He is the author of a "Complete Forensic Medicine Treatise" in two volumes, published in years 1928 and 1930. He had an original contribution: "sudden death", "cadaveric alkaloids", "medical anthropology", etc.

Referring to the territory of Transylvania which became complete through the 1918 Great Union act, we call forth the memory of *Dr. Nicolae Minovici (1868-1941)*[11], Mina's

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[7] Constantin Radu, Drăghici Pompil, Ioniţă Mircea, *Expertizele, mijloc de probă în procesul penal (Expertise, as a Means of Evidence in the Criminal Trial),* Editura Tehnică (Technical Publishing House), Bucharest, 2000, p. 22.
[8] Revista de Economie şi Administraţie Sanitară (Journal of Economics and Sanitary Administration), Issue No. 57-58 (1-2/2011) Publisher TEMCO - Tehno Electro Medical Company Cluj-Napoca, 2011, p. 9.
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[10] Minovici Mina, op.cit. p. 754.
[11] Ibid.

brother. He was first a university professor in Cluj[12] in 1919, then in Bucharest, where he established as first institution *"Salvarea"* (Emergency Rescue Service) and the *"Emergency Hospital"*. He made valuable contributions in the fields of "*congenital heart abnormalities*", "*forensic osteology*", "*the mechanisms of death by hanging*", etc. His post-mortem photography system was awarded the gold medal at the International Social Hygiene Exhibition, held in Rome, in 1912. Then, the field of forensic medicine in Cluj also began with Nicolae Minovici, after 1918, followed by Mihail Kernbach (who would publish, in 1924, *Tehnica autopsiei medico-legale (Forensic Autopsy Technique)*[13].

III. ON MILITARY JUSTICE[14]

The Ministry of War, in the official edition of the *Military Justice Code*, published in 1917, gives us some insights into the establishment of military justice and the amendments made to the Military Justice Code. The Romanian Military Justice Code, in force as of 5th of April 1873, was borrowed from the French, by translating the French Military Justice Code of 1857.

Military justice, as a special court, has been known in all organized states since the times of the Romans. On our territory, before the French code was translated, Alexandru Ioan Cuza had issued a decree on 6th of July 1859, by virtue of which the Romanian military justice was to operate.

The Romanian Military Justice Code of 1873 was remade in 1881, undergoing subsequently, in year 1884, alterations of some of its Articles. Thus, through the law of 25th of March 1881, an additional Title II was established, on the basis of which were created, as attached to all regiments, the Disciplinary Boards, *military courts of first instance, with their competence limited to certain deeds, and concerning only lower-ranking military personnel.* In year 1905, through the law of 12th of April, Disciplinary Boards were also set up as attached to hunter battalions, as well as to the military navy, so that, on 3rd of March 1906, more Articles of the Code could be altered.

On 21st of December 1910, an Additional Title 2 was established, which completely altered the military warfare legislation, by creating the Martial Courts, increasing the competence of military criminal courts, and vesting the Great Commandments with legislative power prerogatives. On 15th March 1917, more changes were made to the Additional Title 2.

At the end of the military hostilities caused by the First World War, through the transition of the army *to a state of peace* in April 1921, the enforcement of the Additional Title 2 and of the entire legislation of the period 1910 to 1917 being abolished, there was a return to the application of military justice as established by the old Code, with the amendments made in year 1900, so that all the Articles of the old Military Justice Code which had governed military justice in terms of peacetime organization, jurisdiction and procedure prior to 1910, became applicable in the united national territory after the completion of the 1918 Union act.

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[12] http://rmj.com.ro/articles/2012.4/RMR_Nr-4_2012_Art-15.pdf, accessed on 10th of October 2018.

[13] Ioanid N., Angelescu B., *Fraţii Minovici (Minovici Brothers),* Editura Ştiinţifică (Scientific Publishing House), Bucharest, 1970.

[14] Chiru D. Vasile, *Dreptul penal militar, infracţiunile (Military Criminal Law, Criminal Offences),* Ancora Publishing House, Bucharest, 1924, pp. 5-6.

CONCLUSION

Medical doctors and officers specializing in the line of police investigation have played an important role in the evolution of forensic science as a science of finding the truth.

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CERTAIN CONSIDERATIONS ON THE "DESTINY" OF THE PRELIMINARY CHAMBER INSTITUTION IN THE CURRENT LEGAL FRAMEWORK

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ABSTRACT

The preliminary chamber is a stage preceding the ruling on the merits of the case. By regulating this institution, the purpose of the Romanian legislator was to eliminate the possibility to raise certain causes of unlawfulness of the criminal prosecution acts carried out during the trial phase. The aim of this scientific research is to highlight certain aspects concerning the purpose of the preliminary chamber procedure, while also militating for its maintenance in the Romanian Criminal Procedure Code.

KEYWORDS: *preliminary chamber, preparatory session, principle of lawfulness, indictment, celerity.*

INTRODUCTION

Regarding the need to regulate the preliminary chamber procedure, the initiator of the current Romanian Criminal Procedure code has shown that[1] *the purpose of this new trial stage is to respond to the lawfulness, celerity and equity requirements in the criminal trial in our country. In the light of the content of the provisions regulating the preliminary chamber institution, through the solutions that the competent judge may order, the purpose was to ensure the celerity of the ruling on the merits of the case, subject to the observance of the lawfulness of the criminal prosecution.*

The preliminary chamber procedure is not, however, completely new in the Romanian criminal trial architecture, considering that the general criminal trial law included such a regulation in the past, referred to as the "preparatory meeting", introduced in the 1936 Criminal Procedure Code through the Decree no. 506/1953.

I. PRELIMINARY CONSIDERATIONS

The enforcement of the current Romanian Criminal Procedure Code brought quite some novelties in the field of the Romanian criminal trial, the preliminary chamber being one

[1] The substantiation note to the New Criminal Procedure Code, according to the Ministry of Justice webpage http://www.just.ro, visited on 23.09.2018.

of the criminal trial institutions that triggered numerous discussions on the correct interpretation and implementation of the law.

This new trial phase is of capital relevance in the economy of the criminal trial as a whole, considering that it rests with the preliminary chamber judge to review and appreciate the whole criminal prosecution case file with regards to the lawfulness, a fact that obviously also directly influences the ruling on the merits of the criminal case, respectively the disclosure of the truth.

According to the considerations in the Substantiation Note to the New Romanian Criminal Procedure Code[2], the need to regulate the preliminary chamber phase in the architecture of the criminal trial in our country was justified by the realities of the contemporary legal environment, characterized by the absence of celerity in the performance of the criminal trials in general, the citizen's low level of trust in the act of justice and the significant social and human costs of the current criminal trial, due to the significant financial and time resources involved.

Hence, in the opinion of the Romanian legislator, the essential issues that the criminal system faced concerned the overloading of the prosecutor's offices and of the law courts, the excessively slow procedures, the unjustified procrastination of the criminal cases and the failure to close the cases because for procedural reasons. Under the circumstances, the legislator intended to respond to the exigencies of lawfulness, celerity and equity of the criminal trial, by regulating the preliminary chamber as an innovating institution, able to create a modern legal framework, susceptible of eliminating the excessive duration of the procedures in the trial stage and to ensure the lawfulness of the summons, as well as of the evidence, so as to remove gaps pursuant to which Romania was convicted by the European Courts of Human Rights for the infringement of the reasonable criminal trial term.

In the light of the Romanian Criminal Procedure Code in force, the preliminary chamber procedure is a new legal institution, regulated by the legislator with the declared purpose of reducing the duration of the criminal trials, through the inclusion under the law of a simplified criminal prosecution lawfulness review procedure[3].

De legelata, the preliminary chamber procedure functions as a filter exclusively focusing on aspects that are related to the lawfulness of the case solved by the prosecutor through the initiation of the court proceedings, a filter that is exerted subsequently to the order on the initiation of the court proceedings and prior to the commencement of the judgement phase. As part of this new trial phase, the preliminary chamber judge operating within the competent court does not proceed to the analysis of the soundness of the criminal charges or the substance of the evidence; thus, the preliminary chamber is distinguished from other institutions previously regulated under the criminal trial law in our country (in this regard, we refer to the "*preparatory session*" stipulated, between 1953 and 1957, in the 1936 Romanian Criminal Procedure Code).

Hence, during the preliminary chamber procedure, the lawfulness of the submitted evidence, of the notification of the law court under the indictment and of the acts undertaken by the criminal prosecution bodies are reviewed. The activity of the competent judge does not concern the merits of the case, because the trial act passed by him does not impact upon the

[2]*Ibidem*

[3] N. Volonciu, A. Vasiliu, R. Gheorghe, *Noul Cod de procedurăpenalăadnotat. Parteaspecială*, "Universul Juridic" Publishing House, Bucharest, 2016, p. 123.

essential elements of the conflict relation: deed, person and guilt; thus, the following trial stage is prepared, i.e., the judgement stage.

The trial activity specific to the preliminary chamber phase falls under the scope of the notion of "review", the use of this term showing that the review is not an instruction (criminal prosecution), but it is not a judgement as such, either[4]. Thus, the preliminary chamber judge observes from outside the criminal case and analyzes the appearances, without focusing on the elements that represent the merits of the case.

The preliminary chamber procedure is a distinct phase of the criminal trial[5], not a trial stage corresponding to the judgement phase[6], during which the preliminary chamber judge has an objective that is exactly determined by the criminal trial law. This opinion, which predominates in the criminal trial doctrine, is also present in the case law of the Constitutional Court[7] and in the one developed at the level of the High Court of Cassation and Justice[8].

To support our opinion, we highlight the fact that the preliminary chamber procedure is separately regulated in Title II of the Special part of the current Criminal Procedure Code, similarly to the systematization of the criminal prosecution phase (Title I), of the judgement phase (Title III) and of the final decision enforcement phase (Title V). Thus, the preliminary chamber is stipulated in the Criminal Procedure Code under art. 342-348, including elements regarding the subject and duration, the preliminary measures, the procedure, the solutions that may be passed by the judge and the means of appeal against the same.

Even if the competent judge cannot proceed to the review of the soundness of the evidence or of the summons or of the integrity of the criminal prosecution, just as he does not rule on the opportunity or sufficiency of the submitted evidence or on the lawfulness and soundness of the legal category associated to the specific charges, it should, however, be noted that his role in the criminal trial is not less important than that of the law court; in this respect, the preliminary chamber judge's orders have a significant impact on the settlement of the criminal trial actions, considering that the evidence is at the heart of any criminal trial[9].

However, even though in addition to the preliminary chamber procedures, the criminal trial law has granted some derivative competencies to the preliminary chamber judge[10], this aspect does not void the preliminary chamber of its trial phase features. In this respect, we highlight that with regards to the derivative proceedings, the legislator has understood to set

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[4] I. Narița, *Camera preliminară – sub spectrulneconstituționalității?*, in "Dreptul" issue 5/2014, p. 173.

[5] In this regard, see: Corina Voicu, Andreea Simona Uzlău, Georgiana Tudor, V. Văduva, *Noul Cod de procedurăpenală. Ghid de aplicarepentrupracticieni*, "Hamangiu" Publishing House, Bucharest, 2014, p. 395; M. Udroiu, *Procedurăpenală.Parteaspecială*, 3rd issue, "C.H. Beck" Publishing House, Bucharest, 2016, p. 148; Anca-Lelia Lorincz, *Dreptprocesual penal*, vol.II, "Universul Juridic" Publishing House, Bucharest, 2016, p. 53

[6] The specialized literature also includes the opinion according to which the preliminary chamber procedure is a trial stage that belongs to the judgement phase, not an autonomous trial phase. In this regard, see: I. Neagu, M. Damaschin, *Tratat de procedurăpenală. Parteaspecială*, "Universul Juridic" Publishing House, Bucharest, 2015, p. 198.

[7] Constitutional Court, Decision no. 641 of 11 November 2014, published with the Official Gazette of Romania no. 887 of 5 December 2014.

[8] Decision no. 18/2014 of the Management College of the High Court of Cassation and Justice, notifying the supreme court with an appeal in the interest of the law (case file no. 6/2014), in M. Udroiu, *op. cit.,* p. 148.

[9] M. Udroiu, *op. cit.,* p. 149.

[10] In this respect, the derivative competencies in the field of the ordering of the special seizure or the full or partial cancellation of a document subsequent to the prosecutor's order as to the non-commencement of the court proceedings, the acknowledgement or denial of the re-opening of the criminal prosecution or the settlement of the complaint against the classification solutions, respectively the verification of the lawfulness and grounded nature of the criminal prosecution waiver order.

own procedural rules, which is why the provisions in art. 342-348 of the Romanian Criminal Code represent the common law with regards to the same.

Another element favoring the retaining of the thesis according to which the preliminary chamber is a distinct trial phase may be encountered in art. 344(3) and in art. 90 of the Romanian Criminal Procedure Code. Thus, the cases in which the legal assistance of the suspect or defendant is mandatory fall under the following categories: (*i*) the cases stipulated under art. 90(a) and (b) of the Criminal Procedure Code, applicable throughout the criminal trial; (*ii*) the case stipulated in art. 90(c) of the Criminal Procedure Code, which only applied during the preliminary chamber and the judgement phases. Hence, the interpretation of these provisions also shows that the preliminary chamber institution was not assimilated by the legislator to the judgement stage.

II. LEGAL PRECEDENTS – BRIEF OVERVIEW

The preliminary chamber institution is not entirely new in the architecture of the Romanian criminal trial, considering that the criminal trial law in our country previously included a similar regulation known as "*preparatory session*", regulated by the 1936 Criminal Procedure Code pursuant to the Decree no. 506/1953; this regulation was subsequently amended by the Law no. 3/1956 and repealed shortly after by the Decree no. 473/1957.

The purpose of the "*preparatory session*" follows from the review of the art. 269 in the text entered in the 1936 Criminal Procedure Code by Decree no. 506/1953: "*The cases submitted by the prosecutor are reviewed as part of a preparatory session, so that only the cases where the evidence is required, sufficient and legally produced reaches the court on the merits, thus allowing the court, while ruling on the merits of the case, to decide whether the deeds are demonstrated and whether the charged party has perpetrated them and can be declared guilty*".

Thus, it may be noticed that the philosophy of the preliminary chamber procedure stipulated in art. 342-348 of the Romanian Criminal Procedure Code in force is different from the preparatory session, regulated by art. 269-279 of the 1936 Criminal Procedure Code. In this respect, as part of this latter procedure, the competent legal body (the law court) was bound to proceed to a review of the grounded nature of the commencement of the court proceedings, of the lawfulness of the criminal prosecution and of the completion thereof. Thus, a full filter was regulated with regards to the criminal prosecution, the court being bound to review not only the lawfulness, but also the grounded nature of the commencement of the court proceedings.

At the same time, according to the provisions in the 1953-1957 Romanian Criminal Procedure Code, the preparatory session procedure was not public, and the both the prosecutor and the charged party could participate in this session (if regarded as necessary by the court). Pursuant to the preparatory session, the court could also order on the return of the case to the prosecutor's office, in order to complete or resume the criminal prosecution or to have the case classified and close the criminal trial (if a cause preventing the initiation or enforcement of the criminal action was retained).

With regards to the competency of the law court as part of the preparatory session, it was quite extended. Thus, the court could rule on all the substantial criminal law and criminal trial law matters, as long as it did not touch the merits of the case, as the judge was not entitled to rule on the guilt or innocence of the charged party.

The preparatory session[11] was appreciated as justified in the criminal trial law, also considering the fact that the legal class could be changed during this procedure; moreover, a classification solution could be ordered, for instance, following the lack of a prior complaint or the intervention of the amnesty.

While it was in force, the "preparatory session" institution raised quite a number of controversies[12]. For example, in the legal practice of the time, the matter of the incompatibility of the participation in the judgement on the merits of the case of the judge who also took part in the preparatory session was raised. In this respect, it should be noted that the former Supreme Tribunal has shown[13] that the participation of the judge in the preparatory session does not trigger a situation of incompatibility with regards to his participation in the session on the merits, considering that upon the conclusion of the preparatory session, the judge does not order on the merits of the case and it cannot be stated that, through the order to commence the court proceedings, the legal body "ruled on the merits of the case", either. Most certainly, this case law solution is not protected from all criticism, since it affects the right to an equitable trial; hence, the judge cannot objectively simply erase from his memory the opinion he made with regards to the charged party's guilt as part of the preparatory session, so as not to affect the innocence presumption.

Please note that the 1968 Criminal Procedure Code also stipulated that the competent legal body (the law court) was also supposed to carry out, subsequent to the commencement of the court proceedings, verifications regarding the competency of the court, the lawfulness of the evidence and of the criminal prosecution acts. However, the preliminary chamber procedure is different from the previous criminal trial regulation in that the new law stipulates a new individual legal body, holding the required competency to proceed to the performance of these activities, of uttermost importance in the economy of the criminal trial. At the same time, the historical review also reveals the establishment, by the legislator, of a trial term for the performance of the performance of the reviews, with legal consequences in case the unlawfulness aspects are not invoked within the legal term.

III. A FEW ASPECTS REGARDING THE PRELIMINARY CHAMBER PROCEDURE

3.1. Competency of the court

During the preliminary chamber procedure, the judge checks, as a priority, its own competency, in the light of the content of the indictment. This first verification implicitly concerns the identification of the court competent to rule on the case in first instance.

Please note that the judge does not analyze whether the charges brought by the prosecutor are real or whether there is sufficient evidence to rule on the guilt, but merely whether the deed stipulated in the court notice act falls under the jurisdiction of the respective court[14].

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[11] D. Roman, *SesiuneaŞtiinţifică a Univ. BabeşBolyai*, Cluj, in "JustiţiaNouă", issue 2/1956, p. 262.

[12] Versavia Brutaru, *Camera preliminară. O nouăinstituţie de dreptprocesual penal. Precedente legislative. Dreptcomparat*, in "*DreptulromânescîncontextulexigenţelorUniuniiEuropene*", Romanian Academy, "Andrei Rădulescu" Legal Research Institute, Hamangiu Publishing House, Bucharest, 2009, p. 599.

[13] Supreme Tribunal, criminal decision no. 324/30.03.1954, in VersaviaBrutaru, *op. cit.*, p. 599.

[14] High Court of Cassation and justice, criminal decision, resolution JCP/C no. 138 of 20.05.2015, in C. Ghigheci, *Cererişiexcepţii de camerăpreliminară. Procedura, regularitateaactului de sesizare, legalitateaactelor de urmărirepenală*, Hamangiu Publishing House, Bucharest, 2017, p. 3.

Hence, considering that the preliminary chamber procedure is initiated after the case is sent to trial pursuant to the notification of the court, the preliminary chamber judge (who is part of the competent court, according to the law, to rule on the case in first instance) will first have to check whether the notified court holds the required jurisdiction[15]. In other words, the preliminary chamber judge must check his own competency (material, territorial and personal); should the judge conclude that he does not hold the required jurisdiction for the performance of the preliminary chamber proceedings, the judge will order the rejection of the case, so that the preliminary chamber procedure is performed by the preliminary chamber judge within the competent court, according to the law[16].

In case there are several defendants, the personal competency does not involve the fulfilment of the terms regarding the capacity of the person for each of them, it being sufficient that only one defendant holds the capacity required under the law, independently of the form of participation that triggers the initiation of the court proceedings.

Subsequently to the point when it set that the court was notified on a deed that triggers its competency, the preliminary chamber judge shall proceed to the review of the material, personal and functional jurisdiction of the criminal prosecution bodies.

3.2. Lawfulness of the notification act

The review of the lawfulness of the court notification involves both the existence of a correct notification (i.e., the notification through the prosecutor's indictment), and the lawfulness of the court notification act (in terms of the observance of the indictment form and substance rules)[17].

According to the law (art. 328 of the Criminal Procedure Code), the indictment, as a court notification act, must be limited to the deed and person envisaged by the criminal prosecution and must adequately comprise the mentions in art. 286(2) of the Criminal Procedure Code. (i.e., all the mentions that an ordinance must comprise), the data on the deed retained against the defendant and its legal classification, the evidence and means of evidence, the legal expenses, the mentions stipulated in art. 330 and art. 331 of the Criminal Procedure Code. (i.e., provisions regarding the preventive measures, the precautionary and, if required, safety measures), the order to commence court proceedings, as well as other mentions required in order to solve the criminal case.

The verification of the lawfulness of the court notification by the preliminary chamber judge is a distinct criminal prosecution act lawfulness review[18]. The validity of the notification act is independent from the lawfulness or the sanctions applied to the criminal prosecution acts, and the unlawfulness of the criminal prosecution acts does not trigger, as such, the unlawfulness of the notification of the court[19].

Thus, the review of the indictment concerns the notification act as such[20], the legal conditions concerning the content of the notification act and the compliance with the

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[15]Anca-Lelia Lorincz, *op. cit.*, p. 54

[16] M. Udroiu, *op. cit.,* p. 150.

[17]Anca-Lelia Lorincz, *op. cit.*, p. 54

[18] M. Udroiu, *op. cit.,* p. 151.

[19] M. Udroiu, Amalia Andone-Bontaş, Georgina Bodoroncea, S. Bogdan, M. Bulancea, D.S. Cherteş, I.P. Chiş, V. Constantinescu, D. Grădinaru, Claudia Jderu, Irina Kuglay, C. Meceanu, I. Nedelcu, LucrețiaPostelnicu, S. Răduleţu, Alexandra Şinc, R. Slăvoiu, Isabelle Tocan, Andra Roxana Trandafir, Mihaela Vasiescu, G. Zlati, *Codul de procedurăpenală. Comentariupearticole*, C.H. Beck Publishing House, Bucharest, 2015, p. 905.

[20] C. Ghigheci, *op. cit.,* p. 6.

provisions in art. 328 of the Criminal Procedure Code being analyzed, not the compliance with the legal norms regulating the criminal prosecution, which is subsequently analyzed.

As part of his review, the preliminary chamber judge is bound to also check the clarity of the criminal charge, the prosecutor being requested to describe the deed in sufficient details, attesting the compliance with the criminal law norm, and allowing for the establishment of the subject of the judgement. In this regard, the supreme court has shown[21] that it is mandatory for the Public Ministry's charges to be lodged in a sufficiently clear manner, so that the defendant is able to understand, even with the support of legal specialists what it is that the criminal prosecution bodies hold against him/her and what the consequences of his/her conduct are from a criminal point of view.

The preliminary chamber judge shall acknowledge the unlawfulness of the notification act that makes it impossible to set the subject and limits of the judgement in case the prosecutor describes the facts in the indictment in an equivocal manner, and the concrete deed held against the defendant cannot be set[22]. Moreover, the competent judge shall also acknowledge the irregularity of the notification act in case it is not possible to identify each of the parties charged for each of the facts presented in the indictment.

At the same time, the preliminary chamber judge must check whether the defendant was sent to trial for the same deeds for which the criminal proceedings were initiated. In this respect, if a criminal charge is lodged subsequently to the criminal prosecution regarding another deed, there is a clear infringement of the defendant's fundamental rights, as he was not granted the possibility to defend himself and submit evidence with regards to the imputed deed after the completion of the criminal prosecution.

Moreover, the competent legal body shall acknowledge the unlawfulness of the notification act if the criminal proceedings were initiated pursuant to the indictment, as well as in case the prosecutor fails to initiate the criminal proceedings for the all crimes for which the initiation of the trial was ordered.

