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LEGAL PROTECTION AND SOCIAL REINTEGRATION OF HUMAN TRAFFICKING VICTIMS

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ABSTRACT:
As of April 2019 the Romanian authorities have expanded the protective measures to which victims of crime will have access through Government Ordinance 24/2019. This legislative amendment is designed to harmonise national legislation with the full provisions of the European Directive 2012/29/EU laying down minimum rules on the rights, support and protection of victims of crime. These changes are welcome given previous legislative loopholes and worrying statistics as the phenomenon of trafficking in human beings is growing in Romania. This paper is reviewing recent legislative changes and proposes an analysis of the protection and support measures available for victims of trafficking in human beings in Romania.

KEYWORDS: assistance for victims of human trafficking, victim protection policies, court proceedings, European Directive 2012/29/EU, the role of legal and judicial authorities

INTRODUCTION

Trafficking in human beings is a global phenomenon. In all its forms, this crime seriously damages the dignity and physical integrity of an increasing number of women, men and children worldwide.

The United Nations (2000) defines human trafficking as the recruitment, transportation, or receipt of persons through some form of threat or coercion, particularly those that abuse positions of power and take advantage of the vulnerability, for exploitation including prostitution, servitude, or the removal of organs.

Based on this definition, victims of human trafficking can fall into several subpopulations along two dimensions[1].

The first dimension is the type of trafficking experienced, the subpopulations of which include commercial sex, forced labour, involuntary servitude, and domestic violence.

The second dimension is the type of individual targeted, the subpopulations of which include domestic or international victims, minors, individuals with special needs, and the children of victims being trafficked.

Trafficking in human beings is often transnational in nature, but this is not always present. Cultural and linguistic barriers and the terror of victims make this crime very difficult to investigate. Despite the background of the majority of victims in politically unstable or economically vulnerable countries, this phenomenon also affects developed countries, which are becoming markets for human traffickers.

[1] Pascual-Leone, A. (2016) ”Working with Victims of Human Trafficking” The Journal of Contemporary Psychotherapy, p. 130

In particular, after accession to the European Union, Romania is affected by this criminal scourge, while being both a country of origin and a transit country for human trafficking networks in eastern Europe.

In the given context, the Romanian authorities have faced two challenges: To protect the national population from potential recruitment in continental networks of prostitution and forced labour, and to provide guarantees to ensure the protection and rehabilitation of victims, as required by the European Union. Slow developments in the fight against trafficking in human beings, the annual increase in the number of trafficked Romanian citizens, and even the emergence of wholly shocking modern slavery, lead us to the idea that this issue is topical and of particular interest in the light of the threat posed by organized crime to the safety of the population and national security.

The main purpose of this work is to present the latest legislative provisions adopted by the Romanian authorities and to assess the impact they can have for victims of human trafficking.

As a secondary objective, the work will present a series of proposals to improve social rehabilitation and relief measures (psychological, legal and financial) for victims of trafficking in human beings.

PROTECTION, ASSISTANCE AND SOCIAL REHABILITATION OF VICTIMS OF TRAFFICKING IN HUMAN BEINGS.

As a result of the traumas suffered by victims of human trafficking have complex needs and thus access to the wide range of services.

Victims often experience various psychological symptoms after experiencing exploitation, physical violence, or psychological violence. They may present a mix of symptoms, including symptoms that originated before the experience, those that were a result of trafficking, and those experienced after release. Psychological disorders and symptoms that are common among victims of human trafficking include symptoms of posttraumatic stress disorder (PTSD), depression, anxiety disorders, dissociative disorders, and substance abuse disorders. This complex of factors, amplified by pre-existing conditions, plays a fundamental role in the vulnerability of the victim[2].

Victims of human trafficking face an extensive battle when trying to heal from their experience and have varying needs at different stages of their recovery process. In the immediate term, victims require safety, clothing, housing, and crisis intervention.

In the short-term, victims require physical and mental health treatment and some appropriate coordination between