In the situation, frequently encountered in the legal practice, where, pursuant to the indictment, the prosecutor orders both the initiation of the trial and the non-commencement of the court proceedings (we are considering the classification and criminal prosecution waiver solutions), the indictment lawfulness review only concerns the commencement of the court proceedings[23].

3.3. Lawful and faithful submission of evidence

In the light of the provisions in art. 342 of the Criminal Procedure Code, the preliminary chamber judge operating within the competent court, according to the law, proceeds to the review of the lawful and faithful submission of the evidence during the

[21] High Court of Cassation and justice, criminal decision, resolution JCP no. 138/C of 20 May 2015, in C. Ghigheci, *op. cit.,* p. 6.

[22] In this regard, the irregularity of the indictment can also be acknowledged if the prosecutor fails to mention the date of the alleged perpetration of the criminal act.

[23]In this regard, according to an opinion encountered in the legal practice it is believed that if, upon the notification of the court under the indictment, the prosecutor also notifies the chamber judge to acknowledge the waiver of the criminal prosecution, he is to submit distinct notifications for the initiation of the court proceedings, respectively in order to acknowledge the waiver of the criminal prosecution, each such notification being separately registered and randomly distributed amongst the preliminary chamber judges of the court – Anca-Lelia Lorincz, M. Popa, *Despreposibilitateacontinuăriiurmăririipenale la cerereasuspectuluisau a inculpatului*, in Pro Patria Lex issue 2(29)/2016, p. 14

criminal prosecution stage, in order to check the incidence of the sanction of the exclusion of the unlawfully obtained evidence[24].

The elucidation of the aspects concerning the existence of the criminal deed, the identity and guilt of the perpetrators is achieved based on the evidence. As part of the criminal trial, the reality of these facts or circumstances is demonstrated based on the means of evidence.

Even though the notion of "evidence" is frequently used both as evidence, and as means of evidence, these are two different notions[25]. Hence, evidence, the factual elements contributing to the disclosure of the truth during the criminal trial, are submitted with the criminal law bodies through the means of evidence; the means of evidence are the legal routes through which the existence or inexistence of the evidence may be acknowledged or, in other words, they are the source of the evidence[26].

Considering all these aspects, the sanction of the exclusion of the evidence unlawfully obtained stipulated under art. 102 of the Criminal Procedure Code actually concerns the means of evidence. In this respect, it is highlighted that in the preliminary chamber phase the realities or circumstances, as factual elements, cannot be excluded, but, instead, only the unlawful means through which they were acknowledged[27]; at the same time, the exclusion of a means of evidence, which in the criminal prosecution stage, acknowledged a certain circumstance does not prevent the possibility to acknowledge the same through a different means of evidence, administered in compliance with the fundamental principle of lawfulness.

As part of this review, the judge must analyze whether the fundamental law to defense of the person held liable for the perpetration of a crime was observed in the criminal prosecution stage as part of the submission of evidence, or if any of the cases of absolute nullity expressly stipulated under the criminal or criminal trial law applies, or if another infringement of the legal provisions triggering the incidence of the relative nullity sanction can be identified.

As part of the review of the lawfulness of the submission of evidence by the criminal prosecution bodies, he is not entitled to review whether the evidence may lead to the passing of a conviction court order or lack of clarity of the evidence. Thus, the competent judge simply acknowledges whether the evidence is legal or not and whether it has been submitted in compliance with the law[28].

As properly shown in the specialized literature,[29] the judge "sees'' the evidence or the act, reviews it from the outside, as materialized in the documents submitted with the case file and determines the identity or, as applicable, the difference between the steps taken by the criminal prosecution bodies to lodge the evidence or draft the document and the ones stipulated under the law.

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[24] In the light of the provision sin art. 102(3) of the Criminal Procedure Code, the exclusion sanction derives from the sanction of nullity.

[25] A. Crişu, *Dreptprocesual penal. Parteagenerală*, 2nd rev., Hamangiu Publishing House, Bucharest, 2017, p. 279.

[26] Anca-Lelia Lorincz, *Dreptprocesual penal*, vol. I, "Universul Juridic" Publishing House, Bucharest, 2015, p. 157

[27] C. Ghigheci, *Cererişiexcepţii de camerăpreliminară. Legalitateaşiloialitateaadministrăriiprobelor*, Hamangiu Publishing House, Bucharest, 2017, p. 1.

[28] C. Ghigheci, *op. cit.,* pp. 1-2.

[29] I. Nariţa, *op. cit.,* p. 2.

It should be noted that the competent has the important task to analyze both the lawfulness of the submission of evidence by the criminal prosecution bodies, and the lawfulness of the court resolutions pursuant to which the judge of rights and freedoms has consented to, authorized or confirmed various evidence submission procedures, respectively the means of evidence obtained pursuant to the approved evidence submission procedure[30].

3.4. Lawfulness of the trial and procedural acts

Last but not least, the preliminary chamber judge is also bound to check the lawfulness of the trial and procedural acts performed by the criminal prosecution bodies, in order to check the possible incidence of the nullity sanction.

In this respect, the task of the judge is to check whether the trial and procedural acts were carried out in compliance with the law and according to the order of precedence established by the Criminal Prosecution Code, as well as if the mandatory stages of the first trial phase were covered[31].

At the same time, it must be established whether any of the grounds for absolute nullity stipulated under the criminal trial law applies in the case or if there is another infringement of the law with regards to the trial and procedural acts performed in the criminal prosecution stage, triggering the incidence of the relative nullity.

IV. Conclusions

Currently, the "destiny" of the preliminary chamber is deeply uncertain, considering that the Romanian legislator intends to proceed to the repealing of the provisions in art. 342-348 of the Criminal Procedure Code, the duties of the preliminary chamber judge being taken over by the law court as part of a prior review upon the first instance judgement. In this regard, we believe that the preliminary chamber institution should be maintained in the architecture of the criminal trial system in our country, because a criminal prosecution filter is required considering that in many of the criminal cases, the control exerted within the prosecutor's offices by the higher ranking prosecutor has been found to be inefficient.

Moreover, as compared to the provisions in the 1968 Criminal Procedure Code, the current regulation reduces the duration of the criminal trials, the possibility to invoke certain reasons for unlawfulness of the criminal prosecution acts during the judgement phase (as allowed under the previous law) being removed. *De legeferenda*, in order to reduce the duration of the criminal trials, we believe that the legislator should also regulate the possibility of lodging a complaint in the preliminary chamber stage, considering that, following the declaration of the non-constitutionality of certain legal texts regulating the written and non-contradictory nature, the period of time during which the criminal trial is in the preliminary chamber phase has considerably increased.

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SHORT CONSIDERATIONS REGARDING THE MAGISTRATES'LIABILITY IN THE CONTEXT OF THE NEW LEGAL PROVISIONS ON THE REFORM IN JUSTICE

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ABSTRACT

The present study analyzes the magistrates' responsibility, in the light of the old and the new legal regulations, the exercise of the right to recourse action of the state against magistrates in case of judicial errors, and the conditions that must be be met in order to promote this action.

The author identifies possible vulnerabilities of the new regulations on the magistrates' civil liability, vulnerabilities that may affect the magistrates'independence in the exercise of their job duties.

The study is focused on the new amendments of the Law no. 303/2004 on the status of magistrates, brought by Law no. 242/2018, as regards the civil liability of magistrates, includes issues related to the guarantees regarding the enforcement of the principles of independence and impartiality of magistrates, guarantees aimed at maintaining a balance between the magistrates' responsibility and their independence.

KEYWORDS: *magistrates'liability, recourse action, judicial error, bad faith, serious negligence.*

INTRODUCTION

In the exercise of their job duties, judges and prosecutors are not avoided by possible *judicial errors* that have the consequence of harming a person's interests. In this context, in a legal state, there must exist the possibility of *magistrates' liability* for the *judicial errors* committed and, consequently, of repairing the damages caused to injured persons as a result of the magistrate's decision or behavior.

As regards the *magistrates'liability*, both the Constitution of Romania and the Law on the statute of judges and prosecutors provide that magistrates can be held accountable, through the special law being regulated three forms of liability: civil, disciplinary and criminal under the law[1].

[1] Article 94 of Law no. 303/2004 published in the Official Gazette of Romania, Part I, no. 576 from 29 June 2004, as amended and republished on the basis of Art. XII of Title XVII of Law no. 247/2005 regarding the reform in the field of property and justice, as well as some related measures, published in the Official Gazette of Romania, Part I, no. 653 of 22 July 2005, giving the texts a new numbering; https://www.juridice.ro/549626/raspunderea-civila-a-magistratilor-in-contextul-noilor-propuneri-legislative.html -06.01.2019

Criminal liability is that form of legal liability arising out of committing a criminal offense and represents the consequence of disregarding the legal criminal provisions and involves the obligation of a person to be liable before the criminal investigation authorities and then before the court for the offense provided by the criminal law, that he has committed, the obligation to bear the criminal coercive measures provided by the law for committing the offense and the obligation to execute the penalty imposed.

The disciplinary liability is that form of the legal liability arising from the violation of the rules of law that represent a disciplinary deviation, rules designed to determine the magistrate to exercise the powers granted to him with responsibility.

The magistrate may also be disciplinarily liable for certain actions or inactions that are not related to the exercise of his job duties, but which affect the justice prestige[2].

Civil liability of magistrates is a special one, derogating from the common law. Such liability is grounded on the notion of the state guarantee, as representative of the public authority, for damages caused to injured parties as a result of committing certain judicial errors during judicial proceedings.

The civil liability of magistrates has a subsidiary nature and is engaged when the state has covered the damage caused by the *judicial error.*[3]

Judicial errors can be caused not only by the culpable acts of the judge or the prosecutor, but also by other circumstances independent of the judge or prosecutor who has given the prejudicial solution by example: poor legislation and contrary to the European Convention on Human Rights, such as the one in the field of properties refund, the one regarding the unanimity in actions in return, etc.

Furthermore, one shall analyze the civil liability of magistrates in the context of the new legislative amendments, the disciplinary and criminal liability being evoked only in places where they are relevant to the engagement of the civil liability.

I. PRELIMINARY CONSIDERATIONS

The Constitution of Romania states in art. 52 par. (3) the principle of patrimonial liability of the State for damages caused by prosecutors and judges through the *judicial errors* made by them in the case files they have settled[4].

The constituent legislator does not specify the nature of the case files where judicial errors have been made, thus they can include both criminal and civil matters.

The constitutional text is developed in Law no. 303/2004 on the status of judges and prosecutors in Title IV with reference to "*Liability of judges and prosecutors*", art. 94-101, legal text that will be further analyzed from the perspective of the current regulations.

Thus, the new amendments to the Law no. 303/2004 on the status of judges and prosecutors by Law no. 242 from 2018 have created a new framework for carrying out the judicial activity by magistrates, essential amendments were made to the status of the judge and the prosecutor, as well as changes in guaranteeing their independence. Also, new regulations have been

[2] See art 99 of Law no.303/2004, published in the Official Gazzette number 576 from 29 June 2004

[3] See also the old regulation, art 94 and art 96 para 1 and 2 of Law no.303/2004

[4] Article 52 paragraph 3 of the Constitution of Romania, republished, published in the Official Gazette no. 767 of October 31, 2003, states that "the State shall be liable for the damages caused by judicial errors. State liability is established under the law and does not remove the liability of magistrates who have performed their duties in bad faith or serious negligence".

introduced regarding the *magistrates' liability* and the conditions under which this liability can be engaged[5].

In its jurisprudence, the Constitutional Court held that in the process of performing the act of justice, the judge magistrate is not holder of own subjective rights, which abusive exercise may lead to the violation of the rights of other persons, the judge belongs to the judiciary authority, he rules decisions not only in the name of the law, but also in that of the state he represents, state that rules the law to which he is subjected. From this perspective, it is natural that, in the event of commiting a *judicial error*, the person concerned should turn directly against the State and not against the Judge, the latter being merely a representative of the first[6].

The new legislative amendments have regulated the separation of the two carreers, of judges 'and prosecutors' magistrates, the prosecutors magistrates as exponents of the Public Ministry manage the criminal prosecution files, and have a specific responsibility for these activities[7].

II. GENERAL PRINCIPLES

The general principles emerging from the new regulation of the statute of magistrates can be summarized as it follows:
The principle of the magistrates'independence in the exercise of their office;
Principle of state liability for the judicial errors committed by magistrates; The action of the injured party against the State as guarantor of the damage repair;
The principle of repairing the damage caused by magistrates in the exercise of their position in bad faith or serious negligence; State's recourse action in the event of the exercise of the powers.
The balance between the magistrate's independence and his liability under the law in relation to the exercise in good faith of their activity.

2.1 Principle of the magistrates' independence

The independence of the magistrate is the premise of the state of law and the fundamental guarantee of a fair judgment. This implies that no one can intervene in the judgments or the thinking manner of the judge or prosecutor[8].

2.2 Principle of the judges'independence

The independence of judges is regulated by art. 124 par. 3 of the Constitution of Romania, which provides that the judges are independent and are subjected only to the law.
Independence of judges is guaranteed by their statute granted by Law no. 303/2004 on the statute of judges and prosecutors, which regulates the appointment and promotion of magistrates.

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[5] Law no. 242/2018 from 12 October 2018 for amending and completing Law no. 303/2004 on the status of judges and prosecutors published in: Official Gazette no. 868 from 15 October 2018.

[6] Paragraph 31 of the Constitutional Court Decision no. 263 from 23 April 2015 on the exception of unconstitutionality of the provisions of art. 96 of the Law no. 303/2004 on the status of judges and prosecutors published in the Official Gazette no. 415 from 11 June 2015.

[7] Art. 1 of the Law no.242 / 2018 provides that "(2) The judge's career is separated from the career of the prosecutor, the judges being unable to interfere in the career of prosecutors and the prosecutors in the judges'carreer."

[8]https://www.juridice.ro/38387/independenta-si-impartialitatea-magistratului-legislatie-doctrina-jurisprudenta.html 17.10.2018.

Another guarantee given to judges magistrates which ensure their independence is given by their *security of tenure*. This implies that any advancement or transfer can only be done with the consent of the judges. The security of tenure is regulated as principle in the Constitution of Romania[9].

Through the new regulation, referring to the independence of the judge, the legislator emphasized their full freedom in settling the cases brought to justice with observing the equality of arms and the procedural rights of the parties[10].

2.3. Principle of prosecutors' independence

A judiciary system based on observing the principles of the state of law needs - in addition to the guarantees given to judges - strong, independent and impartial prosecutors willing to start an investigation and to prosecute suspicious facts and persons, regardless of the status or level of influence of these persons in the society. The authority initiating the law enforcement in the criminal justice on behalf of the society and of the public interest should enjoy a type of independence, similar to that of judges[11].

In the context of the constitutional rules and of the new regulations, respectively of the provisions listed by Article 132 of the Constitution of Romania and by Article 3 para. 1 of the Law no. 304/2004 on judicial organization as amended by Law no. 242/2018 "*Prosecutors carry out their activity according to the principles of legality, impartiality and hierarchical control, under the authority of the Minister of Justice*."

According to this principle, the Public Ministry is conceived as a pyramidal system where the prosecutors in each prosecutor's office are subordinated to the head of that prosecutor's office and the head of a prosecutor's office is subordinated to the head of the hierarchically superior prosecutor's office[12].

Prosecutors are independent in ruling solutions, under the conditions provided by art. 64 of the Law no. 304/2004 on judicial organization, republished, as amended and completed. In the new regulation[13], the solutions taken by the prosecutor can be invalidated in a reasoned manner by the hierarchically superior prosecutor, when they are considered as *illegal or groundless*, towards the old regulation when the prosecutor's solutions could have been invalidated only due to illegality reasons.

This new legislative approach can be perceived as an interference with the independence of the prosecutor in the exercise of his duties in the current context, since, in the absence of a

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[9] Art. 125 para. (1) of the Constitution of Romania provides that "Judges appointed by the President of Romania are irremovable, under the law"

[10] Art. 2 of the Law no. 242/2018, which states that "Judges are independent and are subject only to the law. Judges must be impartial, having full freedom in settling cases brought to justice, in accordance with the law and impartially, with due respect for arms equality and for the procedural rights of the parties. Judges must take decisions without any restrictions, influences, pressures, threats or interventions, either direct or indirect, from any authority, or even from judicial authorities. Decisions ruled in appeal do not fall under these restrictions. The purpose of the judges' independence also includes ensuring that every person has the fundamental right to have his case heard on an equitable basis, based solely on law enforcement."

[11] RECJ Report 2014-2016 published on the website https://www.csm1909.ro/ViewFile.ashx?guid=1c222af9-7731-45f9-b6a3-88b6630c7e9c|InfoCSM -17.10.2018.

[12] https://www.juridice.ro/38387/independenta-si-impartialitatea-magistratului-legislatie-doctrina-jurisprudenta.html 17.10.2018.

[13] Art. 64 paragraph 3 of Law no.304 / 2004 as amended by Law no. 207/2018.

clarification in law, of the term "groundless", increases the risk of interference in the individual case files of the prosecutors[14].

A guarantee of the prosecutor' s independence is also the fact that the prosecutors appointed by the President of Romania benefit from stability [15].

III. MAGISTRATES' LIABILITY: FRAMEWORK AND REGULATION – INTERNAL LEGISLATION

As stated above, the Constitution of Romania, by art. 52 establishes the patrimonial responsibility of the state for judicial errors. This liability is governed by law and does not remove *the liability of magistrates* who have performed their duties in *bad faith or serious negligence*.

According to the provisions of art. 94 of Law 303/2004, judges and prosecutors are liable civilly, disciplinarily and criminally according to the law.

From the above mentioned legal text result three types of magistrates'liability generated by the exercise of their specific position, namely: civil liability, disciplinary liability and criminal liability.

With regard to the criminal or disciplinary liability, any person concerned has the complete freedom to file an action against the judge / prosecutor who can take either the form of a criminal complaint or the form of a referral addressed to the Judicial Inspection within the Superior Council of Magistracy, under art. 45 par. (2) of the Law no. 317/2004.

In criminal matter, the right of the damaged party to the repair of damages caused by judicial errors committed in criminal proceedings is currently governed by Art. 538 par. (1) and (2) of the Criminal Procedure Code. At the same time, art. 539 par. (1) of the Criminal Procedure Code provides that is entitled to the repair of the damage also the person who was unlawfully deprived of freedom during the criminal proceedings"[16].

In disciplinary matter, the new regulation has broadened the scope of disciplinary deviations, among which we mention the failure to draft or sign the judgments or the judicial documents of the prosecutor, due to attributable reasons, within the deadlines provided by law. The system of sanctions for commiting certain disciplinary deviations has also been tightened, including the sanction of professional downgrading[17].

3.1. Principle of the state liability for judicial errors committed by magistrates; the action of the damaged party against the State as guarantor for the damage repair;

Through the new regulation of magistrates' liability the legislator set out the conditions under which the state is responsible for judicial errors, defined the notion of *judicial error*, the notion of *bad faith* and of *serious negligence*, as well as the conditions for exercising the *recourse action* against magistrates[18].

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[14] Preliminary Opinion no. 924/2018 of the European Commission for Democracy through Law (Venice Commission)

[15] Article 4 of Law No 242/2018 amending Law 303/2004 on the status of magistrates.

[16] Section 208 of the Constitutional Court Decision no. 45/2018.

[17] Articles 99 and 100 of Law no. 303/2004 amended by Law no.242 / 2018.

[18] Art. 151 of Law no. 242/2018 amending Law no. 303/2004 provides that "(3) There is a legal error when: a) during a trial there was ruled to carry out procedural acts with the obvious violation of the substantive and procedural legal provisions, which seriously violated the rights, freedoms and legitimate interests, causing a damage that could not be remedied by an ordinary or extraordinary remedy; (b) a final judgment which is obviously contrary to the law or to the factual situation resulting from the evidence managed, which seriously

In the new vision of the law, the civil liability of the state for *judicial error* is no longer linked and is no longer prior conditioned by the engagement of the criminal or disciplinary liability of the magistrate through a final judgment, as previously regulated, but strictly by the idea of *judicial error*.

From the wording of the new normative text results that the state will compensate the damaged persons if a *judicial error* has occurred, irrespective of the conduct of the magistrate concerned; in practice, the civil liability of the state is removed from the sphere of criminal / disciplinary liability of the judge / prosecutor[19].

As such, from the provisions of Art. 96 par. 3 of the Law no. 303/2004 result that, in the event of a judicial error, the damaged party may file an action against the State, represented by the Ministry of Public Finances, for the damage repair, action which falls under the jurisdiction of the county court in which jurisdiction the plaintiff is domiciled.

This new regulation, even if it fully satisfies the alleged victim of a judicial error, has unimaginable consequences in the current legal reality. Thus, it is known that one of the parties of the trial loses, and the other is satisfied with the decision taken by the magistrate.

The new regulation also opens the possibility for the party who lost the trial to invoke an alleged *judicial error* committed by the magistrate in the settlement of his case and to file an action against the state under Art. 96 par. 5 of the Law no. 303/2004, for the recovery of the presumed damage, which, in the author's opinion, constitutes an appeal to appeal.

In the absence of some concrete guarantees, such as the decrease of the state's right to dispose in the proceedings filed by the damaged person, namely the limitation of the State's possibility to meet the plantiff's claims, and the imposition of the court's obligation to effectively verify the existence of the judicial error, since, after the final judgment by which the error was found and the indemnities have been settled in favor of the plaintiff, the State is obliged to file the recourse action against the magistrate who committed the error.

Another negative aspect of this regulation is the fact the magistrate who ruled the solution which determined the alleged judicial error, although is not a party in the action filed by the damaged person, he must follow the existence of these actions and to intervene in the trial in order to prevent a possible recourse actio[20].

Or, as provided by Art. 53 of Opinion 3 of the Consultative Council of European Judges CCJE, "the judge does not have to work under the threat of a pecuniary punishment, even less of one with imprisonment, which presence may, even subconsciously, affect his judgment”[21].

3.2. Principle of repairing the damage caused by magistrates in the exercise of their office in bad faith or serious negligence; Recourse action of the state against magistrates.

In accordance with the provisions of art. 96 paragraph 7-9 of the Law no. 303/2004 amended, (7) within two months of the notification of the final decision ruled in the action provided by para. (6), the Ministry of Public Finances **shall notify** the Judicial Inspection in order to verify *whether the judicial error was caused by the judge or prosecutor* as a result of the exercise of their position *in bad faith or serious negligence*, according to the procedure provided by Art. 74 ^ 1 of the Law no. 317/2004, republished, as subsequently amended.

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affects the legitimate rights, freedoms and interests of the person, which could not be remedied by a ordinary or extraordinary appeal.(…)”.

[19] Section 215 of the Constitutional Court Decision no. 45/2018.

[20] Section 221 of the Constitutional Court Decision no. 45/2018.

[21] https://www.csm1909.ro/303/3937/Consiliul-Consultativ-al-Judec%C4%83torilor-Europeni-(CCJE).

(8) The State, through the Ministry of Public Finances, **shall file** recourse action against the judge or the prosecutor if, following the consultative report of the Judicial Inspection provided by par. (7) and its own assessment, considers that the *judicial error* was caused as a result of the exercise by the judge or prosecutor of their office in bad faith or serious negligence. (....) ".

As it can be seen, through the new regulation, the State, through the Ministry of Public Finances, is obliged to exercise the recourse action towards the previous regulation when the recourse action was optional.

The above mentioned legal text provides the following conditions for exercising the recourse action against the magistrate:

1. The existence of a final court judgment ruled in the action provided by paragraph 3 of Art. 96 of the Law no. 303/2004 amended, respectively the action of the damaged party filed against the State.

2. the existence of *bad faith or serious negligence* in committing the *judicial error*, ascertained by the Judicial Inspection, or considered by the Ministry of Public Finances following its own assessment;

3. filing the recourse action should be made within 6 months from the date of notifying the report of the Judicial Inspection.

As regards its own assessment that must be made by the Ministry of Public Finances regarding the existence of *bad faith or serious negligence* in committing the *judicial error*, the Constitutional Court has held that, through this assessment, it is avoided the mechanical filing of recourse actions whenever it was found a judicial error even in the absence of *bad faith or serious negligence* of the judge / prosecutor[22].

Regarding the appeal that may be filed against the judgment ruled in the state's action filed against the magistrate, the new regulation provided the second appeal to the appropriate section of the High Court of Cassation and Justice[23].

The new regulation establishes the obligation for the Superior Council of Magistracy to lay down the conditions, deadlines and procedures for the compulsory professional insurance of judges and prosecutors within 6 months from the entry into force of the law[24].

The legislator provided that the insurance would be fully covered by the judge or prosecutor and its absence could not delay, diminish or remove the civil liability of the judge or prosecutor for the *judicial error* caused by the exercise of the office in *bad faith or serious negligence.*

I consider that the professional risk insurance should take the form of a collective insurance concluded by the Superior Council of Magistracy as a guarantor of the independence of the magistrates, insurance borne by the state in relation to the number of cases completed through the number of final court decisions admitted, through which was admitted the recourse action for a period of one year, or the average for a period of 5 years, given that the magistrates are exponents of the judiciary power and do not act in their own name.

[22] Decision of the Constitutional Court no. 263 from 23 April 2015.
[23] Art. 96 para 10 of Law no.303/2018 amended by Law no..242/2018.
[24] Art. 96 para 11 of Law no.303/2018 amended by Law no..242/2018.

Moreover, the obligation of the magistrate to conclude and pay a professional risk insurance is likely to lead to an indirect decrease in his salary incomes, without any grounded reason, and without knowing the limit of his incomes, which is in contradiction with the provisions of Art. 74 par. 2 of Law 303/2004, legal text providing that "(2) The salary rights of judges and prosecutors can be decreased or suspended only in the cases provided by the present law".

IV. CONCLUSIONS

Legislative changes regulating the magistrates'liability, civil, disciplinary and criminal, and cases where this liability operates, and the procedure to be followed, do not provide all the procedural guarantees in order to avoid affecting the independence of magistrates.

In this respect, we point out that the action filed against the state by the person damaged through a *judicial error* is no longer conditional on the existence of a final court judgment establishing the *judicial error* and the possibility that the State through the Ministry of Public Finances to be able to satisfy the plaintiff's claims and thus create the premise of the recourse action without a court to analyze in fact the existence of the judicial error, since in the recourse action is verified only the existence of *bad faith or serious negligence* of the magistrate in committing the judicial error, and not its existence.

As such, in this situation it is necessary to provide certain procedural guarantees, such as the limitation of the principle of availability as regards the possibility for the State to satisfy the claims of the plaintiff, victim of a possible *judicial error* in the action filed by him against the State. At the same time, I consider that the professional risk insurance should have taken the form of a collective insurance concluded by the Superior Council of Magistracy as a guarantor of the independence of the magistrates, with the arguments set out above.

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THE ISSUE OF TESTIMONY OF BAD FAITH IN THE CRIMINAL TRIAL

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SUMMARY

The quality of the witness takes precedence over the status of expert or lawyer, mediator or representative of one of the parties or of a main procedural subject, regarding the facts and factual circumstances that the person knew before acquiring this quality. Persons who are in a situation that reasonably doubts their ability to witness are only heard when the judiciary finds that the person is capable of consciously telling facts and factual circumstances in line with reality. In order to decide on a person's ability to be a witness, the judicial body shall, upon request or ex officio, have any necessary examination, by the means provided by law. The witness is heard on facts or factual circumstances that are the subject of the probation in the case in which he was quoted. Witness hearing can be extended to all circumstances necessary to verify its credibility

KEYWORDS; *witness, judiciary, statements, perception, sensations, circumstances, good faith, etc.*

1. ELEMENTS OF TESTIMONY IN RELATION TO THE PERCEPTION OF FACTS AND FACTUAL CIRCUMSTANCES

The initial moment of the testimony as an act of knowledge is the perceptive moment by which the witness becomes aware of the fact that he will later report to the criminal investigation bodies.[1]They can be heard as a witness in accordance with the provisions of art. 114 of the Code of Criminal Procedure any person who is aware of factual facts constituting evidence in the criminal case. Any person cited as a witness has the following obligations:

a) to appear before the judicial body that cited it at the place, day and hour appearing in the summons; b) to take an oath or a solemn declaration before the court;

c) to tell the truth.

I can not object to the witness statement those facts or circumstances whose secrecy or confidentiality may be opposed by law to the judicial bodies. However, they may be the subject of a witness statement if the competent authority or person entitled to do so or when there is another legal cause to remove the obligation of secrecy or confidentiality.

Have the right to refuse to be heard as a witness by the following persons: a) the spouse, ascendants and descendants in direct line, as well as the brothers and sisters of the suspect or defendant; b) persons who have been the spouse or suspect's spouse. During

[1] E. Stancu, „*Tratat de criminalistică*\ Ed. Actami, Bucureşti 200 p. 433.

criminal prosecution and trial, the criminal prosecution body and the president of the panel ask the witness to take the oath or the solemn declaration. Each witness is heard separately and without the presence of other witnesses. The witness is left to declare everything he knows about the facts or circumstances of fact for which he has been proposed, then he can address questions. Witnesses can not ask questions about political, ideological or religious choices, or other personal and family circumstances, unless they are strictly necessary to learn the truth in question or to verify the credibility of the witness. The hearing of the minor witness aged up to 14 years takes place in the presence of one of the parents, the guardian or the person or the representative of the institution to whom the minor is entrusted to raise and educate.

The witness comes in contact with the objects and phenomena of the surrounding world through his sense organs. Objects and phenomena of the material world acting on the sense organs give rise to psychic processes known as sensations and perceptions.

Feeling is the simplest form of sensory reflection of the isolated features of objects or people who act directly on the sense organs.

Perception is the mental process of reflecting the objects and phenomena of the surrounding world in the complexity of their attributes, a process that leads to awareness, to the identification of objects and phenomena. Perception occurs as a result of the action of objects and phenomena of the world around human analyzers.

The analyzer is a system of the human body made up of sensory organs, the nervous ways of transmitting information and the corresponding nervous centers on the cerebral cortex.

The faithful reflection of the fact of the event in the testimony of the witness is conditional at the first moment of its formation by the state of the analyzer's witnesses.

Possible pathological influences on their component parts will generate errors and inaccuracies in the testimony of the witness in question.

A. Elements of testimony based on visual reception

Most often testimonies are based on the activity of the visual analyzer. The testimony the source of which is the visual sensation is the standard testimony as in every criminal case it is felt the necessity of the most faithful reconstruction of the configuration of the place as a point in the space in which an offense was committed, the delimitation of it, the localization of objects in space related to the perpetration of the offense, to the mentioning of spatial relations between objects, between objects and persons whose presence at the place of committing the crime is in one way or another related to its commission.

The main visual elements on which the witness is called are the spatial and chromatic attributes of objects and persons in the field of deed.

The decisive objective factor that gives fullness and fidelity to the visual testimony is the intensity of light. This differs according to the moment of the day when the facts were perceived:

- during the day (natural light under diurnal vision);
- at dawn or dusk (twilight light);
- during night time (natural night light or artificial light).

And the perception of the chromatic attributes of objects is directly dependent on the lighting conditions existing at the moment of perception, because as the facts are received

during the day, we perceive them colorfully, in bitonal twilight light, and in the uni-tonal night conditions.[2]

Color perception can be deformed if the control potential suffers from one of the following conditions[3]

- acromatopsia, the inability of the human eye to distinguish other colors than black and white;
- discromatopy, the inability of human eye to distinguish certain colors well (sensitivity only for certain colors);
- daltonism, the inability of the human eye to distinguish between red and green.

The judiciary can estimate, using very simple evidence, whether the witness suffers from any of the aforementioned illnesses, any of these chromosome vices deforming the reality and the probative force of the testimony.

Because the image of the shape of the objects perceived by the witnesses does not suffer alterations, verbal misstatements, it is ideal that they reproduce it figuratively by drawing or modeling; in reality, however, few are able to reproduce verbally by drawing the objects perceived in the field of deed.[4]

B. Elements of testimony based on hearing reception

In witnesses' testimony there is the requirement of the criminal investigation bodies to play the sounds, words, phrases, possibly the perpetrator's discussion with other persons or with the victim, which the witness perceived voluntarily or involuntarily in the field of deed.

The witness who perceives words, sentences, phrases, is called upon to recognize, identify on the basis of voice and speech the person from whom these voices are emanating. This hypothesis is verified when the identity of the person who emanates the words is unknown.

Voice, the basic element through which man can communicate his ideas and feelings, characterizes man as an individual, as a personality, by virtue of his anatomical-physiological, age and gender particularities.

In all the above-mentioned situations, both the hearing and especially the assessment of the testimony will have to take into account the real possibilities of the perceiver to understand the content of a conversation, determined by the degree of complexity of the conversation, the degree of culture, the professional formation of the witness.[5] An important element in the auditory witness is to determine the distance to which the sound source is located. Appreciation of the distance to which a sound phenomenon has occurred, based on its intensity, may give rise to erroneous assessments. The atmospheric phenomena such as wind, mist, snow, blizzards, etc. play an important role in the correct assessment of the sound source distance.

The echo is caused by the reflection of the sound waves, so that after a certain period of time, a sound similar to the initial sound is perceived to give the impression of the perceiver that comes from another direction.

C. The elements of the testimony based on the skin reception

At the skin level there are four categories of sensations: tactile (touch, pressure), hot, cold, pain (algic) sensations.

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[2] E. Stancu, *Tratat de criminalistică* Ed. Actami, Bucureşti 200 p. 434

[3] Ioan Micle Teoria,tactica şi practica poliţienească,vol.II. Editura Universităţii Aurel Vlaicu Arad 2009 p.25

[4] Gh. Alecu, „*Criminalistică*Ed. Ovidius University Press, Constanţa, 2004, p. 549.

[5] I. Mircea. ..*Criminalistică*Ed. Lumina Lex. Bucureşti 2001, p. 273.

[6]1. Doltu, *„JProbele şi mijloacele de probă...",* Ed Dobrogea, Constanţa, 1997, p. 238.

Under certain conditions, any of these sensations[6] may play a role in forming the psychological process of the testimony, either as a result of their concurrent action or acting independently.

From the skin sensation category, the most important role in testimonies is held by tactile sensations.

Tactile sensations are the result of skin receptor stimulation by distortion or distortion of the skin as a pressure effect. The intensity of the tactile sensation is determined nditions: of two factors: the rate of deformation of the skin and the variation in pressure exerted on it. By combining the two factors, the feelings that provide information about the attributes of the surrounding objects are formed: strength, hardness, asperity, smoothness, relief, contour, by touch with the moving hand.

For visually impaired people, tactile sensitivity is highly developed as a result of the compensatory function of intact analyzers and can be a valuable help in the content of the testimony.

Thermal feelings (hot and cold) and pain are considered to be the most primitive sensations of man. They have an important role in the testimonies of witnesses who have been victims of accidents or railroad catastrophes, traffic accidents, explosions, etc.

Elements of testimony based on olfactory receptions

Olfactory sensations are the result of stimulation of olfactory receptors located in the upper part of the nasal cavity, by gaseous or vaporous substances. Independently or in conjunction with other sensations can be a source of testimony.

Olfactory sensations are important in a series of crimes such as:

- fire accidents, where the olfactory analyzer could distinguish the characteristic odor of the fire itself from the odor of the flammable substance that caused it;
- the odor of certain toxic substances;
- the medicinal odor of some substances, etc. who served or were intended to serve a crime.

The information obtained by the activity of the olfactory analyzer is inconsistent and impalpable, they can not locate the stimuli in space and can not contribute to the identification of objects or persons[7], the more so since the smells are subjectively perceived by each person: what for some can make a smell pleasant, for another, it can be a disagreeable odor

D. Elements of testimony based on taste receptions

Gustative sensations are produced by the chemical properties of dissolved substances in saliva or aqueous solution that stimulate the taste buds especially in the lingual papillae.

The four sensations of human taste are: sweet, bitter, sour and salty and they are due to the receptors distributed on the lingual surface (the taste buds).

Although less used in testimonies due to the limited number of situations in which they can intervene as well as the low degree of certainty they offer, the usefulness of these testimonies is present in cases of poisoning, intentional or deliberate food intoxication, etc.

In cases of poisoning, a distinction is made between the situation in which poisoning is the activity by which the objective side of the offense is carried out or it is the means by which

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[7] C. Panghe, C. Dumitrescu, *portretul vorbit",* Ed. M.I., Bucureşti, 1974, p. 154.
[8] E. Stancu, op. cit., p. 432.
[9]C. Beccaria, *„J)espre infracţiuni şi pedepse",* Ed. Rosetti, Bucureşti, 2001, p. 61.

suicide or suicide attempts are carried out, or if such activity has resulted in the death of the person.

The testimonies of the witnesses who perceived the properties of the ingested substances through the organ of the taste, must be carefully examined, because this information may at best regard the nature of the sensation, if it is similar to a substance known to the witness, highly subjective elements.[8]

2. THE PROBLEM OF BAD FAITH TESTIMONY

"The credibility of a testimony must be reduced in proportion to the hatred, the friendship, or the close relationship that exists between the witness and the guilty. [...][9] The credibility of a witness diminishes sensibly with the increase in the gravity of an offense or the improbability of the circumstances [...]. "The testimony raises from the beginning the problem of its infidelity, the opposition of the lie with the truth. is a perverse, malignant psychopath, fantastic as some children or paraphysics, expansive, imaginative, or purely pathological in the delusional psychosis There are also secondary forms of lies, which are done through excessive caution, through protector and opposition reactions, by group factors (where the subject is allowed to plead falsehood in order to find the truth) as well as for the purpose of revalorizing a negative situations previously experienced.[10] Actions or omissions that characterize the objective side of these crimes in the fundamental value of the criminal process, the truth that is necessary for the accomplishment of justice. Under the subjective aspect, actions or omissions lie at the psychological level of simulation in positive or negative forms (concealment of truth through omission).[11] Article 273 of the Penal Code defines the offense of false witness as the act of the witness who, a criminal, civil, or any other proceedings in which witnesses are heard, makes false allegations, or does not say all they know about the essential facts or circumstances about which they are being asked. The author is not punished if he withdraws the testimony in the cases criminal proceedings, prior to the arrest or arrest of criminal proceedings or other causes of the defendant, before a decision has been pronounced or another solution has been given as a result of the false witness, the witness withdraws testimony. It is obvious that the tolerance of criminal law is based on the psychological processes that take place in the consciousness who has made a liar and who, judging the consequences of his testimony, decides to declare the truth. Thus, from a psychological perspective, it is useful to know the content and the quality of the assessments made by a false witness in the period elapsing between the official testimony of the false testimony and its withdrawal.[12]

Usually, withdrawal of the false testimony is provoked, being a voluntary initiative in rare cases. It is clear from the practice of the judicial authorities in this matter that the promotion of the withdrawal of the false witness is the result of some procedural activities of analysis and evaluation of the incriminated testimony, which reveals logical conclusions that

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[10] Gh. Scripcaru, P. Boişteanu ş.a., *psihiatrie medico-legală",* Ed. Polirom, Bucureşti, 2002, p. 254.
[11]N. Mitrofan, V. Zdrenghea, T. Butoi, op. cit., p. 171
[12] N. Mitrofan, V. Zdrenghea, T. Butoi, op. cit., p. 172.
[13] N. Mitrofan, V. Zdrenghea, T. Butoi, op. cit., p. 172
14N .Mitrofan, V. Zdrenghea, T. Butoi, op. cit., p. 173.

the testimony can not be credited, being suspected of being untrue. In the course of the investigations, however, it can be established that the testimony, albeit untrue, is not, however, false, the lack of truth being the result of some perceptual or error deficiencies, the proof being removed with proper motivation. Thus, the witness who has put down a liar is given a psychological chance to reflect on the consequences of his testimony.[13]

The concept of "essential circumstances" (because the subject of the false witness is constituted by these "essential circumstances" which the witness has not declared or made untrue statements about them) is not defined by the Criminal Code, which indicates from that they will be established in relation to the subject of each testimony.

For example, in the case of a driver's murder, if a witness is heard about the speed of the vehicle involved in relation to the traffic signs at the crime scene, and will report a liar about the real speed of the vehicle on which she knew herself in the cabin with the driver, while the technical expertise found another speed, the essential circumstance in question is that of the speed of traffic at the time of the accident, because this is the fault of the driver.[14] Requires the essential circumstances to be analyzed in a concrete way, because the psychological element of the intention to declare a liar bears upon an essential circumstance on which the existence or non-existence of culpability depends.[15]

3. CRITERIA FOR VERIFYING THE VERACITY OF THE JUDICIAL WITNESS SUSPECTED OF BEING FAITHFUL

Even though these criteria have a certain degree of relativity, they need attention in order to fulfill the duty of the judicial authorities to verify testimonies about which suspicions of insincerity and fidelity arise. They are combined and are:[16]

a. Criterion of source of testimony.

The legal and psychological literature, but especially the judicial practice, taking into account the relationships between the fact that the facts are brought to the attention of the judicial bodies and the source, the starting point of the testimony, imposed the distinction between the direct or immediate testimony (in which the witness was present in the context of producing the facts and perceived by the appropriate stimuli the event, its development in the time and space), the mediated or mediated testimony (in which the witness indirectly provides information not on facts or circumstances perceived from the original source, a mediated source, consisting of other persons who perceived the circumstances of the offense or the perpetrator) and the "hearing" or the public rumor (in which the witness refers to the facts heard, to rumors of a notoriety, but whose original source is imprecise, indeterminate parastas).

Taking into account these three categories, the testimony from the "public rumor" appears to be the most unsafe, given that between the original source and the one through which the facts come to the knowledge of the judicial organs, a whole set of links is inserted, the number of which is The facts transmitted from one person to another are subjected to a pronounced process of alteration, denaturation and transformation, often such a testimony far from the true configuration of the facts, going as far as their total distortion.

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[15] N .Mitrofan, V. Zdrenghea, T. Butoi, op. cit., p. 173.
16Ibidem, pp. 174 - 182 // A. Ciopraga, op. cit., pp. 206 - 209.

From the point of view of the testimony verification, the information from a source whose origin can not be individualized, from an individualized but indirect source, and finally from the original source, can not be located in the same plane under the aspect probative force. From this point of view, it is imperative to determine unequivocally the source from which the testimony comes. Once the primary source has been identified, the foundations for the verification of the deposition are set up by the confrontation process of the information from two sources, where the coincidence of the facts as a whole or the coincidence of only irrelevant elements can be noticed.

Judicial logic demonstrates that the basis of contradictions is either error or reluctance, the appreciation of such testimonies presupposing, above all, the identification of the part of the inaccuracy, and then determining whether it is due to a voluntary cause (rea- faith) or involuntary (error). For these reasons it is imperative that the appraisal of a testimony be based on two fundamental principles, namely, the sincerity of the witness and the fidelity of the perception and accuracy of the reproduction of the data concerning the perpetrator and the circumstances of the act.

b. Criterion of the position of the witness in relation to the parts of the process.

The relationship between the witness and the other participants in the trial must be clarified in the subjective report of the witness against the accused or defendant, the injured party, the civil party, the civilly responsible party based on kinship, friendship or affection, or feelings of sympathy, antipathy, revenge, fear, etc.).

Strong emotional ties (between husbands, mothers, and children) deform from the point of view of objectivity the real data. For example, it is not surprising from a psychological point of view that the mother who loves her child excessively does not notice moral defects, justifying her behavior in any situation. In the parents' testimony, the son being investigated for causing a scandal in public, is described as a humorous, humorous child, and the committed acts are considered simple childhood or obsolete jokes. In fact, in all situations, whether it is triggered by noble generosities, whether it is determined by inferior mobs, when the testimony is based on feelings, reality is perceived transfigured due to the change in the representations of the persons to whom the witness is emotionally bound.

c. Criterion of the socio-moral and psychotherapeutic condition.

The practitioners imposed a pragmatic vision on the witness, being treated not as an abstract element, but as belonging to a certain social environment that left its mark on his moral formation, giving him a moral physiognomy and a certain social status. From this point of view, it is good to know whether the witness is morally inclined towards the dominance of sincerity, honesty, fairness, modesty, generosity or selfishness, cowardice, dishonesty, etc.

Thus, the reputation, in the sense of the witness in the social environment to which it belongs, attitudes, beliefs, ideals are essential elements of appreciating the credibility of the witness.

Judicial psychology has attempted to highlight the extent to which the affiliation of a witness to a psychological type affects favorably or unfavorably perception, memory and reproduction, and to what extent the veracity of the testimony is trivial to psychological typologies, thus establishing two distinct categories of witnesses: the objective type which characterizes the witness with precision, a good observer, describing things according to their objective external attributes, not concerned with the significance of the stage at which they are assisting and in which they are not emotionally involved, the witness who correctly records and faithfully memorizes the facts perceived by their own senses) subjectively (who is

concerned about the meanings and meanings of the scenes he assists, and gives him interpretive content through his value judgments, emitted under the influence of a maximum intensity emotion).

d) The criterion of the witness's interest in the crime.

The way in which the perpetrator of a crime is known to occur as a witness may provide significant evidence for the assessment of the position to be taken and the veracity of the deposition as such[17].

In this respect, if the witness is a person who is wholly random in the field of deeds or who is concerned about other problems in relation to the perceived event, it is possible that a number of aspects are superficially fixed in the field of attention. If, on the contrary, the witness was interested in that circumstance, it is hard to assume that he will escape some of what will happen.

In other words, the claims of the judicial body regarding the veracity and extent of data perceived by the witness will be different, depending on the degree to which they were at the periphery of their center of interest or, on the contrary, even in the sphere of concern of the witness.

e) Good faith in the assessment of the testimony.

Due to the immediate contact of the magistrate with the participants in the judicial process, he may and is required to interpret the data given to him by the conduct, the physiognomy and the external reactions of those with whom he is in psychological intercommunication in the judicial investigation. These interpretations will provide him with the necessary data on the thoughts and feelings that witnesses try when he denies or asserts something, all the more so since the contact of the witness with the judiciary takes place under a relatively stressful, atmospheric atmosphere.

The attempt of voluntary substitution of real deposition with imaginary or false deposition is always accompanied by reflexive physiological changes that automatically trigger and escape the censorship possibilities of the subject.

Physiological indicators of inappropriate emotional behavior are: increased heart rate and blood pressure, changes in tissue temperature, electrical changes in the skin, increased activity of sweat glands, change of breathing rate, change of phonation etc.

At the level of physiognomy, the careful investigator can capture tribute changes to the apparent behavior of emotional stress, change of mimic, facial expression, pallor or sudden redness, tremor of hands or feet, voice changes due to salivation and inconsistency in breathing.

The specialized psychological literature recommends the magistrate and the judiciary to address methodical questions in order to appreciate the witness's ability to record, memorize and render faithfully the perceived facts. However, when the magistrate remains uncertain about the verifiable ones, and witness testimony is decisive in the matter, he will have to resort to the psychological examination of the witness by testing the directly involved capabilities (ability to focus and distribute attention, memory capacity, coefficient of intelligence, visual acuity, etc.) and, in the case of a witness's suspicion of lack of good faith, to resort to its expertise through judicial biodetection.

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[17] Ioan Micle, *Teoria, tactica şi practica poliţienească, volll,* Editura Universităţii "Aurel Vlaicu" Arad, 2009, p. 55

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LEGAL PERSPECTIVE OF CHILD ADOPTION UNDER THE NIGERIAN LAW

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ABSTRACT

Adoption is the process which creates a parent-child relationship between the adopted child and the adoptive parents with all the rights ,privileges and responsibilities that attach to that relationship. Adoption severs a relationship between the child and the natural parents or guardians.The institution of adoption is important in society because it touches on status and therefore affects the rights and obligations of an adopted person. Adoption is recognized as one of the forms of alternative care for children who have been temporarily or permanently deprived of their family environment and also for children who are unable to remain in their family environment. This paper seeks to examine the adoption of a child under the Nigerian lawie. The statutory law, the customary Law ,procedure for adoption under Nigerian Lawand the legal effect of adoption of a child under the Nigerian Law.

KEYWORDS: *adoption,child,juvenile,court,adopter,adopt*

INTRODUCTION

Adoption means the taking of a child or young person into the family of a spouse whereby there is transferred to the spouse all the rights duties ,obligations and liabilities of the natural parents in relation to the child or young person,as a result of which transfer the spouse stands to the child or young person in the position of his lawful parents.[1]Thus by means of adoption, a family is continued through the artificial relationship for example, between a man and his wife on one hand, and a child on the other hand. Therefore the mere fact that a couple brings up an orphan does not automatically mean that they have adopted the child since the child may still be taken away from such a couple. Rather anyone or (any couple) wishing to bring up somebody else's child as his or (their) own has to apply for an adoption order from a court of competent Jurisdiction.

1. MEANING OF ADOPTION

The word "adoption" is the noun form of the verb "adopt". The word adopt has different connotations in different contexts.in the context of adoption as it relates to adoption of children, to adopt means "To take a child of other parents into one's own family becoming its legal parents[2].In the words of DavidWatson, adoption is a legal procedure that permits a

[1] Section 2, Cap4,Laws of Edo State of Nigeria 2008
[2]Mairi Robinson and George Davidson (Editors)Chambers 21st Century Dictionary,RevisedEdition,NewDelhi,allied Chambers(India)Limited,P.17

child born to a person,or people to become in legal terms the son or daughter of another,or others,`the adopter`.

2. HISTORYOF CHILD ADOPTION UNDER THE NIGERIAN LAW

Prior to 1965,there was no statutory regulation in any part of Nigeria for adoption.[3]But in spite of such absence of legislation, there were instances of people adopting children as a result of agreement with parents of the children and of institutions taking care of orphans and destitute children.[4]These arrangements could not be regarded as legal adoption .At best they were mere instances of foster parenthood or guardianship.[5]The unfortunate result was that the child's natural parents or guardian might at any time assert their parental rights by demanding the return of the child . there was therefore perpetual fear that the couple might lose the child to its natural parents in spite of close relationships which may have developed between them[6].The first attempt at providing statute on adoption was a private member bill presented to the then eastern House of Assembly.[7]It was followed by the adoption Laws of Lagos State 1968.[8]Other States subsequently legislated for adoption. These were Bendel State (1979)[9] now Edo state[10],Ogun State(1983)[11] and Oyo State(1984)[12].These Laws have substantial similarities though some differences exist.[13]However, with the promulgation of the Child's Right Act of 2003(CRA) the previous enactments made on adoption have beenovertaken by its provisions .Hitherto, where inconsistency exits between the (CRA) and these earlier provisions, the latter would give way.[14]States are however expected to adopt the CRA. For those states that have adopted it, it becomes law for them. For those who have not adopted it, their old law remains, unless they have adopted the amended part of the CRA.[15]

3. TYPES OF ADOPTION UNDER THE NIGERIAN LAW.

There are two basic forms of adoption in Nigeria.These are Customary and Statutory Adoption.

3.1 Customary adoption

Customary adoption may be formal or informal.[16]The process of formal customary adoption starts by a meeting of the families of the child to be adopted and that of the person seeking to adopt the child. The purpose of this meeting is to formally transfer the parents' rightsand duties of the child to the person seeking to adopt the child, which is a crucial aspect of the adoption. Upon such transfer,the adopter then publicly declares his intention to regard the child in question as his own.This ceremony is sealed up with the sharing of a prepared meal together among the families.[17]Customary law of adoption is practiced in some parts of

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[3]Enemo I.P, *Basic Principles of Family Law in Nigeria,* Ibadan: Spectrum Books Limited, 2008, p 314
[4] For example missionary societies
[5]NwoguguE.I,Family Law in Nigeria,Ibadan:HEBN publishers plc,Revised Edition 1990,p.312.
[6] Ibid
[7]Ibid.
[8]No.5 of 1979. SeeEnemoI.P,op.cit p.315
[9] No .7 of 1981.See EnemoI.P,op.cit
[10]Cap4,Laws of Edo State of Nigeria 2008
[11] No.3 of 1983.See Enemo I.P,op.cit,p.315
[12] No.4 of 1984.See Enemo I.P,op.cit,p315
[13]Enemo I.P,op.cit,p315
[14] Section 12 of the Child's Right Act,SeeEnemoI.P,op.cit p.315
[15]Enemo I.P,op.cit.p.315
[16]Osondu A.C ,*Modern Nigerian Family Law &Practice*.Lagos,Printable Publishing Company,2012,p.257
[17] Ibid.

Iboland,Yako tribe of plateau State,Okrika of Rivers State,Ishan of Edo State,Egbas of Yorubaland amongst others.For example under the Yoruba land in *Akinwandev.Dogbo*[18]X took the child of his deceased sister into his household and the child lived there over a long period of time. During this time, X was responsible for the child's maintenance and upbringing.Thompson,j.held that the child was adopted by X's under customary law. This decision brings out the defects of customary law adoption.for instance X 's responsibility for the maintenance and upbringing of the child is capable of several interpretations including evidence of guardianship or adoption.On the other hand ,an informal adoption is not characterized by any formalities. It occurs Upon the person seeking to adopt taking the child, usually the child of a relative ,into his own family and treats the child as his own.[19]This is a common feature of African societies due to the extended family system.[20]Adoption under the English law permanently extinguishes all the rights, liabilities and duties of parents in relation to the child, the so called customary adoption does not permanently severe or annul the legal relationship between the child and its natural parents.[21]

3.2 Statutory Adoption

Statutory adoption is a formal and legal type of adoption governed by the provisions of statutory lawsi.e written law. The adoption laws of the various states where such laws exist govern statutory adoption in those states. Such laws usually provide for the qualifications of persons eligible to adopt and be adopted, conditions for adoption, consents required before adoption,procedures to be followed in adoption matters and the legal effects in adoption.one distinguishing feature of statutory adoption from customary adoption is the fact that while statutory adoption permanently extinguishes the rights and legal relationship between the child and his natural parents, this is not so under customary form of adoption where the rights and legal relationship between the child and the natural parents remains intact.[22]

4. WHO MAY ADOPT

In all existing adoption laws in Nigeria, any person may be authorized by the court to adopt a child.There are certain general rules however,which cut across all states.[23]Except where joint application is made by husband and wife,only one person will be allowed to adopt a child.[24]`Thus an applicant for an adoption order may be sole male or female.where a sole applicant is a male he will not be allowed to adopt a female child unless there are exceptional circumstances in the opinion of the court, would justify the making of such order.[25]The essence of this prohibition is to guard against the danger of sexual corruption of the female child.where a married person is the sole applicant for an adoption order, the court may require that the consent of the other spouse be obtained[26].The Child's Right Act[27] has specified in any

[18] Suit AB/26/68(unreported)High court ,Abeokuta.14 July 1969.See E.I Nwogugu,Family Law in Nigeria .Third Edition 2014,p.344
[19]Osondu A.C,p.257
[20]Ibid.p.258
[21] Ibid.
[22] Ibid.
[23]ERLaw,Section 3(1);Lagos Section 2(1),Bendel Section 3;Cross River Section1(1),Ogun Section.5(1).See Enemo I.p.op.cit,p.317
[24]ERLaw,Section 3(2) and 3(3);Lagos Section2(3);Bendel,4(2);Cross river Section1(2);Ogun ,Section5(2).See Enemo I.P,p.317.
[25] ER Law,Section 4(2);Lagos,Section3(3);Bendel,Section 5(1)(2);Cross River,Section3(1);Ogun,Section7(1) .See Nwogugu E.I, Revised Edition,P.314.
[26] ER Law,Section 6(2);Lagos ,Section4(1);Bendel,Section6(1);Cross River, Section3(1)Ogun.Section 7(1).See NwoguguE.I,Revised Edition,P.314.

way that an adoption order shall not be made unless the applicant is acitizen or,in the case of a joint application,both applicants are citizens of Nigeria.[28]It seems that a child who is not a Nigerian Citizen but who resides within a state in Nigeria where the machinery for adoption exists, may be adopted,since all the laws are silent on the matter.[29]

5. WHO MAY BE ADOPTED

Under the relevant adoptions laws,the only person that can be adopted is a juvenile.A Juvenile is defined in some states[30] as a person under seventeen years of age while some others apply a higher age limit of eighteen years.[31]The Childs Rights Act of 2003 provides for a child to be a person under the age of 18 years.[32]The Oyo State law uses the term 'child' instead of Juvenile and it means a person under the age of 18 years who has never been married.

In former Bendel[33] and Lagos[34]an adoption order may only be made in respect of a juvenile "who is abandoned, or whose parents and other relatives are unknown or cannot be traced after due inquiry certified by juvenile court"[35]The problem in these states is that once the parents of achild were known, he or she cannot be subject of an adoption order.

The former Ogun State Adoption Law[36] is similar to that of Lagos and Bendel States in this respect, but also includes that "unwanted babies of unmarried mothers who are incapable of taking care of them and whose natural fathers are either unknown or cannot be traced,or where known do not want the babies of insane mothers who have no willing to take care of them could also be subjects of an adoption order." This provision is not all encompassing because achild should be capable of being a subject of an adoption order whether or not the parents cannot be traced,provided that in making the order, the best interest of the child is of paramount consideration. Section (1) of the Childs Rights Act even provides that in every action concerning a child the best interest of the child shall be the primary consideration. In Former Anambra,Imo,Rivers and Cross River states adoption orders may be made in respect of any child within the prescribed age whether or not the parents and the relatives are known.[37]In former Oyo State, the child to be adopted must in addition to the age limit be a person who has never been married.[38]However the Childs Rights Act has put the marriageable age at 18years, which means that such children that may be adopted would not be married during the adoptable years. Under section128 of the Childs Rights Act, a child who is abandoned, neglected or persistently abused or ill-treated, may be adopted, and also a child whose parents are known may also be adopted and also a child whose parents are known may also be adopted provided they give their consent. Therefore whether child is abandoned

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[27] CAP C50Laws of Federation(LFN)2004.
[28]Section 131(d) of the Child's Right Act.
[29]Enemo I.P op,cit,o.320.
[30] Former Anambra,Imo,Rivers States (E.R.Law,Section 2).Lagos Section .1),and Ogun (Section 2)States.SeeEnemo I.p,op.cit,p.316.
[31] Former Bendel(Section 2),Cross River(Section 20) and Oyo(Section 2)States.
[32] Section 277
[33] Section 3(1).See Enemo ,I.P,Op.cit,p.316.
[34] Section 3.See Enemo, I.P op.cit,,p.316.
[35] Section 1(1)Lagos.SeeEnemo I.P,op.cit,p.316
[36]Section 3.See Enemo I.P,Op.cit,p.316.
[37]Enemo I.P.op.cit.p.317.
[38] Section 3,Oyo State Law. SeeEnemo I.P,op.cit,p.317.

or not, legitimate or illegitimate, such a child can be adopted as long as the necessary consents are obtained.

6. CONSENTS REQUIRED BEFORE ADOPTION

Where a married man or woman is the sole applicant for the adoption of a juvenile, the consent of the other party to the marriage shall be obtained before an adoption order is made. Similarly, where a person other than the father or mother or relative of a juvenile has any rights or obligations in respect of the juvenile under any order of a court or any agreement or under customary law, the court may refuse to make an order until the consent of that person is first obtained.[39]Such consent may be given conditionally or unconditionally[40].In the case of an illegitimate child,the consent of the mother shall be required before an adoption order is madein respect of the child.[41]

7. PROCEDURE FOR ADOPTION UNDER THE NIGERIAN LAW

The Child's Right Act, 2003[42] provides for adoption of a child in Nigeria. An application for adoption is made to the High (Family) Court accompanied with the following documents;

(a) Where the applicant is a married couple, their marriage certificate or a sworn declaration of marriage;[43]

(b) The birth certificate or sworn declaration of age of each applicant;[44]

(c) 2 passport photographs of each applicant;[45]

(d) A medical certificate of the fitness of the applicant from a Government hospital;[46] and

(e) Such other documents, requirements and information as the Court may require for the purposes of the adoption[47].

In practice, the Court prefers that an applicant must have fulfilled the condition precedent at the Child Welfare Department and obtain a report stating that the applicant is a proper person to adopt the child. The report would accompany the application for adoption.

Upon receipt of an application for adoption, the Court shall order an investigation to be conducted by child development officers or a supervision officer or such other persons as the Court may determine, to enable the Court to assess the suitability of the applicant as an adopter and of the child to be adopted[48].

The Court shall, in reaching a decision relating to the adoption of a child, have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare and the best interest of the child throughout the childhood of that child and ascertaining, as far as practicable, the wishes and feelings of the child regarding the decision

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[39]OsonduA.C,op.cit ,p.266
[40] Section 4(1) of the Adoption Law of Lagos State.SeeOsondu A.C ,op.cit.
[41] Osondu,A.C,op.cit,p.267
[42] Section 126(1)CAP C50LFN 2004.
[43] Section 126(a)CAPC50LFN2004.
[44] Section 126(b)CAPC50LFN2004.
[45] Section 126(c)CAPC50LFN2004.
[46]Section126(d)CAPC50LFN2004.
[47]Section126(e)CAPC50LFN2004.
[48] Section 126(2)CAPC50LFN,2004.

and giving due consideration to those wishes and feelings, having regard to the age and understanding of the child[49].

8. LEGALEFFECTS OF ADOPTION UNDER THE NIGERIAN LAW

The legal effects of adoption of an adoption order are primarily two-fold. First it severs all parental rights and obligations between the juvenile and his natural parents. Second and of immense importance, it establishes the legal relationship of parent and legitimate child between adopter and the adopted juvenile. In respect of custody, maintenance and education, the juvenile shall stand to the adopter and the as if he was born in lawful wedlock.[50] Where the juvenile is jointly adopted by husband and wife, then in respect of the custody, maintenance and education of the juvenile, they will occupy the position of natural parents.[51]

8.1 Intestacy

If after an adoption order has been made an adopter dies intestate, his estate shall devolve as if the adopted person were his lawful child.[52]But an adopted person has no right to succeed to property if his natural parents die intestate since all legal connections with them have been severed by adoption order.[53]

8.2 Construction of Settlement and Will

In any property disposition of property made by instrument inter vivos or by will after the date of adoption order, any reference to the 'child', or children of the adopter, includes the adopted person.[54]It is necessary to note that disposition by will or codicil takes effect from the date of the testator's death rather than on the day it was made. Consequently, it may transpire for example, that X made a will in May 1964.In July 1967, he adopted y.He died in December 1968.Y will be entitled to share in any gift or disposition made generally to the 'children' of X.As a corollary, the adopted person ceases on his adoption to be regarded as a child of his natural parents in respect of testate and intestate succession. A person adopted jointly by two spouses will be regarded as a brother or sister to the natural or adopted children of the adopters for the purposes of administration of estates.[55]Moreover a person related to the adopted person in any degree shall unless a contrary intention appears, be regarded as if he would be related to himin that degree if he were of the adopter.[56]

8.3 Effect of Adoption on Maintenance Order

Where at the time when and adoption order is made in respect of a juvenile an order requiring any person to contribute towards the juvenile's maintenance under the children and young person's Act is in force,the latter shall cease to have effect at that time.[57]

9. PROHIBITED ACTS IN RESPECT OF ADOPTION ORDERS

A number of acts are made punishable if committed against the prohibition of law made in respect of adoption orders.

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[49]Section126(3)CAPC50LFN,2004.
[50] ER Law section 13(2);CrossRiver, section 10(2).
[51] ER Law section 13(2);Lagos section12(3);Bendel section 14(2);Cross river,section10(3).
[52]ER Law section 14(1);Lagos section 13;Bendel, section 15;Cross River, section 11;Ogun section 16
[53]ER Law section 14(1);Lagos section 13;Bendel, section 15;Cross River, section 11;Ogun section 16;Section141(3) of Childs Right Act CAP C50LFN2004.
[54] ER Law,section14(2);Lagos, section 4,Bendel section 16;Cross River, section 12;Ogun,section 17.
[55] ER Law, section 15(1)
[56] ER Law, section 14(1)(c);Lagos, section 14(b);Bendel,section 16(b);Cross River,section12(b);Ogun,section17(b).
[57]Lagos, section 15; Bendel,section 17,Cross River, section 13,Ogun ,section 18.

9.1 Prohibition Of Marriage BetweenAn Adopter And The Adopted Juvenile

Marriage between an adopter or his natural child and a juvenile adopted by him is prohibited. The same is true in respect of any juvenile adopted under a separate adoption order.Consequently, an adopted son, forinstance, cannot marry the daughter of his adopter or a female adopted by the same person because the effect of the adoption orders is to create blood relationship between them. The violation of the prohibition is made punishable with five years of Imprisonment.[58]

9.2 Prohibition of certain payments

It is unlawful for an adopter or any other person to receive any payment or reward in consideration of the adoption of a juvenile or for the facilitation of the arrangement thereof unless with the leave of court.The punishment for the contravention of this rule is a fine or imprisonment or both.[59]

9.3 Restriction on Sending Juvenile Away for Adoption

All the adoption laws under consideration make it unlawful to permit the care and possession of a juvenile to be given to any person outside the stat for the purposes of the juvenile being adopted here.The sanction for the violation of this rule consists of a fine or imprisonment or both.[60]

CONCLUSION

This paper has examined meaning ,types of adoption available in Nigeria,who may adopt,who may be adopted ,consent before adoption,procedure for adoption and adoption maintenance order.The most significant aspect of adoption of child or juvenile under Nigerian law is the fact that it extinguishes the rights and obligations of the natural parents and transfer such rights and obligations to the adopter.Thus, adoption confers on the child all the rights vis-à-vis his adoptive parent(s) as if the child has been born to them in lawful wedlock as well as imposes on the adoptive parent(s) parental responsibility equivalent to that of the natural parents of the child.

[58] ER Law, section 13(4);Lagos, section 22;Bendel,section 24;Cross River ,section 18;Ogun section 25.
[59] ER Law section 17,lagos,section 17;Bendel,section 19;Cross River section 15;Ogun,section 20;Oyo,section12.
[60]Lagos,section18,Bendel section 20,Cross River, section 16;Ogun,section 21,Oyo ,section 15.

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PENAL MEDIATION FROM A PERSPECTIVE OF SOCIAL CONTROL. FRENCH AND SPANISH EXPERIENCES

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ABSTRACT

This research is focused on the penal mediation that is resorted in social, educational, family, cultural, criminal and other conflicts, in order to obtain recognition not only in terms of otherness, but above all of collective belonging. The article presents cases of mediation in France and in Spain. The main idea is that mediation can be used in all the systems in which the conflictual dynamics are manifested.

KEYWORDS: *penal mediation, social control, conflict, criminal law*

INTRODUCTION.

The age of globalization, in the second and third phase (the second already ended with the twentieth century), in which we witness the full deployment of the productive and commercial potentialities of humanity, has broken the "boundaries" of the relationship between individual and institutions, spreading a feeling of "disorientation", fueled by the widespread complexity of heterogeneous and sometimes contradictory values.

In the society of individualism the collective forms of control must give way to individual and individualized forms, which go to work on the individual.

Often they are tools that exist or are born in the social, disconnected from the institutional network and aimed at helping people to manage the relational conflicts that enmesh them. In this context the mediation, precisely because it is born as experience and social practice and constitutes an adequate response to the needs of the individual, it can represent a new (at least for the right) and different modality conflict regulation, which allows institutions to move closer to the individual, recovering the dual capacity and function of promoting individual liberties and guaranteeing social order.

I. THE CRISIS OF INSTITUTIONS AND THE MEDIATION AS AN ALTERNATIVE TOOL OF CONFLICT MANAGEMENT

The crisis of institutions and the consolidation of individualism, the widespread lability of consciences and the common indifference towards the "set of values, norms, customs that with varying effectiveness define and regulate durably, regardless of the identity

of individual people" (Gallino, 1993, 387) find their incompressible and ineluctable causality in the social, economic and cultural change of our day.

The age of globalization, in the second and third phase (the second already ended with the twentieth century), in which we witness the full deployment of the productive and commercial potentialities of humanity, has broken the "boundaries" of the relationship between individual and institutions, spreading a feeling of "disorientation", fueled by the widespread complexity of heterogeneous and sometimes contradictory values.

The institutions, that is all those systems that have "a general regulatory value", assume legitimacy if they are functional to the concrete reality of civil society and consistent and adhering to collective needs. When they are unable to listen to these needs and give an adequate response, the individual moves away from the institutions and these, consequently, lose legitimacy.

The detachment of the individual from the institutions favors that crisis of which so much is spoken and the need to seek tools and forms that they can allow to re-establish the relationship also in order to avoid a definitive and total delegitimization.

The individual no longer recognizes institutions as their derivations, capable of guaranteeing and protecting them, credible and reliable; equally the rules appear empty and betray the trust and the desire for recognition and protection of everyone. The norm does not satisfy!

Hence the diaspora towards areas increasingly on the margins of legality.

The conscious vision of the individual-institution relationship crisis reveals the need to look for tools that favor a path of recovery of the bond, of the sense of trust, of guarantee and of credibility.

For this reason, and to block the de-legitimization process,

the need to support the formal regulatory control[1] (Ross) a "soft" control emerges, with tools that allow to create an interaction with the citizen, making him feel closer to the institutions, in a new perspective capable of living and operating horizontally.

The research is therefore aimed at the re-discovery of means that "look after" the citizens, their problems, their conflicts (big and small) and that help them, in this way, to obtain recognition not only in terms of otherness, but above all of collective belonging.

In the society of individualism the collective forms of control must give way to individual and individualized forms, which go to work on the individual.

Often they are tools that exist or are born in the social, disconnected from the institutional network and aimed at helping people to manage the relational conflicts that enmesh them. In this context the mediation, precisely because it is born as experience and social practice and constitutes an adequate response to the needs of the individual, it can represent a new (at least for the right) and different modality conflict regulation, which allows institutions to move closer to the individual, recovering the dual capacity and function of promoting individual liberties and guaranteeing social order.

With institutionalized mediation, a process of control of social relations is started no longer in terms of imposition, but of interaction.«Two ideologies currently dominate the

[1] The distinction between regulatory operating institutions was introduced by Ross in 1901: operating institutions implement a service to society or a part of it (business, administrative organs of the state, hospitals, schools);regulative institutions, however, have as their main function the control of forms of behavior through the definition of models to follow.

mediation discourse - individualistic and relational. An individualist view, upon which the settlement approach is based, sees the world as made up of separate beings of equal worth, but different needs, whose human nature it is to seek satisfaction of their needs and desires. A relational framework, views the world as made up of persons with diverse needs and desires but who possess a common form of consciousness that connects them to each other. Transformative models of mediation are based on this ideology (Bush and Folger, 1994). (Picard A. C., 2000)

Mediation, conducted by a third and unknow subject, is a process that aims to open channels of communication that were blocked, allowing the parties in conflict to compare their points of view and find a solution to the problem.

Mediation, as an tool for managing conflicts expressed and unexpressed, shows the need to overcome them, avoiding pathological interpretations of the conflict and, instead, reworking the critical event in terms of relational reorganization, rediscovering other communication plans.

In this way, broken the logic of the conflict and interrupted its escalation, it is possible to reach an agreement, deeply and emotionally matured and, therefore, more stable and lasting than any executive decision.

Conceived as a resource for an informal management of the conflict between two people in terms of re-discovery and mutual re-know, mediation assumes the value of an tool that can be used in all the systems in which the conflictual dynamics are manifested, albeit with the necessary peculiarities and specificities that the different contexts require.

So we could resort to mediation in social, educational, family, cultural, criminal and other conflicts.

In particular, the commission of a crime produces or feeds a conflict, a communicative fracture between the victim and the guilty party, which sees the victim unrecognized and not respected as a person and often relegated to his marginal and unsatisfactory trial role; the guilty, isolated and subjected to a process of labeling, which will make him a career criminal.

A path of mediation in this context would build a "space" and a "time" that could favor the recovery of roles in the conflict, giving the victim a central and recognized position and favoring the rapprochement with socially shared values.

In this perspective, mediation favors both a "re-education" of the guilty, an aware recognition of the rules and social relations, and the possibility for the victim to assume ownership in the management of the conflict and to be recognized as a person, with all his suffering.

The deepest motivation that pushed us to look for ways to integrate the process is in the awareness of the inadequacy and incompleteness of this process and in the need to recognize to the passive subject of the crime a role that the criminal trial does not guarantee: the centrality and priority in regulating the conflict arising from the crime.

Mediation, therefore, arises as a possible response to these needs, as an instrument through which "re-establish a broken relationship between several parties and not, unlike the jurisdictional act, to establish a winner and a loser, a reason and a wrong " (Bouchard, 1995).

As an tool of non-violent regulation of the conflict, inspired by logics and communication and emotional dynamics, mediation favors a real informal path of

management of the conflict between victim and offender through recognition and

the identification with the other and with his feelings.

The penal mediation, therefore, is essentially a process of relating two people and goes to work, as Woolpert (Woolpert, cit. in Mackay R., 1992), on three levels:

- as a process aimed at encouraging personal awareness;
- as an tool aimed at increasing the self-esteem of the victims and the sense of responsibility of the offenders;
- as an intervention aimed at promoting the sense of belonging to the community.

From a structural point of view the mediation is an informal path punctuated by different phases, during which the mediator, the equidistant third party, promotes communication among the conflicting, fostering confrontation, recognition of the other as a person, with his fears and emotions, to come to an agreement for conflict management.

It is, therefore, a modality of intervention that aims to "enter the conflict", helping the parties to meet, to understand their behavior and, if possible, to agree on solutions.

This way of regulating conflicts does not replace the trial, but it can well represent, in an exosystemic vision, an operational asset, usable for a management of the conflict in its complexity, which takes into account not only the declared conflict but also that conflictual level that has not been manifested and of which the "trial" does not take into account.

Furthermore, the criminal trial ends up denying recognition to the victim, forced to relive the offense suffered for a long time, often subject to attempts to blame, with the risk of not even get a repair at the end. The criminal trial can protect the guilty and at the same time stigmatize him.

This model of justice has as its objective the elimination of the negative effects of the crime, through a process of recognition and self-esteem on the one hand and of responsibility on the other, also through restoring the damage by the offender.

The offender is no longer a passive subject recipient of a penalty, but an active subject who is asked to remedy the errors made and the damage caused by his criminal conduct. From criminological perspective, importance is attached to lying testimonies that bring justice service[2]

Expression of the reparative paradigm, the mediation involves the victim, the offender and the community in the search for solutions to the effects of the conflict generated or fed by the crime, with the aim of promoting compesation for the damages, reconciliation between the parties and the strengthening of the collective sense of security. Through the "restorative" the victim can regain control over his life and his emotions, gradually overcoming the feelings of revenge, rancor and even of mistrust and its inevitable paralyzing effects.

The offender, for his part, is not only the passive subject receiving the penalty; but an active party who is asked to remedy the errors made and the damage caused by his criminal conduct.

Mediation, with its pervasive capacity, exerting a deterrent and accountable function, already represents a new way of regulating and controlling conflict.

The need to rectify the crisis of legitimization of the penal institutions, which more generally reflects the crisis of the mechanisms of social regulation, tries to go through the attempt of the law to incorporate the mediation and link it to the criminal trial.

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[2] Elena-Ana Nechita, *Criminalistică. Tehnica si tactica criminalsitică*, PRO Universitaria, Bucharest, 2009, p.163

Conflicts destabilize the community and the inability of the state institutions to manage them determines, as we have already pointed out, their progressive delegitimization, a loss of credibility and an inevitable moving away from the community.

The institutions are no longer able to respond adequately to the needs of the individual, for which he begins to no longer recognize them, to not consider them credible, to delegitimize them. The institutions, as a result of this distancing of the individual and this progressive delegitimization, which will end up rendering them useless and emptied of power, seeks exogenous tools that, moving on a horizontal plane, are able to be close to the needs of the individual. and to give satisfactory answers. They absorb them in their mechanisms, make them their own. Thus the institutions and in particular the judicial universe can give an adequate response to the individual.

One of these tools is the mediation that is open to this logic, precisely because of its ability to informally manage conflicts, restoring the ownership, in the search for the solution, to the parties.

Mediation is in itself an tool through which an informal control over individuals is exercised and its institutionalization responds not so much and not only to the institutional need for control, but rather to the need to recover credibility and reliability in the eyes of individuals.

Including mediation in criminal law, and in particular in the judicial universe, responds to the logic of regaining legitimacy. The penal system, in fact, is a system that for its characteristics, its rituals, its language, tends to isolate itself, producing a block of communication and interpretation, a separation with other systems, first of all the social one. This closure and distance delegitimizes the law, depriving it of its concrete foundation.

In the face of this crisis of legitimacy of criminal law and its inability to meet the needs of each individual, the community is organized by developing alternative tools of conflict management that, on the one hand, heighten the crisis of law and, on the other, tend to increase the power of the social system to function autonomously.

The weakening of expectations towards formal control tend to increase the space of informal control.

The attempt to institutionalize mediation expresses the desire for law and, therefore, for the judicial universe to absorb it to rediscover or recreate a new systemic balance and recover legitimacy, with a view to re-establishing an individual-institution interaction, to exercise control over individuals, their conflicts, on how to manage them and on the social risks of these conflicts, with a view to recovering and strengthening its legitimacy. Mediation is open to this end because it expresses the desire and the will to deform the management procedures with a view to restoring the ownership of the conflict and its "solution" to the parties involved.

II. MEDIATION IN THE CRIMINAL FIELD IN FRANCE AND SPAIN

One of the risks of the incorporation of mediation in the judicial universe is the loss of that promotional character of the private autonomy that characterizes it, to become a "reward"

if it has a positive outcome or a "threat" if the parties do not consent to participate in the mediation path or if this fails.[3]

Let's think, for example, of what happened in France, where the first attempts to absorb mediation went through the granting of funding to organizations of victims who were more dealed with mediation, then arriving in October 1992 at the Ministry of Justice, which spread a guidance note on penal mediation, up to the full institutionalization made by the reform law of the code of criminal procedure of 04/01/1993.

In Article. 6, integrative of the art. 41 of the Code of Criminal Procedure, the Public Prosecutor was expressly authorized to decide, after a preliminary agreement with the parties to use the mediation, with the aim of ensuring the restoring the damage to the victim, to end the conflict and to contribute to the reintegration of the auteur des faits. In fact, the successful outcome of the mediation, which ends with a written agreement, is cause for dismissal the case by the public prosecutor.

The French experience dates back, however, to 1980, the period in which some districts of Lyon were beginning to rise, c.d. "Boutiques de droit" which, according to their main inspirer (Bonafé-Schimitt), already made social mediation.

These emphasize the need to reconstruct spheres of sociality in places where the tearing of the social fabric is most evident (degraded neighborhoods, etc.) and the failure of traditional ways of regulating conflict appears to be greater.

The Boutiques de droit identify in their neighborhood the most suitable place in which everyday conflicts can be institutionalized and regulated. This attention to the conditions of degradation rather than to the techniques of conflict resolution represents the characteristic and, at the same time, the limit of the Lyon project.

In fact, the social contextualization of the conflict, which widens the attention to the satisfaction of broader social policies, runs the risk of not opportunely focusing the recomposition of the single conflict.

The boutiques also have the task of "mediation / knowledge", inform the user about all the tools he has available to resolve his disputes, and including the mediation itself.

By virtue of this link between legal information and mediation, the cases taken into consideration by the boutiques come from the community and not from the transmission of the notification by the judicial authorities. In Spain, informal experimentation mediation has also become an integral part of the criminal trial.

The first experiences of mediation were carried out in Catalonia, where a commission was set up in 1989 within the Justice Department of the Generalitat of Catalonia, regional government body, with the task of drafting a juvenile criminal mediation project and in May 1990 the mediation program began to function in Catalonia for crimes committed by minors, although it was not provided for by the law in force, the law of 11 June 1948 of the juvenile court[4].

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[3] When the mediation is inserted in the judicial process as a normative instrument, in fact, if the parties consent to start this path and in that place they reach agreement, the law reward them, eg. with the dismissal, the mitigating circumstances, etc .; if, instead, the parties do not want to go to mediation or if it fails, the law punishes them or threatens to punish them.

[4] This law was issued under the Franco regime and sanctioned even purely irregular behavior by all those aged between 0 and 16 years. Even with its limitations and its provisional nature (it had to remain in force for 1 year), it had the merit of having determined the passage from a positivist and correctionist model (which inspired the 1948 law) to a guaranteeing and empowering model.

The normative support of this choice was then identified in the recommendations of the Council of Europe, in the laws of other European countries, in the United Nations Minimum Rules on the Administration of Justice and in the United Nations Convention on the Rights of the Child.

The major obstacle that the mediation encountered in entering the juvenile criminal trial arose from the necessity of the consent of the two parties and the 1948 law considered the children of 16 years not imputable and, therefore, unable to give consent to participate in a path of mediation. For this reason the judge had to give it in their place.

From 1990 to 1992, about 1200 cases were dealt with by mediation.

Subsequently, under the guise of "urgent" reform dictated by the declaration of unconstitutionality of art. 15[5] of the 1948 Act (sentence 36/91), the law 5 June 1992 n. 4 was enacted, which modified only some articles of the law of '48, causing contradictions in the new text.

The new law introduced some fundamental characteristic principles to protect the minor. First of all, the principle of the best interests of the child , which involved respect for the personality of the child and its development processes. Therefore, the measures to be applied had to respect the educational needs[6] of the minor and the whole process had to respond to pedagogical and punitive purposes[7].

Another fundamental principle introduced was that of the minimum intervention, to be applied not only during the trial but above all as an instrument to favor the decriminalization of deviant behavior. This principle provides that the court has "wide powers to agree the end of the trial to avoid, as far as possible, the afflictive effects that it can produce to the minor". Thus on the one hand it gives to the public prosecutor

the possibility of not pursuing certain crimes if accompanied by certain circumstances, such as the lack of seriousness of the facts, and from the other to the juvenile court, therefore, the power to dismiss the case or decide to suspend, for a fixed term, of the sentence.

For the first time, moreover, the law introduced in Spain the so-called "Principio de oportunidad" [8], by virtue of which, before a crime report, the public prosecutor could, if necessary, decide freely in favor of criminal prosecution without any kind of control.

Precisely in the name of this principle[9] the mediation was introduced, as a path that, ending with the reparation of the damage[10], gave the fiscal ministry a valid reason for not to prosecute.

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[5] Article 15 reads: "the sessions that the tutelary tribunals celebrate are not public and the court is not subject to the rules of procedure in force in other jurisdictions". Therefore, it excluded the application of the procedural rules in force in other jurisdictions to the juvenile criminal trial (it involved the non-application of the guarantees of the ordinary process to that for minors, where neither the defense lawyer nor the public prosecutor intervened).

[6] In this regard, the intervention of a technical group was planned with the task of reporting on the child's psychological, educational and family situation as well as on environmental conditions.

[7] In this direction, for example, the suspension of the trial and the extrajudicial reparation of the damage were foreseen when the further course of the proceeding had adversely affected the educational needs of the minor.

[8] The principle of opportunity is also provided for in international legislation. In this regard, article 11.2 of the Beijing Rules reads "the police, the prosecutor or other services in charge of juvenile delinquency will have the power to decide such cases at their discretion, without resorting to formal proceedings, in accordance with the criteria set for this purpose in the respective legal systems, and also in harmony with the principles contained in these rules ".

The process of mediation, aimed at repairing the damage, was also conceivable at a later date, as an alternative to the execution of the measure established by the judge in the sentence[11]. In this case, the suspension of the sentence was therefore functional to the implementation of the reparation: if, in fact, the reparation had not been completed, the judge would have implemented the sentence.The law in question canceled the absolute discretion of juvenile jurisdiction, recognizing for the first time the constitutional guarantees, in a perspective aimed at re-educating the minor.

Even with its limits and its temporary nature he had the great merit of determining the transition from one positivist and correctionist model (which inspired the 1948 law) to another guarantor, empowering and aimed at the re-education of the minor, in accordance with the Council of Europe recommendations.

On January 1, 2001 the law of 12 January 2000 no. 5 on the criminal responsibility of the minor entered into force (a law that for the first time deals with juvenile justice in an overall way containing rules of substantive law, procedural law and penitentiary), in which explicit reference is made to mediation and there is also talk of reconciliation and reparation of damage. The Organic Ley of 12 January 2000 n. 5[12] (LORP), in regulating the criminal liability of minors[13], has foreseen the need to take to account not only the interests of the minor offender, but also of the victim, both in judicial processes and in extrajudicial matters.

For the first time in Spanish legal history, "the functions of mediation" and the cd. "Indirect mediation" are expressly explicitly covered.

The new law provides, in fact, the possibility of access to mediation at two different stages of the criminal proceedings , that is during the preliminary examination phase, and during the execution of the judgment.

In the preliminary examination phase, article 19.2, entitled "Dismissal of the case for conciliation or reparation between the child and the victim", defines what is meant by conciliation and reparation and the benefits that may arise from it. In particular, the second paragraph, as amended by the L.O. 8/2006, of 4 December 2006 provides that “A efectos de lo dispuesto en el apartado anterior, se entenderá producida la conciliación cuando el menor reconozca el daño causado y se disculpe ante la víctima, y ésta acepte sus disculpas, y se

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[9] Article. 15.6 of the aforementioned law provided, in fact, that during the preliminary investigation "considering the lack of seriousness of the facts, the conditions and circumstances of the minor, the fact that there had been no violence or intimidation, or that the minor had repaired or committed to repair the damage caused to the victim, the judge, on the proposal of the public prosecutor, will close every action".

[10] The possibility of repairing the victim's damage was foreseen for the first time by Law n.4 / 1992.

[11] Article 16.3 of the law provided that "having regard to the nature of the facts, the juvenile judge, ex officio or at the request of the public prosecutor or lawyer, could assess the suspension of the decision for a fixed period of up to two years, always that, by mutual agreement, the child, duly assisted, and the victims, accepted an out-of-court redress proposal. This opportunity may be granted if the victims, duly cited, do not express their opposition or are manifestly unfounded. To this end, after hearing the technical group, the public prosecutor and the lawyer, the judge must reasonably evaluate, from the exclusive point of view of the minor's interest, the pedagogical and educational meaning of the proposed reparation [...]. does not carry out the repair will revoke the suspension of the sentence and will complete the measure established by the judge ".

[12] In the reform on civil and mercantile mediation, introduced by the Organic Law 5/2012, Articles 6.1, 6.3, 7, 8, 10.1, 10.3, 11, 12, 13, 14, 17, 18, 19 were also extended to penal mediation. The first articles, in particular, establish the general principles that apply to all types of mediation: voluntariness, equality of the parties and impartiality of the mediator, neutrality, confidentiality, secrecy and gratuity.

[13] While the l. 4/92 took care of children aged twelve to sixteen, the law 5/2000 is intended to be applied to minors from fourteen to eighteen.

entenderá por reparación el compromiso asumido por el menor con la víctima o perjudicado de realizar determinadas acciones en beneficio de aquéllos o de la comunidad, seguido de su realización efectiva. Todo ello sin perjuicio del acuerdo al que hayan llegado las partes en relación con la responsabilidad civil".

The provision provides the extra-judicial way to resolve the conflict through the path of conciliation, reparation and criminal mediation.

In order to determine this spill of the minor from the juvenile criminal trial the following requirements must be met[14]: the lack of violence or serious intimidation in the facts and whether it is a less serious crime or a violation; the recognition by the minor of a "certain participation" in the deeds constituting a crime; the proposal by the technical group of a mediation project accepted by the minor and the victim; the actual realization of the repairing or mediating activity by the minor.

The fulfillment by the minor of the repairing activity will make void the criminal responsibility with consequent dismissal of all charges . Particular features of the provision in question is the provision of so-called "indirect mediation", in which there is no meeting between the victim and the offender.

The art 19.4 provides, in fact, the particular case in which, for reasons unrelated to the will of the minor offender, conciliation or realizing the reparation obligations towards the victim is not possible. These are the hypotheses in which, for example, you have not been able to contact the victim (because you do not know or do not respond to letters or telephone calls) or the victim does not want to participate. In these cases, the child's will to repair the victim can avoid his entry into the criminal trial.

The conciliation of the minor with the victim, at any time in which the agreement between the parties referred to in Article 19 of this law occurs, will also be effective during the execution of the judgment.

Article 51, now no longer in the second but in the third subparagraph following the amendment made by the L.O. 8/2006 of 4 December 2006, in fact, provides for the possibility that the conciliation intervened between the parties can fall the measure provided for in the sentence, if it is an expression of reproach and condemnation of the conduct of the offender (unlike the provisions of the law of '92).

In this case the mediation is conceived as an alternative to the continuation of the execution of the sentence. it is rather unusual and, as regards the objectives pursued by mediation, rather useless.

Legal practitioners, in fact, consider thepreliminary examination phase of the criminal trial as the natural space of mediation, as free from prejudices and mistrust that are in the next phase of the process and they also defend mediation as a useful tool to avoid the execution of the punishment.

In the case, however, provided for by article 51.3 of the law, mediation does not prevent the child from either the criminal trial or the execution, even partial, of the punishment.

Reconciliation and remedying of damage are conceived as an out-of-court conflict resolution tool, although included in the criminal process: in the mediation foreseen in the

[14] With regard to the cases of mediation in the initial phase, Law 5/2000 has not made any significant change compared to the law of '92. The requirements for access to mediation are basically the same in both laws.

educational phase, the public prosecutor represents the legality on which the mediator acts, while in the cases provided for in the execution phase is the judge acting as guarantor.

A full institutionalization of mediation took place in Spain, and therefore only in the criminal trial against juvenile offenders, while for adults a "Mediation and Restorative Program in Criminal Jurisdiction" was launched in 1998 and only in Catalonia. Service of alternative criminal sanctions ".

The Barcelona Penal Mediation Office, both in the juvenile as well as adults, is physically located inside the judicial structures, where the criminal trial is breathed and the mediators are functionally inserted in the justice department. All this to underline that the mediation has not only a preventive role in the criminal policy and of the atenciò a vìctima, but it is also a possible formal instrument of social control. To reserve for penal mediation an "exo-systematic" position, in which it is an alternative to the penal system, in terms of deflation or better decriminalization in concrete terms, means giving it the function of promoting an internal rationalization of criminal law, with a view to marginalizing progressively the penalistic response to the advantage of the remaining instruments of social control. With the current tendency to give it, instead, an "endo-systematic" collocation, in which it represents a "stabilization variant" of the penal system, the mediation will end up remaining "entangled" in the regulatory tangles of the penal system and "institutionalized" as a new form of formal social control, deprived of its very essence.

In fact, the institutionalization of mediation would end up distorting it so much that it became ineffective. Indeed, mediation by its very nature is an informal process and its "forced" insertion in the judicial universe would hardly allow it to preserve its peculiarities. It is difficult to think that it could preserve that voluntary and spontaneous character that today guarantees the ability to manage the conflict in its complexity made of a manifest and a latent level, because silently the mediation would no longer present itself as a proposal but as an imposition and consequently, the refusal to start this path or its failure would end, as we have already underlined , to be sanctioned.Moreover, it would lose the characteristic of informal path that acts and moves on that emotional level that the judicial universe ignores, debased in a schematic logical-rational process, deprived of its strength and its effectiveness.

CONCLUSION

In the face of this crisis of legitimacy of criminal law and its inability to meet the needs of each individual, the community is organized by developing alternative tools of conflict management that, on the one hand, heighten the crisis of law and, on the other, tend to increase the power of the social system to function autonomously.

The weakening of expectations towards formal control tend to increase the space of informal control.

The attempt to institutionalize mediation expresses the desire for law and, therefore, for the judicial universe to absorb it to rediscover or recreate a new systemic balance and recover legitimacy, with a view to re-establishing an individual-institution interaction, to exercise control over individuals, their conflicts, on how to manage them and on the social risks of these conflicts, with a view to recovering and strengthening its legitimacy.

Mediation is open to this end because it expresses the desire and the will to deform the management procedures with a view to restoring the ownership of the conflict and its "solution" to the parties involved.

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CRIMINALITY AND PSYCHOPATHOLOGY. THE PROFILE OF STALKERS

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ABSTRACT:

The present research is aimed to analyze the evolution of the profile of stalkers in the Italian culture. The stalking is a complex behavioral constellation with different motivations, not always with psychopathological relevance. It is a desperate attempt to seek an interpersonal relationship: to devalue and above all to subject the victim to constant control, allows the stalker to keep alive, albeit in a persecutory key, the desire for an indissoluble bond.

KEYWORDS: *stalking, behaviour, criminality, psychopathology*

INTRODUCTION

The relationship between psychopathology and criminality can be tackled from different perspectives, but I have chosen to minimize any legal, philosophical and anthropological encroachment to then analyze the figure of the stalker. In this perspective, starting from the complex history of criminological psychopathology, we proceeded to analyze the evolution of the '50s and' 60s and then focus on the specifics of the "harassing molester". The criminological investigation aims to grasp the motivations of those who break the law, the causes of sometimes radical and apparently incomprehensible conduct, the significance of crime in the biography of a criminal personality, sometimes overwhelmed by the perception of uncontrollable dangers and unpredictable that enhance psychic disturbance. In the history of criminology different theories have confronted different legal and cultural systems. In particular, the scientific approach to the disease, and in particular to mental illness, is born with Greek culture,[1] with the abandonment of magical thinking and the arguments of humoralism and the removal of the disease from the universe of evil. The present analysis, although aware of the richness and vivacity of the European tradition, will tend to be limited to Italian culture alone.

I. CRIME AND PSYCHOPATHOLOGY

[1] While in Greek culture the scientific knowledge matures, in the Roman culture the law matures. Already from the XII tables (around 450 BC) the mentally ill is the object of care and is therefore in a particular position before the law and in the Digests Iustiniani Augusti impubes and furiosus are assimilated and do not respond to serious responsibility.

The eighteenth-century development of anatomy, comparative anatomy and above all neurophysiological research bring to light an anthropological model characterized by the hegemony of the nervous system, and methods of observation, linked to anatomy, such as physiognomy and phrenology.

Physiognomy, in particular, has not had great impact on Italian medicine in the early nineteenth century, but it transmits a knowledge that in the second half of the century will favor the construction of the stereotype of the criminal. The phrenology, between medicine, criminology and the study of races, still the various personal inclinations to the development, more or less broad, of a well defined cerebral territory [Lanteri L. G., 1970]. Gall in particular advances the idea that there is a parallelism between the embryological development of the cranial bones and the underlying cortex, so that a different development of the various brain zones (responsible for the different inclinations) would correspond to similar modifications of the cranial vault. In this perspective, which proved to be incorrect, then, through the analysis of the skull, it would have been possible to elaborate a topography of the various individual inclinations [Lombardo G. P., Duichin M., 1997].

In particular Morabito [1994] states: "We call" organology "Gall's theory because this was always the term he used. Initially it was Schädellehre (craniology), but it was abandoned because it was the brain and not the skull the object of interest of Gall. [...] "Phrenology" (from the Greek, doctrine of the mind) is a term used and spread by Spurzheim since 1818, but on the opportunity to adopt it Gall was always contrary (because he tended to identify the functions of the brain only with the mind) [...] " . In Europe, biologists and doctors are interested in phrenology, but also jurists and theologians and in Italy we remember Fossati and Miraglia. In particular, the southern scholar Miraglia [1854], in a work on the thought of Gall, presents tables that provide a map of the skull and provides a link between the development of organs and certain human behaviors. For example, transgressive behaviors are configured as the emphatic manifestation of normal inclinations. For the phrenology the behavior depends, therefore, from an anatomical substrate and, therefore, the criminal is a figure determined by inevitable factors of natural order.

With the development of embryology, proved unfounded the thesis that the skull is modeled on the brain, the phrenology was quickly exhausted and its image of the rich man of motives will flow into positivist anthropology. In particular, Cesare Lombroso, considered the father of criminal anthropology, adheres to evolutionist positivism and using history, social statistics and anatomical measurement, comes to a typification of the criminal man.

Lombrosian thought moves in an evolutionary sense: history and evolution merge more and more intimately according to a correlation that moves from monkeys, to savages, to civilized man, passing through the possible biological regressions of criminality and mental illness. Lombroso's interest in any abnormal or pathological morphological trait is inscribed in the climate that characterizes medicine in the second half of the nineteenth century: interest is no longer on normal anatomy but on pathological anatomy.

Lombroso advances the hypothesis that the criminal man is the bearer of stigmata of primitive times, in which violence and means of oppression were wholly physiological. The delinquent man would then be the bearer of an abnormal psychism, not so much because it was the expression of a sick mind, but because of the emergence of ancient behavioral structures, which today are completely unacceptable.

The reading provided by E. Morselli, on the other hand, is more linked to psychiatric dialectics. He, deepening the theme of suicide in criminals and the relationship between

murder and suicide, explains mental illness, suicide and criminal conduct as signs of degeneration that united the "losers in the struggle for life" in a single anthropological grouping. Criminal conduct is therefore completely assimilable to mental illness and shares the source of genetic origin with it: criminals, like madmen, express a pathological mental dialectic. Thus the season of positivistic forensic psychiatry was inaugurated with Morselli.

Around the Lombrosian thought there arose the positive school, whose most representative figures were Enrico Ferri and Raffaele Garofalo,[2] a jurist and a magistrate, the first more attentive to the social dimension of crime, the second, instead, at the psychological moment that underlies the crime.

Lombroso, however, between controversy and contrasts, has attracted the attention not only of contemporaries, but also of many of the leading scholars of the '900.[3]. Continuers of the Lombrosian tradition were the daughter Gina[4], the son-in-law Ferrero, Niceforo, Di Tullio[5] , etc. and the continuity of positive school bears witness to the strength of a knowledge, even if the field of criminal anthropology must not be identified with that of criminal psychopathology alone, or psychiatry.

The image of a man around whom clinical psychiatry develops, in fact, is different from that on which criminal anthropology is founded: the radical primacy of the nervous system is consolidated and an immanentist conception of the soul is proposed. "The encephalous ... sits in the place of honor, in the highest room of the human edifice, as if to signify that it must oversee everything and watch over everything" [Verga A., 1896]. In Verga's thought, the task of the psychiatrist before the crime is to recognize the possible presence of a mental disorder, to relate it to the environment in which it manifests and understands its value in the criminal dynamics. Psychopathology has an uncertain horizon despite references to the system of neurology that orients not only mental medicine but all general medicine with the advent of modern constitutional theories. Constitutionalism[6] proposes a vision of man in its entirety, at first through the enhancement of the nervous system and, in the second half, thanks also to the role of harmonization and coordination of the various organs recognized to the endocrine glands. The large total institutions, the asylum and the mental asylum, which arise between 800 and 900 are the answer to the doctrinal needs

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[2] Garofalo, moving on Lombrosian positions, argues that crime is not a mere convention defined by law, as the classical school wants, but it is a natural fact: "The social or natural crime is a lesion of that part of the moral sense that consists in fundamental altruistic sentiments (piety and probity) according to the average measure in which we find ourselves in the higher human races, which measure is necessary for the adaptation of the individual in society ". Garofalo [1885] manifests a radical pessimism that derives from the conviction that "all criminals are ... psychically abnormal men, many also anthropologically"; and moreover if, under similar conditions, among so many one and only five men it must be consistently deduced that "the prime factor of the crime is always individual, and that without it the occasional thrusts remain ineffective". The crime, therefore, is fatally induced by an individual anomaly, and, therefore, the family and social influences have little importance. Otherwise Enrico Ferri adopts a more sociological approach, arguing that the largest number of delinquents is made up of occasional ones, particularly influenced by social motivations.

[3] We remember the controversy with the contemporary French authors that revolve around the school of Topinard and the debate, even after death, with Agostino Gemelli, Zerboglio, Gentile, Gramsci

[4] The daughter Gina took care of young or not very accessible works of her father, but she was also very attentive to the difficulties of the female condition and engaged in promoting the cultural elevation and social emancipation of the woman.

[5] A Di Tullio is responsible for a treaty of criminal anthropology. He intended to ignore any philosophical question to deal with the crime alone: a human act that must be considered and evaluated in relation to the social context where it is consumed. «... every crime is always the expression of a psychic disturbance» [1945].

[6] The founder of the Italian school is Achille De Giovanni who attributes to the sympathetic the role of influencing the individual constitution.

of the Lombrosian anthropology that, by denying free will, refers to atavistic degeneration, coming to assimilate mentally ill people and delinquents. In particular, the criminal asylum is functional to the protection of society and is an expression of those nineteenth-century biological guidelines anchored to the concept of degeneration. So it is physiological that it loses consensus during the 1900s, after having revealed its limits. After the 1904 law on mental hospitals and the insane,[7] psychiatric hospitals are called upon to receive patients on the basis of the criterion of social danger, rather than on the basis of exclusive clinical motivations. Consequently, the psychiatrist becomes an expert in psychopathology, a medical examiner, with tasks more and more as an expert and not as a therapist. The balance that is established between criminology and psychiatry, on the other hand, transpires from the essay by Catalano Nobili and Cerquetelli [1953] on psychopathic personalities and from the treaty of Ferrio of clinical and forensic psychiatry [2nd ed. 1970], anchored to references to Kretschmer and Schneider. It will only be the widespread interest in psychoanalysis and phenomenology, the new sociological approaches and the penetration of German psychopathology[8] in Italian culture to produce a renewal in this area, breaking down traditional psychiatric knowledge. In particular, Schneider argued that psychopathic personalities are to be understood as human types describable in an asystematic manner, distancing themselves from biology. The Comparative Criminology Treaty of Mannheim is fundamental [1975], which in relation to the relationship between psychopathology and criminality describes the risk that, in the genesis of crime, can be connected to various psychic disorders and shows the need for a deeper knowledge of psychology. of the normal offender. Mannheim also focuses on the modern sociology of crime, aware that now new forms of crime have arisen, new theories to interpret the crime and that even psychopathology has been renewed.

Between the '60s and' 80s there was an institutional reorganization of psychiatry which is also reflected in crime.

The law n. 180 of 1978[9], then implemented by law 833 of the same year, produces the deactivation, after almost a century, of the asylum, challenged to be more a segregating structure than therapeutic. The law 180, known as the Basaglia law, abolishes, in fact, the reference to the danger for the hospitalization of the mentally ill. Basaglia who had challenged for years the meaning of the asylum, but also of the prison, as structures in which recourse to the alibi of delinquency and psychopathy marginalizes those who are poor, had expressed great concern for the fate of hospitalized patients on the basis of an alleged dangerousness, which is in fact locked up "to expiate a guilt of which he does not know the extremes and the condemnation, nor the duration of the atonement" [1982].

"Madness is a human condition. Folly exists in us and is present as is reason. The problem is that society, to be called civil, should accept both reason and folly, instead it

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[7] Article. 1 of the law of 14 February 1904 on mental hospitals and the insane as a matter of fact recites: "Persons affected for any cause of mental alienation must be kept and treated in mental hospitals when they are dangerous to themselves or to others".

[8] As for the diffusion of German psychopathology and criminology, it is worth mentioning the translations of the clinical psychopathology of Kurt Schneider of 1954, of the General Psychopathology of Karl Jaspers of 1964 and of the Comparative Criminology Treaty of Hermann Mannheim of 1975.

[9] The norm, with the closing of the mental hospitals and the regulation of the obligatory health treatment, opened a new course of psychiatry. In the past, mental hospitals were similar to prisons, and were functional only to contain and control patients. Law 180, on the other hand, foresaw a reduction in treatment and aimed at establishing human relationships between society and patients, taking care of their quality of life.

instructs a science, psychiatry, to translate madness into illness in order to eliminate it. Here the asylum has its raison d'etre ».

"Delinquency or illness" - he adds - "are human contradictions, but they are also a social product, and the consequences can not be paid to those affected as if it were always and only an individual fault". It is a deresponsibilizing optic that, having abandoned the Lombrosian bio-anthropological perspective, is based on sociological dynamics: we should change the family, society and factory, etc.

"The overthrow of a dramatic and oppressive reality, like that of the asylum, can not therefore be carried out without polemical violence against what is wanted to be denied, involving critics in the values that allow and perpetuate the existence of such a reality. This is why our anti-institutional, antipsychiatric (ie anti-specialist) discourse can not remain restricted to the specific terrain of our field of action. The polemic to the institutional system emerges from the psychiatric sphere to move to the social structures that support it, forcing us to a critique of scientific neutrality, which acts in support of the dominant values, to become critical and political action. Within the psychiatric institution, every scientific inquiry into mental illness is possible only after having eliminated all the superstructures that refer to the violence of the institution, to the violence of the family, and to the violence of society and of all its institutions. (October 1967) »[1968].

The desire to give an explanation to the criminal phenomena is ever more evident, taking into account different factors such as those of a social nature and thus develop new theories, especially in the sociological field. In particular Merton publishing in 1938 the volume "Social Structure and Anomie", shows that: "The image of man as a bundle of unmoved impulses begins to look more like a caricature than a portrait [...] being the role of biological impulses, it remains to be explained why the frequency of deviant behavior varies in different social structures, and how it happens that in different social structures the deviations are manifested in different forms and models ".

A behavior depends above all on the meaning that the subject attributes to it, in relation to the social purposes he intends to pursue, and which society itself presents to him as models to be followed.[10] Criminology takes into account the basic units of personality: temperament, skills and character [Elena-Ana Nechita, 2009].

Over time, many conjectures of traditional criminological psychopathology are obscured and it clearly emerges that there is no equivalence between mental illness and danger and that the danger is not well predictable [Fornari U., 1989; Merzagora Betsos I., 2001; Ponti G., 1999]. Gulotta [2002], in particular, states that "mental disorder is a risk factor for violence and the correlation between violence and mental illness is significant but low". Yet the prejudices are still very persistent, certainly also fed by the media,[11], which generally avoid dealing with mental illness, or speak only in relation to facts of crime. In cases of violence, in fact, too often emerges the question about an alleged pathological origin of violent behavior from which to start the motivations that push men to brutal aggressions.

[10] Merton makes a distinction between cultural goals and institutional means: the first are the desirable objectives of each member in a given society (well-being, success, etc.); the means, on the other hand, are the legitimate tools that the subjects can use to reach their goals. These two components are not integrated with each other and the excessive exaltation of the goals leads to a demoralization of the means, leading to anomia. While for Durkheim the anomaly originates in the excessive stimulation of individual aspirations, for Merton the anomaly arises from the dissociation between socially recognized values and legitimate means to achieve them..

[11] A 1996 UK survey found that 66% of mental illnesses represented on TV is associated with violence.

Important information transfer of affectivity is achieved through extraverbal channels [Elena-Ana Nechita, 2009].

Today more and more criminological psychopathology, without neglecting the somatic and genetic foundation, tends to enhance multifactorial interpretations of criminality, considering also the social context where crime has matured, looking with great attention to the sociological elements that intertwine and underpin each dynamic psychological and psychopathological.

II. PSYCHOPATHOLOGY OF THE STALKER

Going against what is the collective imagination is first necessary to clarify that not all stalkers are affected by mental disorders and that outlining the typical profile of the stalker is a rather difficult task, because it is always necessary a case by case analysis, avoiding include, reductively, in one or some categories the possible psychopathological aspects that characterize it.

The stalking, in fact, recalls a complex behavioral constellation, which can have different motivations also, but not only, of purely psychopathological relevance. It also includes a whole series of behaviors that are at the limit with socially and culturally accepted actions.

We are certainly in the presence of an extreme and desperate attempt to seek an interpersonal relationship: to devalue and above all to subject the victim to constant control, allows the stalker to keep alive, albeit in a persecutory key, the desire for an indissoluble bond.

The stalker generally manifests an evident problem in the emotional-emotional, relational and communicative area that does not always correspond to a precise psychopathological framework. First we can identify two types of stalker behaviors [Mullen P. E. & al., 2000]: intrusive and control. The first (phone calls, messages, e-mails, gifts, etc.) are put in place by the stalker to try to convey to the victim their emotional state, their feelings, desires, intentions, moods, with ambivalent emotional manifestations and often contradictory. Control behaviors (stalking at home or at work, stalking, threats, assaults up to murder) aim, precisely, to constantly monitor the victim, violating heavily freedom and privacy and generating a state of strong pressure psychological.

Usually the stalker uses both behavioral strategies according to a criterion that follows the escalation of violence or, in some cases, alternating phases. As with any conflict situation, it is indeed possible to identify phases of escalation of violence, which can synthetically be reduced to three essential moments:

1. a positive phase, in which the stalker, infatuated, invests emotionally on the victim and courts her;

2. an ambivalent phase, following the refusal of the victim, in which the stalker on the one hand begins to project his feelings onto the latter, so that his refusal assumes the value of a manifestation of love, on the other, however, seized by a strong anger and hostility, he takes on intimidating behavior, which feeds his desire to possess the victim and who manifest his need to restore his self-esteem, strongly threatened by rejection.

3. The last phase is the one in which the victim is defined as ungrateful and unfaithful and the violence tends more and more to increase up to the point of murder.

Starting from the needs and desires that underlie the harassing behavior, it is possible to identify different types of stalkers. In particular, following the classification of Mullen:[12], we can identify five categories of stalkers:

1. The refused, who, unable to accept the end of the relationship, is in search of a last desperate contact and puts in place behaviors that on the one hand aim to restore the relationship and on the other hand express his desire for revenge. Controlling, persecuting the victim becomes a way to try to keep the relationship and not accept the loss. This stalker has narcissistic and antisocial traits and, to a lesser extent, dependent, with substance abuse. Where they have failed to establish a positive personal relationship with their victim, they try to force it with threats and intimidation. The most frequent behaviors are: stalking, repeated direct approaches, phone calls, messages, etc.

2. Intimacy seekers are looking for an emotional / sexual relationship with the victim, who may also be a stranger. They invest a lot in this fantasized relationship, facing a central problem of their life, solitude. In the throes of a real erotomania (the belief of being secretly loved by someone), they attack unknown victims and celebrities of whom they are in love, with the desire to start a relationship with them. In this category we also find women. It appears to be the most persistent form of stalking [Mullen et al., 1999][13].

3. The rancorous, who is convinced that he has sustained a real or presumed wrong (eg for the end of an emotional relationship or for the end of a working relationship, or a customer dissatisfied with a service, or in condominium relationships) is a stalker that we often find in professional relationships. His behavior is justified as a defense or a fair revenge against those who allegedly damaged him. He feels betrayed and begins by seeking revenge and rehabilitation of his own reasons. Thus he pursues a punitive plan against his own "oppressor". In this type, borderline, narcissistic and paranoid personality disorders are more frequent. An example of rancorous we find him in the figure of Alvi Pepler in the "Zuckerman unleashed" by Philip Roth.

4. The incompetent is an inadequate suitor, not very skilled, with poor social and intellectual abilities. He wants to court, but ends with adopting attitudes that can be annoying. This type of stalker acts for short periods against the same victim and turns, soon, to other people.

5. The predator is the most dangerous category, because it draws pleasure and sense of power in the "voyeurism", that is in watching and spying in secret the chosen victim, planning in the meantime the attack. The predators then attack the victim by surprise. They are mostly men, often suffering from paraphilias (in particular pedophilia, exhibitionism and fetishism), bipolar disorders or substance abuse [Mullen et al, 1999]. «The duration of stalking is greater in those refused and seekers of intimacy and far less in incompetents and predators» [Monzani M., 2016].

As we have already pointed out very often, the stalker implements behaviors that to a certain extent are socially shared. We think of the jealous and passionate boyfriend who wants

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[12] Stalkers (Mullen et al., 1999): "il risentito", "il bisognoso di affetto","il corteggiatore incompetente","il respinto" ed il "predatore". Tra le più recenti forme di stalking abbiamo quello agito nel cyberspazio. I cyber-stalkers, infatti, incontrano le loro vittime in chat e ne diventano ossessionati.

[13] Lo studio inglese di Mullen, Pathé e Purcell (2000) dell'università di Cambridge ha cercato di classificare lo stalker sulla base di un campione di 168 valutazioni cliniche di casi di stalking cercando di analizzare e la motivazione predominante dello stalker, il contesto, la natura del rapporto preesistente e la sua diagnosi psichiatrica (Curci, Galeazzi, Secchi, 2003).

to win back his woman. How many more can they see real stalking actions in these behaviors? Precisely the cultural data once again often causes the victim not to perceive the severity of the conduct suffered. This is why often there can still be a strong resistance to recognizing the oppressive behavior as real "harassing harassment". And then once again it is necessary that alongside the regulatory interventions we act to favor a cultural transformation that relegates to the area of unlawfulness every action that in the name of "love" violates the person in his body and in his psyche.

CONCLUSIONS

Today more and more criminological psychopathology, without neglecting the somatic and genetic foundation, tends to enhance multifactorial interpretations of criminality, considering also the social context where crime has matured, looking with great attention to the sociological elements that intertwine and underpin each dynamic psychological and psychopathological. As we saw the stalker manifests emotional, relational and communicative problems that does not always correspond to a precise psychopathological framework

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PRACTICAL NOTIONS REGARDING THE CONTRACTUAL PROVISION ON THE WARANTY AGAINST THE EVICTION OF SELLING CONTRACTS

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ABSTRACT:
The contractual provision on the warranty against eviction is a matter in which the parties involved in the making of a selling contract often have tight negotiations. Many times the seller is looking for the exemption of provision of warranty, but is such a clause legally available? In the following we will present you the procedure in which the parties can limit or extend the provision aginst eviction.

KEY WORDS: *warranty against eviction, contractual limitation*

I. Introduction

Writing a sales contract can seem like a very easy job. However, during the preparation for such a document, an expert should consider the theoretical aspect- applied legislation, the doctrine and the jurisprudence regarding the matter, and also practical part of a transaction. So, during the making of a contract, the expert must represent more than a simple uninvolved advisor, and it is mandatory that he must profoundly know the commercial agreement between the parties, in the scope of turning it into the right words.

II. THE CONCEPT OF WARRANTY AGAINST EVICTION

Article 1672 Romanian Civil Code states that the seller has the following obligations: (i) to transfer the propriety or the right of the good , (ii) to deliver the good to the buyer and (iii) to guarantee the buyer against eviction and against the vices of the good.

A first observation which we mention in this article is the fact that, if the first two obligations are strongly influenced by the moment of signing the sales contract, in the case of warranty we acknowledge the fact that this is a continuous obligation, of which accomplishment can be demanded later than the moment of signing. Thus, we can state the fact that satisfying the provision of warranty against eviction is not mandatory in perfecting the contract, the possibility of it to never be executed being very high, and this absence doesn't a affect in any way the validity of the contract.

The provision of warranty against eviction finds its appliance in the article 1695 Romanian Civil Code. Practically, the provision against eviction is that insurance which the

seller provides to the buyer regarding the useful and undisturbed use of the good which functions as the object of sale. Moreover, the law states the fact that the warranty against eviction subsist against any second receiver of the good, even if these ulterior transfers are made in an onerous or free way, the warranty continues. This solution states that along the right of the sold good, the buyer is entitled to all the other rights that are bound with that good, rights that are closely linked to the good which is the object of the contract.[1]

III. THE CLASSIFICATION OF THE WARRANTY AGAINST EVICTION

From the way it is described in the law, the warranty can distinguish itself in two big categories: -(i) by the person which causes the eviction (ii) by the juridical consequences determined by the intervention of eviction.

From the perspective of the person which determines the apparition of the eviction, the Romanian Civil Code states two cases of warranty against eviction: (i) the warranty against eviction which originates from circumstances imputable to the seller and (ii) the warranty against eviction which originates from the claims of a third-party.

When it comes to the category of juridical consequences which occur as a result of an alteration in the quiet usage of the sold good. The Romanian Civil Code provides three situations: (1) total eviction (2) partial eviction and (3) eviction was overthrown by the buyer, with the price of some patrimonial sacrifices.

3.1. The warranty against eviction resulting from the personal matter of the seller

3.1.1. Notion and conditions

Article 1695[2] Romanian Civil Code states the obligation of the seller to guarantee the buyer against any eviction which originates from facts imputable to the seller, no matter the moment in which these facts occur, before or after the signing of the contract.

As a result, the warranty against eviction resulting from the personal fault of the seller is qualified as a perpetuate and abstinent (the obligation of not doing) which comes as a seller, but also an eventual successor with universal vocation responsibility. It is inconceivable the fact that through the sales contract, the seller transferred to the buyer not only all the rights which he had regarding the seller's benefit good-object at the date of the signing of the contract., but also all the rights susceptible to be received by him in the future, for example the right to build by virtue of a building authorization which was not emitted at the date of the closing of a land sales contract. An example- the guaranty school against eviction regarding the future rights which the seller woud have about a good which presumes the obligation of abstention from the seller is the one in which the good is sold to another, and later the seller inherits the true owner or gains through a donation that very good[3].

We highlight the fact that the obligation of warranty against eviction of the seller is born in the case of a disturbance of a right against which the buyer can defend himself by

[1] See Fr. Deak, Lucian Mihai, Romeo Popescu – "Tratat de drept civil"- Volume 1 of the fifth edition, Ed. Universal Juridic 2017, pg. 139

[2] Art.1695 Al.3 Romanian Civil Code specifies: "Moreover, the warranty is owed against the eviction that originates from the imputable deeds of the seller, even if these appeared after the sale"

[3] See Civil Sentence no. 264/2016 pronounced by the Motru Court, published on www.rolii.ro, as well as Monna Lisa Belu Magdo - Contract for Sale in the New Civil Code, Hamangiu Publishing House, 2014, pp. 243, Răzvan Dincă - Special Civil Contracts in the New Code Civil, Course Notes, Universul Juridic Publishing, 2013, pg. 127

invoking the personal exception from the warranty[4]. As far as the in fact disturbances, in the virtue of the owner of the right of property, the buyer will be able to defend by appealing to actions for recovery.In accordance to the in fact disturbances, these involve the prohibition of the seller to commit any material fact, even an illegal one, which roots can disturb the buyer to apply the right of property's powers[5]. The disturbances consist the interdiction of the seller to emit any claims on a right (a real or a receivable one) over a sold good, as long as the contract is in force. This matter doesn't mean that will be prohibited neither the seller's possibility to bring the validity of the sales act up nor the possibility to request under any legal way the implementation of the buyer's obligations. Equally, we're still in the situation of a right disorder and a signing procedure of some acts between seller and third-parties, until the sales contract, in which the sold right is limited or the seller gets to know the limits of the causes, and he hides from buyer the existence of these. [6]In case the seller signs this kind of act in which the limits of the property right are brought up, for example a transaction in which a place is given to two persons, it is obviously that the first person who will write this right in the Land Registry, will be the one who evict the other one. The eviction is produced as a result of signing a sales contract between seller and an eviction third-party. In this case, we can underline that the warranty obligation against the seller's eviction, which has come from a personal deed, implements the effects as a result of a direct or an indirect eviction (or through a third party who wants to fix his right in the Land Registry).

3.1.2 The contractual regulation of the warranty against evictionfrom own deed

In our legislation there are no provisions on limitation of cases that would imply the seller's liability. As a result, we agreed that the seller's liability could be aggravated and/or extended to other unforeseen circumstances or situations, such as the extension of warranty against eviction caused by disturbances in factgenerated by theseller. Such an extension of warranty could be justified by a higher price requested by the seller compared to the situation in which they would not grant additional warranties.

As for the contractual limitation of the warranty against eviction owed by the seller for his disturbances in fact, some specifications are imposed. Firstly, in accordance with the provisions of article 1699[7]Romanian Civil Code, a clause for total exemption from the seller's liability for the caused disturbances in law, which came from own deed, is considered unwritten. This provision is based on the principle according to which he who warrants cannot evict.

The same principle is found in the legal solution to the unwritten consideration of the exemption clause in which the seller, even though knew about the existence of an eviction cause, hid this information from the buyer. The reason why the legislative power introduced such an interdiction is that the seller is no longer of good faith in his relationship with the buyer, for he had misled him by omission of facts.

We also specify that, in the case the buyer was informed of an eviction cause, it is presumed that the latter assumed the risk of the eviction and so, is unable to request the

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[4]See Monna Lisa Belu Magdo, op. cit. pg 243

[5]Gheorghe Comăniţă, Ioana-Iulia Comăniţă, Civil Law. Special civil contracts, Universul Juridic Publishing House, Bucharest, 2013

[6]Ibidem

[7]Art. 1699 Romanian Civil Code specifies : "Even if has been agreed on that the seller will not owe any warranty, he is still responsible for the eviction which was caused after the sale by his own deed or by causes which were known before the sale and which were hid from the buyer."

warranty from the seller. Of course the contractual parties can extend, while negotiating and only through specific clauses, the warranty against eviction owed by the seller even if such a cause was brought to knowledge to the buyer.

In the doctrine[8] appeared the opinion that the existence of a clause for total exemption from the seller's liability would not have the desired effect of reimbursing the price by the buyer only in the case where a possibility of eviction was brought to his knowledge before concluding the contract.

3.2. The warranty against eviction from a third party's deed

3.2.1. Notion

The seller also has the obligation to warrant the buyer for the disturbances caused to him by the deeds of third parties in the exercise of the prerogatives of the property rights over the purchased good. Thus, unlike the warranty for own deeds, which is actually an obligation of abstain(not to do), the warranty for a third party's deed is a commissive obligation, consisting in defending the buyer by rejecting the claims of the third party, by fulfilling some conditions

As for those disturbances of the prerogatives of the property rights, there are some specifications imposed. Thus, regarding such disturbances, the buyer can even be responsible for the eventual limitations of his propriety right, allowing third parties to act lawfully, or the buyer himself is capable of avertingthe respective demands if the third party's deeds were unlawfully. In the first instance, we cannot identify any legal justification of a warranty demand from the seller, and in the latter instance, such a demand would be futile, the buyer solely having every possibility to defend himself against such a disturbance. Therefore, the seller is to ensure the buyer that those deeds of third parties, which can limit or prevent the exercise of the propriety rights of the purchased good, deeds that must be both legal and not caused by the buyer

3.2.2 Terms

To invoke the warranty against eviction from a third party, the legislative power imposed the necessity of having fulfilled the next conditions: a disturbance in law must exist, the cause of eviction must be prior to the conclusion of the sales contract and the buyer must not have known about the cause of eviction while closing the contract. These requirements were also examined in the judicial practice when the courts were vested with the settlement of some claims regarding evictions. The refore, the Bucharest Court of Appeal, in nr. 1098R/09. 11.2015, stated that "*The seller's duty to ensure the buyer of the "quiet possession of the good" implies not only the warranty against own deeds, but also the warranty against third party's deeds. Thus, the seller is expected to know the legal status of the sold good, which is why it is natural that he should be defending the buyer from the third party. The seller'sobligation to warrant exists in this instance only if the following requirements are met: it must be a disturbance in law, the cause of eviction to be prior to the conclusion of the sales contract and the cause of eviction to not be known by the buyer*".[9]

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[8]See Monna Lisa Belu Magdo op. Cit. Pg.252

[9]See the Civil Decision of the Bucharest Court of Appeal , No 1098R/09.11.2015- The Fourth Civil Section, irrevocable, which was published on the site : http://www.rolii.ro/hotarari/58a03517e49009b433000ff0

As far as the existence of a disturbance in law (be it a real right or a claim right) is concerned, the third party must invoke in his favor a right, a privilege or a power that would allow him to proceed in order to prevent or restrain the buyer from the exercise of his acquired right, or, through his actions, the third party must reduce the value of the good or it's purpose (i.e. the right of use based on a tenancy agreement).

This obligation cannot be used when it comes to disturbances in fact, against which the buyer can defend himself, by appealing toactions for recovery and possession. The disturbance in law caused to the buyer must be recent or at least imminent, not only eventual[10]. In most cases, this occurs as a result of a definitive court order from which the third party gains a right over the good. The existence of the court order is not a *sine qua non*condition that generates liability for the seller, the eviction produces its effects even in the absence of any legal action brought before justice by a third party. However, in the doctrine it was established that the disturbance must be recent or to result from a serious threat of dispossession for it to justify the seller's liability for eviction[11]. The sole probability of a disturbance in the exercise of the prerogatives of the propriety right is not and will never be enough to admit anlegal action against the seller, even if the buyer would find out about the existence of a right which could expose him to eviction.

Regarding the condition according to which the cause of eviction should be prior to signing the sale contract, this means that the judicial fact or act which is the generator of the right on which the third-party is based on or of the limit of the given right which they claim to have must be on a date which is previous to the one on which the sale contract was signed. We mention the fact that in order for this condition to be accomplished it is not necessary that the right claimed by the third-party to be in their patrimony at the date on which the contract of sale was signed, the condition being accomplished even if at the moment when the sale of the right was realized and it was in the patrimony of another party which was then transmitted to the third-party. In other words, what is relevant is the existence of the right, regardless of the patrimony it belongs to at the date of the contract being signed.

We underline the fact that if we were to accept that the seller would be responsible for causes which have their origins prior to the sale and are not imposed on them, there would be a breach of the arrangements that regard the risk of the contract and which is to be supported by the buyer after the moment of transferring the property and the transition of the good. Even more, in such a situation, the seller would not be able to be protected in any way against any possible abuses made by the buyer. In the eventuality in which the eviction case appears after, and the reason can be imposed to the seller, they will respond as a consequence of their own act and not the third-party.

According to article 1695, Civil Code, one of the conditions of existence of a guarantee against eviction is that the right claimed by the third-party should not be known by the buyer at the moment of materializing the sale contract. In the situation in which, at the moment of signing the contract, the buyer knew the cause of eviction, they obliged to pay the price being fully aware with regard to the limits of the given right and/or with regards to a possible threat to the exercise of the right, thus accepting the possibility of the threat to materialize. As there was mentioned in doctrine[2] , the buyer which knew about the cause of

[10]Florin Moțiu, Special contracts in the new Civil Code, the fifth editure,UniversulJuridicEditure, Bucharest 2014

[11]CameliaToader, Eviction in the civil contracts, All Editure

eviction accepted the risk of total loss or partial loss of the good, as they agreed to the realization of the sale contract, which gains a random[3] nuance. If the seller who is given the burden of probation proves by any method the fact that the buyer knew about the risk of eviction (and not just a simple possibility), they will be exonerated of any liability. It must be reminded that good-faith of the buyer in the moment of signing the contract involves not knowing the eviction by the buyer and is presumed by the law.

3.2.3. Contractual agreement of the guarantee against eviction started from the action of a third-party

According to article 1698, the parties can limit the liability of the seller of eviction coming the action of a third-party, as they may even reach the total elimination of it. Still, the clause according to which the obligation of guarantee against eviction is limited or eliminate completely will no exonerate the seller from the obligation of giving back the price, fully or only partially, depending of the effects of the eviction (total or partial), with the exception in which the parties introduced specific clauses through which they anticipated that the price will not be repaid or when the buyer themselves assumed directly and without hesitation the risk of eviction. In the absence of a concrete specification, the mention will not be interpreted in the way in which it would reflect the knowledge of the buyer regarding the cause of eviction, but only of the method through which the engaged parts decided to share the risk in the situation in which the eviction would take place[5].

IV. CONCLUSIONS

As we previously mentioned, the guarantee against eviction is an essential obligation of the seller, which is stipulated in article 1672 from the Civil Code, along with the obligation of transferring the property right as well as giving the sold good.

Generally, the ending of the sale contract for eviction is to be established by a competent court, method which will also establish the damages to which the buyer is entitled. Such a conclusion results from the form of article 1700 from the Civil Code – the buyer may ask the end of the sale. The Civil Code also mentioned the exception from this rule by the stipulations from article 1552 – unilateral resolution of the contract or article 1553 Cod Civil – the existence of a commissary pact according to which the parties established that in the eventuality of an eviction the contract would stop.

As a rule, the parties can establish freely thought the contract the limits of the guarantee against eviction, as well as its effects. As it is a derogation from the legal statements, these contractual clauses must be written in such way that the will of the parts of extending or limiting the effects of the guarantee against eviction should be clear, without any other interpretation. From the form of the article results that the parts can even use to the total elimination of the liability of the seller in such case. It was not the same solution used by the law-maker in the situation of eviction which comes from the own action of the seller or of the eviction which origins from causes which were hidden by the seller at the time of the sale from the buyer – eventual contractual clauses which would eliminate the liability of the seller in those situations will be considered unwritten, as the previously mentioned rules would be applied.

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THE SCIENCE OF JUDICIAL PSYCHOLOGY

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ABSTRACT: *Judicial psychology is the science that analyzes and tries to understand the criminal phenomenon in general and its determinant factor in particular, by the complexity of factors that generate it and by the diversity of its forms of manifestation. Although the determining factor of criminal behavior is always subjective being generated by the psychic of the offender, this aspect must be correlated with the context in which it manifests itself: social, economic, cultural context etc. Judicial psychology investigates the behavior of the individual in all its aspects, seeking a scientific explanation of the mechanisms and factors enhancing criminal favors, thus enabling the identification of the preventive measures to be taken to reduce the categories of offenses. It studies the psycho-behavioral profile of the offender, identifying the causes that determined its behavior in order to take preventive measures.*

The domain of judicial psychology is mainly deviance, conduct that departs from the moral or legal norms that are dominant in a given culture. The object of judicial psychology is the criminal act, correlated with the psychosocial characteristics of the participants in the judicial action (offender, victim, witness, investigator, magistrate, lawyer, civil party, educator, etc.). The science of judicial psychology also analyzes how these characteristics appear and manifest themselves in concrete and special conditions of their interaction in three phases of the criminal act: the pre-criminal phase, the actual criminal phase and the post-criminal phase.

KEYWORDS: *judicial psychology, offender, victim, pre-criminal phase, post-criminal phase, criminal offense, psycho-behavioral profile of the offende*

I. THE SCIENCE OF JUDICIAL PSYCHOLOGY.

Judicial psychology is the science that analyzes and tries to understand the criminal phenomenon in general and its determinant factor in particular, by the complexity of factors that generate it and by the diversity of its forms of manifestation.[1] Although the determining factor of criminal behavior is always subjective being generated by the psychic of the offender, this aspect must be correlated with the context in which it manifests itself: social, economic, cultural context etc. Judicial psychology investigates the behavior of the individual in all its aspects, seeking a scientific explanation of the mechanisms and factors enhancing criminal favors, thus enabling the identification of the preventive measures to be taken to reduce the categories of offenses. It studies the psycho-behavioral profile of the offender,

[1] See,Butoi,T.,*Psihologie judiciară,Ediţia a II-a,*Editura Fundaţiei România de Mâine Bucureşti 2004,pag.221.

identifying the causes that determined its behavior in order to take preventive measures. As a stand-alone science, judicial psychology analyzes human personality, following how it manifests and acts in family and society.

The domain of judicial psychology is mainly deviance, conduct that departs from the moral or legal norms that are dominant in a given culture. The object of judicial psychology is the criminal act, correlated with the complex study and analysis of human behavior before, during and after the use of the offense. Judicial psychology studies the psychosocial characteristics of the participants in the legal action (offender, victim, witness, investigator, magistrate, lawyer, civil party, educator, etc.), how these characteristics appear and manifest in concrete and special conditions of their interaction in the three phases of the criminal act: the pre-criminal phase, the actual criminal phase and the post-criminal phase. It is important to specify the objectives of judicial psychology, taking into account, first of all, those who will benefit from and effectively use the results of research in this field.

Judicial psychology is primarily addressed to justice specialists who, by their nature, deal with people involved in criminal cases and whose decisions can influence their destiny. The act of justice can not be understood and accepted outside the desiderate that governs the intention of the legislator, namely, finding out the truth. Judicial psychology imposes a series of requirements without which the act of justice remains a sterile, technicalist exercise, lacking credibility and force. In terms of methods, judicial psychology as an applied part of general and social psychology has taken over most elements from their conceptual framework, using techniques and investigative tools specific to these disciplines: observation, experiment, psychosocial investigation, and judicial investigation as specific methods based on questionnaires and interviews), the biographical method, the activity analysis method, the opinion poll, etc. The system of categories with which judicial psychology operates belongs to general and social psychology, but also to other related disciplines, thus having an interdisciplinary character. In organizing and conducting his theoretical and practical approach, judicial psychology also uses notions from other psychological disciplines such as experimental psychology, differential psychology, cognitive psychology, psychophysiology, medical psychology, psychopathology, military psychology, psychology of conduct, etc. The theoretical approach of judicial psychology consists of: organizing, developing and improving an operative conceptual system; the validation of conceptual theoretical and explanatory models elaborated by other branches of psychology, following their testing on the specific field of judicial activity; elaboration of theoretical and explanatory models regarding the etiology of some psychic phenomena in the judiciary field, etc.

The practical approach of judicial psychology presupposes: elaboration of a specific methodology for investigation-research of the psychic reality in the judicial field and highlighting the legal phenomena of psychological phenomena specific to this field; providing specialized judicial staff with data, relevant and useful information about the psychic reality of the judiciary in order to establish the truth; the development of psycho-social programs to prevent crimes and recidivism; developing strategies for educational therapy for criminals; elaboration of recovery programs for socio-professional reintegration of offenders; the provision of psychological assistance, materialized in the specialized expertise offered to both the judiciary and the offenders, etc.

II. *ANALYSIS OF THE CRIMINAL ACT AND ITS CAUSAL COMPLEXITY*

In order to analyze the criminal phenomenon in its vast complexity, it is necessary to study disciplines such as: criminology, judicial psychology, judicial sociology, criminal biology, legal medicine, criminal psychiatry, criminal anthropology, criminal statistics etc. Although it is a social phenomenon, criminality must be investigated individually, as an act committed by a concrete person in a concrete situation. It is a human action, determined by certain psychological elements, needs, tendencies, motives, goals, etc. A coherent vision of the dynamics and interaction of the elements of the whole set of factors that contribute to the production of the criminal act can only provide a systemic conception of the conduct and psycho-behavioral manifestations.

The factors underpinning the psycho-biological, psycho-social, and psycho-moral theories, taken separately, can not adequately explain the origin of the phenomenon and the criminal behavior. This presupposes the development of a theoretical-scientific and methodological system with integrating possibilities and generalizers for the concrete reality. In Romania, the evolution of the criminal phenomenon is a consequence of the impact of the serious economic and social problems characteristic to the transition period, as well as the crisis of authority that the institutions crossed. Lack of legislation and overload of the criminal justice system, correlated with staff shortages and logistics, have limited the effect of preventive and repressive measures. Elements of organized crime have emerged and developed most rapidly in the economic and financial sphere given the high rate of profit and the low degree of risk incurred.

To explain the mechanism of the occurrence and the dynamics of the criminal phenomenon, it is necessary to start from the concept of connection that involves the interaction of objects and phenomena, the correlation of the subsystems into the system and the systems in the context. In accordance with the principle of connection, the origin and dynamics of the criminal phenomenon can not be the result of a single factor or of several factors, but only of the interactions between them, which gives it the configuration and which has an objective character.

The difficulty of the theoretical approach and the practical investigation of the etiogenesis of the criminal phenomenon derives precisely from the impediments that arise in the discovery of the types of relations that act specifically in this field. The use of the "possibility and reality" categories mediates the surprise of the mechanism of the synthesis between continuous and discontinuous in the transition from one state to another in the process of determining the criminal phenomenon. Unlike reality, the possibility designates the totality of virtual states through which the criminal phenomenon can pass, but for which there are still insufficient conditions. At this level, it is necessary to locate the true prevention, which must precisely prevent or eliminate the appearance and influence of conditions that facilitate the passage from the realm to the real one in the case of a concrete crime.

The timely and effective intervention is strongly conditioned by the understanding that the dynamics of internal and external interactions, current or prospective, of biopsychosocial factors marked by criminogenic influences determine a wide range of present or future possibilities in the occurrence and manifestation of the criminal phenomenon.

The boundaries between the possible and the impossible crime are relative, because the evolution of the manifestation states has a concrete character and is the expression of the internal content and the variability of the range that favors or suppresses some directions. It

should also be emphasized that if some directions are part of the system's essence, others are cantonized to its accidental aspects.

The former are necessary directions and manifest as dominant tendencies, while the other are random and do not depend on the internal and stable conditions, but on the non-essential variable conditions. The necessity of the criminal phenomenon is the way of existence or manifestation of criminogenic states, properties, relationships or tendencies, circumscribed at the level of biopsychosocial factors, taken in their interaction, deriving from their internal nature and, under constant conditions, unfold as inevitably in - a certain well-specified way.

Opposite to necessity, occurrence is the way of existence or manifestation of criminogenic states, properties, relations or tendencies located at the same level that derive from the peripheral or external factors and are characterized by variability and inconsistency, whether or not they succeed is done in one way or another, without affecting the essence of the system. Necessity and occurrence are not absolute, but relative, so that in a particular report or given circumstances, what is necessary may be incidental, in another relation or under other conditions. Thus, for example, theft committed by a person who has not been offered the chance of a job and in his conception does not have other possibilities of honest gain, seems necessary, whereas in the conditions of a stable work place can be considered a coincidence.

Reality, possibility and impossibility, along with necessity and chance, are categories that express qualitative states of the criminal phenomenon, its existence also involves quantitative determinations found in the concept of probability. In this case, it refers to the possibilities of becoming a criminal offense, to the extent and frequency of conditions conducive to the transition from a virtual state to a real one, to the chances of committing a criminal offense. Probability is found in the frequency equation as a ratio between the number of actual offenses and the total number of possible cases. Probability has meaning and value only in the case of casual offenses, because there are at least two possibilities: to be committed or not, to be committed in one form or another. Probability gains increasing significance and importance, as criminological prognosis shapes its place and role in criminal prophylaxis.

The causal relationship, as a particular form of determining the criminal phenomenon with its proximal genres and concrete facts of manifestation, expresses a genetic relationship and is considered as a link independent of the will of man between two subsystems or elements of the same system that succeed; one provoking the other one. The phenomenon that precedes and causes the production of another phenomenon is called a cause and which, from a criminological perspective, has the interaction of the biopsychosocial factors that necessarily determine the offense. Cause is the necessary condition without which a certain behavior would not manifest and at the same time precedes the effect being invariably followed by the same effect.

The effect is the phenomenon or process that succeeds the cause and whose production is determined by it. Between cause and effect, a need report is established. The constant of this report is marked by conditions. Causes produce the same effects only if they act under the same conditions, just as the variability of the conditions mediates the variability of effects in relation to the action of the same causes.

The interaction between cause and effect is complex.[2] On the one hand, the phenomena are, at the same time, in different ratios, both causes and effects, and on the other hand, several causes interact in the production of effects, which in turn act in close connection to various conditions.

Once it appears, the effect can have an active role on the cause that generated it, influencing it favorably or unfavorably. Conditions are a complex of phenomena that can not in themselves generate criminal behaviors but which, accompanying time and space cause and influence them, assureing a certain evolution. Conditions may be necessary, incidental, sufficiently necessary, insufficiently necessary.

The conditions accompanying the action of the cause, mark their manifestation by hurrying or slowing, stimulating or hindering the appearance of a certain effect. The difficulty of revealing causal relationships in determining the criminal phenomenon derives from the fact that they correlate with the entire network of other relationships present in its structure and dynamics. In order to facilitate their conduction, particularly at the level of concrete criminal offenses, theoreticians and practitioners are concerned with the isolation of causal relationships in the universe of possible relationships, with particular reference to the motives and relationships on which the subjective side of the crimes under consideration are based.

III. ANALYSIS OF THE CRIMINAL PHENOMENON

For the correct interpretation of criminal behavior, the three phases of the offense must be taken into account, namely the pre-criminal phase, the actual criminal phase and the post-criminal phase. The pre-criminal situation is a set of circumstances outside the offender's personality, which precedes the offense. This situation involves two elements:

a) the event that determines the occurrence of the criminal idea, and

b) the circumstances in which the offense is being prepared and is being carried out

In committing a crime, its author participates with his whole being, mobilizing his potential otivational and cognitive-emotional potential. The enforcement of the decision to commit the offense is preceded by a series of processes of analysis and synthesis, the fight of motives, deliberation and enforceable acts deeply engaging, in all its complexity, the personality of the offender.

Until the decision to commit the offense is made, the offender's psyche is dominated by the perception and processing of triggering motivational information whose polarity is structured according to the pattern of related-evolutive syntheses, serving the deliberations on the mobile behavior of criminal behavior. As an initial step in the formation of the criminal behavioral mobile, there are the needs whose antisocial orientation is of fundamental importance, because of their perception of the external situation.

From a psychological point of view, the needs are manifested in the individual's consciousness as a mobile of possible behavior, and in case of a contest of circumstances, they can determine the decision making for committing the offense. The outcome of the deliberation process depends largely on the degree of intensity of the antisocial orientation of the offender`s personality. In the pre-infraction phase the subjective premises of committing the act are determined both by the psychic predispositions of the perpetrator and by the favorable circumstances with triggering valences. This stage is characterized by intense inward consumption, reaching even a high degree of excitement, the psychological issue

[2] SeeTănăsescu,C.,*Psihologie judiciară,*Editura All,Bucureşti 2009,pag.155.

being focused on both the risk coefficient and the stake placed in the game. In the deliberative process, motivational, value, moral, emotional, and material criteria come into play.

The ability to project and anticipate consequences influences the decision-making. The processes of analyzing and synthesizing data about the crime scene and structuring them in a range of concrete variants of action (transitive behavior of choosing the optimal variant) are triggered in the second phase of the act, the actual crime scene.

The action plan in its deployment (time of execution, succession of stages, means of realization, etc.) is mentally represented. Once the decision to commit the offense has been finalized, the imaginative side of the offense is supported by concrete preparatory actions. Thus, if during the deliberation stage the offender`s behavior is of expectation, after the decision has been made, it is characterized by activism, the execution of the preparatory acts presupposes the appeal to the means of assistance, the tools, the contacting of accomplices, the gathering of information, the supervision of the objective.

The result of this behavior may be, as the case may be, the materialization of the decision to commit the act by achieving the optimal conditions for its success, either the discontinuance, the delay, the expectation of favorable conditions and circumstances. The transition to accomplishment of the act is associated with experiencing intense emotional states. Fear of unpredictability, time crises, objects, beings or phenomena perceived during the act of committing the deed (breaking instruments, weapons, victim, witnesses, space-time context of the deed, etc.), depending on their physical and chemical properties , shape, size, color, spatial mood, etc.) amplify these emotional states. Lack of control over behavior during operation, a feature of normal activity can generate a series of errors, loopholes (loss of personal belongings at the crime scene, forgetting of offending objects or omission of deleting some categories of traces, giving up the glove port , various injuries, etc.), which, after being exploited, will contribute to the identification of the author.

The characteristic feature of the perpetrator's psychology after committing the deed is the tendency to defend itself, to evade identification, accusation and sanction. The postinfractional phase has a very varied configuration, its content is largely determined by the way the previous phase has unfolded. The behavior of the offender at this stage is reflexive-action, his whole psychic activity being marked by the panoramic view of what happened at the scene. Practice has demonstrated in this respect the existence of a register of strategies to counteract the identification and prosecution of authors. In this respect, a number of criminals create alibis to convince the authorities that it was impossible for them to have committed the deed.

The strategy used is, as a rule, to move away from the crime scene in due time and to appear as soon as possible in another place where, through various actions, it seeks to be remembered to create evidence, relying on that after a certain period it will be difficult to accurately determine the succession of the two events in time. Otherwise, the offender appears around the place where the investigations are conducted, seeking to obtain information about their conduct, and subsequently acting through denunciations, anonymous notices, changes in the field of action, removal of evidence, home displacement, hospital admission, or committing small actions to be arrested.

All these actions are aimed at confusing the ongoing investigation and, implicitly, its identification. Running from the place where a crime has occurred and the concern to get an "alibi" is not always a clue of guilt. In order to determine the circumstances in which the deed

was committed, people of different qualities will be heard[3]. There are cases when people who happened to have witnessed or found a crime, do not stay at the scene, to be suspected or quoted as a witness. Such behavior is typical of the recidivists, who, as a result of their criminal history, would be slightly blamed. In pursuing the purpose, offenders do not hesitate to use any means that could help them: lying, perfidy, various attitudes, seeking to inspire sympathy for their injustice or for the situation in which they have become "circumspect". When these strategies are unsuccessful, some offenders show arrogance to the investigator or sometimes resort to, even intimidating him.

The processing of information about the events that have occurred causes the emergence of an exciting focal point with an inhibitory effect on the other areas, especially those involved in the processing of those events that are not related to the offense, and acts at the behavioral level according to the law defensive dominance. The offender has a defensive attitude both during the commission of the offense and after the arrest, during the investigation and trial, sometimes even during the execution of the punishment. When the offender was included in the suspect circle and is invited for hearings, his behavior continues to be characterized by the simulation tendency. It has a defensive attitude, ranging from small distortions to systematic attempts to improve its procedural condition.

The offender adopts different tactical positions determined not only by his degree of guilt but also by his position towards the investigator. If the offender feels that he or she dominates the investigator (either in the capacity to argue or in the evidence he has on his guilt), he will be extremely cautious in what he relates and will not give up his position unless there is evidence strong. If he realizes the superiority of the investigator, then his resistance decreases and the defensive dominance will only manifest through some adjustments to the statements he makes. Most offenders are inconsistent in depositions, recognize a party at first, then deny fiercely, return to what has been declared, in the end to make a confession, but also incomplete.

Among the circumstances that may constitute attenuating circumstances stipulated in the Criminal Code (Article 74, letter c), there is also the one regarding the perpetrator's attitude after committing the offense. This attitude may consist in presenting willingly to the criminal investigation bodies, in sincere attitude throughout the trial, recognizing from the beginning that he committed the deed and stating precisely the circumstances surrounding it. Everything can be corroborated with the traces discovered at the scene, the preference for certain objects, the traitor's interest in removing the traces, which, from the initial stage, helps the judiciary to bring the perpetrator into a particular group[4].

Once the offender has been identified and receives legal punishment, it would be ideal to have a psycho-behavioral profile in place to implement an appropriate corrective program. Difficulties in this area lie in the fact that the diagnosis of each case is laborious, requiring the participation of several specialists (psychologists, magistrates, sociologists, criminologists, lawyers, etc.).[5] The most accurate diagnosis of the psycho-behavioral profile of the offenders, the most accurate identification of the causes that determined their antisocial behavior, would be essential requirements for shaping the therapeutic-recuperatory programs within the correctional institutions, impacting on their reinsertion and social reintegration.

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[3] Elena Ana Nechita, Metodologia investigării infracţiunilor, Ed. PRO Univeristaria, 2012, p.115.
[4] Elena-Ana Nechita, *Criminalistică,* edition II, revision, Ed. PRO Univeristaria, 2009, p.145
See,Tănăsescu,C.,*Psihologie judiciară,*Editura All,Bucureşti 2009 ,pag.162.

CONCLUSIONS:

Judicial psychology is the science that analyzes and tries to understand the criminal phenomenon in general and its determinant factor in particular, by the complexity of factors that generate it and by the diversity of its forms of manifestation. Although the determining factor of criminal behavior is always subjective being generated by the psychic of the offender, this aspect must be correlated with the context in which it manifests itself: social, economic, cultural context etc.

Judicial psychology investigates the behavior of the individual in all its aspects, seeking a scientific explanation of the mechanisms and factors enhancing criminal favors, thus enabling the identification of the preventive measures to be taken to reduce the categories of offenses. It studies the psycho-behavioral profile of the offender, identifying the causes that determined its behavior in order to take preventive measures. As a stand-alone science, judicial psychology analyzes human personality, following how it manifests and acts in family and society.

The domain of judicial psychology is mainly deviance, conduct that departs from the moral or legal norms that are dominant in a given culture. The object of judicial psychology is the criminal act, correlated with the complex study and analysis of human behavior before, during and after the use of the offense. Judicial psychology studies the psychosocial characteristics of the participants in the legal action (offender, victim, witness, investigator, magistrate, lawyer, civil party, educator, etc.), how these characteristics appear and manifest in concrete and special conditions of their interaction in the three phases of the criminal act: the pre-criminal phase, the actual criminal phase and the post-criminal phase.

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In committing a crime, its author participates with his whole being, mobilizing his potential motivational and cognitive-emotional potential.

The enforcement of the decision to commit the offense is preceded by a series of processes of analysis and synthesis, the fight of motives, deliberation and enforceable acts deeply engaging, in all its complexity, the personality of the offender. Until the decision to commit the offense is made, the offender's psyche is dominated by the perception and processing of triggering motivational information whose polarity is structured according to the pattern of related-evolutive syntheses, serving the deliberations on the mobile behavior of criminal behavior.

As an initial step in the formation of the criminal behavioral mobile, there are the needs whose antisocial orientation is of fundamental importance, because of their perception of the external situation. From a psychological point of view, the needs are manifested in the individual's consciousness as a mobile of possible behavior, and in case of a contest of circumstances, they can determine the decision making for committing the offense. The outcome of the deliberation process depends largely on the degree of intensity of the antisocial orientation of the offender`s personality. In the pre-infraction phase the subjective premises of committing the act are determined both by the psychic predispositions of the perpetrator and by the favorable circumstances with triggering valences.

This stage is characterized by intense inward consumption, reaching even a high degree of excitement, the psychological issue being focused on both the risk coefficient and the stake placed in the game. In the deliberative process, motivational, value, moral, emotional, and material criteria come into play.

The ability to project and anticipate consequences influences the decision-making. The processes of analyzing and synthesizing data about the crime scene and structuring them in a range of concrete variants of action (transitive behavior of choosing the optimal variant) are triggered in the second phase of the act, the actual crime scene.

The action plan in its deployment (time of execution, succession of stages, means of realization, etc.) is mentally represented. Once the decision to commit the offense has been finalized, the imaginative side of the offense is supported by concrete preparatory actions. Thus, if during the deliberation stage the offender`s behavior is of expectation, after the decision has been made, it is characterized by activism, the execution of the preparatory acts presupposes the appeal to the means of assistance, the tools, the contacting of accomplices, the gathering of information, the supervision of the objective.

The result of this behavior may be, as the case may be, the materialization of the decision to commit the act by achieving the optimal conditions for its success, either the discontinuance, the delay, the expectation of favorable conditions and circumstances. The transition to accomplishment of the act is associated with experiencing intense emotional states. Fear of unpredictability, time crises, objects, beings or phenomena perceived during the act of committing the deed (breaking instruments, weapons, victim, witnesses, space-time context of the deed, etc.), depending on their physical and chemical properties, shape, size, color, spatial mood, etc.) amplify these emotional states.

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THE IMPORTANCE OF ANALYZING THE STRUCTURE OF THE LEGAL NORM IN ORDER TO INTERPRET AND TO APPLY CORRECTLY THE LAW

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ABSTRACT

In everyday life, people enter a multitude of social relationships with their peers. A social relationship turns into a legal relationship only if there is a legal norm that governs it. The law can not be conceived in the absence of the legal norm, so we can say that the legal norm is an essential element of the law.

KEY WORDS*: legal norm, hypothesis, disposition, sanction*

INTRODUCTION

Being an integral part of social norms, legal norms address human behavior. They are rules of conduct instituted or sanctioned by the state, the application of which is ensured by legal consciousness and, if necessary, by the coercive force of the state.[1]

The purpose of the legal norm is to ensure social cohabitation in the direction of promoting and consolidating social relations according to the ideals and values that govern the society. By means of legal norms, inter-human relations are regulated in specific forms.[2]

In the analysis of the structure of the juridical norm, we distinguish the logical-juridical structure and the technical-legislative structure of the rule of law, respectively the internal structure, given by the way of its composition, and the external construction, given by the way of expression of the regulation within the normative act or another source of law.[3]

THE LOGICAL-LEGAL (INTERNAL) STRUCTURE OF THE NORM

The logical-juridical structure of the rule of law is of particular importance, as it indicates the elements of the norm and the interdependence between them.

This construction corresponds to the logical situation that any prescription to have the meaning and authority of a rule of law must prescribe the conditions under which certain categories of subjects will have a certain conduct (hypothesis), what is this conduct (disposition) and the consequences of non-compliance or violation (sanction).

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[1] Gh. Boboş, C. Buzdugan, V. Rebreanu, *Teoria generală a statului şi dreptului*, Ed. Argonaut, Cluj-Napoca, 2008, p. 334.
[2] L.R. Popoviciu, *Elemente de drept: note de curs,* Ed. Universităţii Agora, Oradea, 2007, p. 25.
[3] I. Santai, Introducere în teoria generală a dreptului, Ed. Risoprint, Cluj-Napoca, 2000, p.66.

Irrespective of its textual formulation or the branch of law to which it belongs (constitutional, administrative, criminal, civil, international, etc.), the rule of law has a structure consisting of three elements: hypothesis, disposition, sanction.

1. The hypothesis is that part of the legal rule that prescribes the conditions under which the disposition is to be applied. It can be formulated in general or more specific terms.[4] It provides, in abstract, the facts or legal acts that, when they occur and have a specific character, lead to the birth, modification or termination of a legal relationship. The hypothesis also indicates the categories of persons covered by the disposition.

Considering the precision with which the hypothesis of the legal norm is formulated, we distinguish determined hypotheses and relatively determined hypotheses.

A determinate assumption is that which sets out precisely the conditions under which the disposition rovision applies "the borrower can not, ahead of time, ask for the good borrower."[5]

A relatively determined (hypothetical) hypothesis exists when the mood conditions can not be formulated in all details, or not formulated, the hypothesis resulting from the context of the regulation.[6] An example in this respect is art. 188 Criminal Code "The killing of a person is punished by imprisonment of 10-20 years and the prohibition of the exercise of certain rights". There is no indication of the circumstances of the person who committed the murder, in the place, time, and it is understood that no matter who does this deed and no matter what circumstances will be sanctioned by law.[7]

According to the degree of complexity of the circumstances under consideration, the hypothesis may be straightforward if it provides for a single circumstance in which the disposition applies or complex when it provides for a multitude of circumstances which all together or individually , determines the application of the disposition

Following the number of circumstances envisaged for the application of the rule, the hypothesis may be unique when only one circumstance has been foreseen to trigger the incidence of the law, or alternatively, a situation where several ways to achieve the law are foreseen.[8]

By the manner in which the terms of application are enunciated, the hypothesis may be generic when it provides for a particular genre or type of circumstance through which law is applied, or causal, when it lists, in a limitative or exemplary way, the circumstances in which the law applies.[9]

Whatever the norm, the hypothesis may be established, even if it is not expressly formulated, by answering the question "under what circumstances?" And "to whom?" The disposition of the legal norm will apply.

2. The disposition is the most important part of the legal norm and establishes the conduct to be respected under the circumstances and circumstances of the hypothesis. In other words, the disposition sets out the subjective rights and the corresponding obligations of the subjects covered by the legal norm.[10]

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[4]Gh. Boboş, C. Buzdugan, V. Rebreanu, *Teoria generală a statului şi dreptului*, Ed. Argonaut, Cluj-Napoca, 2008, p. 338.

[5] A. Sida, *Introducere în teoria generală a dreptului,* Cluj-Napoca,1996, p.119.

[6]L.R. Popoviciu, *Elemente de drept: note de curs,* Ed. Universităţii Agora, Oradea, 2007, p. 28.

[7] D. Moţiu, *Teoria generală a dreptului*, Cluj-Napoca,1996, p. 97.

[8]I. Santai, Introducere în teoria generală a dreptului, Ed. Risoprint, Cluj-Napoca, 2000, p.68.

[9]I. Santai, Introducere în teoria generală a dreptului, Ed. Risoprint, Cluj-Napoca, 2000, p.68.

[10]L.R. Popoviciu, *Elemente de drept: note de curs,* Ed. Universităţii Agora, Oradea, 2007, p. 28.

The disposition may provide for the obligation to carry out certain actions, the obligation to refrain from action, as it may only permit, recommend or stimulate a wide range of human actions.[11]

According to the manner in which the subjects comply with the prescribed conduct, we distinguish between onerous dispositions - which require the obligation to carry out certain prohibitive actions - which prohibit the permissive actions - neither impose nor prohibit the actions, but leave to the parties to choose the conduct they want to follow (a variety of permissive disposition are suppliative dispositions that leave it to the stakeholders to choose the conduct they want to follow, and if they do not decide on the conduct, their will will be filled by the competent state bodies), recommendations - as a rule, review a certain conduct that the state recommends to social, incentive organizations - disposition reward for a special conduct, especially in the work process.[12]

By their degree of generality, we distinguish between general dispositions - they have a broad scope, usually referring to a branch of law, special dispositions - refer to a certain category of relations in a branch of law, exceptional dispositions - which have the role of protecting more effectively a range of social values, coming to complement the general or special dispositions.

According to the mode of determination of the conduct of the subjects of law, the provisdisposition ion can be determined or relatively determined. It is determined when determining precisely the conduct to be followed by the parties to the legal relationship, as is the case with onerative and prohibitive dispositions. When the rule provides for several possible variants of behavior, the subjects are to choose one, or set certain limits, within which legal rights and obligations can be established, the disposition is relatively determined, as is the case with permissive dispositions.

3. The sanction is the element of the legal norm that specifies the consequences of non-compliance.[13] It is the consequence of acts of violation of law, violation and destabilization of the established order, aimed at restoring the violated order of law, repairing it and preventing its violation in the future, and contains the measures taken against the person who violated the law and which, if necessary, fulfilled by the coercive force of the state.

Sanctions are enforced by specially empowered bodies and is aimed at repairing the damage and restoring the violated order[14], preventing violations of the rule of law in the future, punishing and re-establishing the culprit, and reintegrating it into society.

According to the legal nature of the breached name, we distinguish: criminal sanctions (applies to the offense committed), administrative sanctions (applicable for committing offenses, eg fine), disciplinary sanctions in the case of deviations from the labor discipline, eg reprimand, warning, termination of the employment contract), civil sanctions (consist of compensation for the person responsible for causing damage, or reinstatement, execution in kind, annulment of the unlawful act).

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[11]Gh. Boboş, C. Buzdugan, V. Rebreanu, *Teoria generală a statului şi dreptului*, Ed. Argonaut, Cluj-Napoca, 2008, p. 339.

[12]D. Moţiu, *Teoria generală a dreptului*, Cluj-Napoca, 1996, p. 97, 98

[13]Gh. Boboş, C. Buzdugan, V. Rebreanu, *Teoria generală a statului şi dreptului*, Ed. Argonaut, Cluj-Napoca, 2008, p. 345

[14]L.R. Popoviciu, *Elemente de drept: note de curs,* Ed. Universităţii Agora, Oradea, 2007, p. 29

According to their purpose, sanctions may be reparatory (ie reparation or compensation for the damage caused), coercive or repressive (ie coercive on the guilty person), penalties for annulment or termination of the act of nullity.[15]

According to the degree of determination, the sanctions are of several kinds: absolutely determined (those precisely formulated sanctions that can not be reduced or increased by the enforcement organs), relatively determined (they are set within the limits of a minimum and a maximum, and the sanction concrete, precise, to determine the enforcement body), alternatives (allow the enforcement body to choose between two or more types of sanctions, usually between imprisonment or fine), cumulative (establish several types of sanctions for the same deed).[16]

According to their content, sanctions can be patrimonial (pecuniary, refers to the goods and income of the sanctioned person) and non-property (personal, directly and exclusively target the guilty person).

THE TECHNICAL - LEGISLATIVE STRUCTURE

The technical-legislative (external) structure refers to the form of expression of the content and its logical structure, when it is drafted.

The legal norm is not elaborated and does not appear distinct but as a rule part of a normative act that can take several forms (law, decision, ordinance, regulation, etc.) according to the authority that issued it.

In turn, regardless of the form under which it appears, the normative act is structured in chapters, sections, articles and paragraphs. The basic element of the normative act is the article that usually contains a standalone provision. However, not every article coincides with a rule of conduct. There are situations in which an article contains several rules of conduct or, to the contrary, an article may contain only one element of the legal norm (in this situation, in order to determine the content of the rule with all its logical-juridical elements it is necessary to corroborate more articles).

The technical - legislative structure of the norm does not always overlap with its logical - juridical structure, which is why, on the doctrine, some authors have supported an atypical construction of the legal norms in the respective branch. Thus, in the field of criminal law, there are authors who consider that the rules of criminal law contain only the provision and the sanction. Such a point of view can not be accepted because the criminal law rules contain all three elements only that they can be identified by a logical interpretation, in each case, of all the provisions of the Criminal Code - both a general part and a special part.

Generally, the legal rule brings together the three elements in the legal formulation of the legislative test. In many cases, however, the legal rule does not include all three constituent elements arranged in such a structure, for example, it may first foresee the sanction and then the hypothesis and disposition (as in the case of contraventional rules). In other situations, an element of the norm, such as sanction, as in the case of most constitutional norms (which, as a rule, only basic guiding principles and rules for other branches of law), may be missing.[17]

CONCLUSIONS

[15]I. Santai, Introducere în teoria generală a dreptului, Ed. Risoprint, Cluj-Napoca, 2000, p.69
[16] D. Moțiu, *Teoria generală a dreptului*, Cluj-Napoca, 1996, p. 99, 100
[17]I. Santai, Introducere în teoria generală a dreptului, Ed. Risoprint, Cluj-Napoca, 2000, p.70, 71

Any legal norm presents content and form, each with its own way of expression. The content, consisting of hypothesis, disposition and sanction, is the internal structure of the legal norm, while the form is its external structure, by drafting that content, which may appear as an article, group of articles, or a determined normative act.

It is desirable that the assumptions be as concrete and complete as possible, which is a guarantee of the application of the provision, a measure to prevent arbitrariness and to strengthen the legality. Therefore, sometimes, after the adoption of the law, the legislative body intervenes to determine the limits of a more precise setting of the hypothesis of norms which are of particular importance for the realization of the law order in a certain area.

The relationship between the logical-juridical structure and the technical-legislative structure must be well understood because different ways of misinterpreting and applying the law would otherwise arise. This situation is more particular especially in the case of the rule, it lacks one or more elements of the structure and its retrieval must be made in the same or in other normative acts or even deduced from the same norm or from other legal formulations.

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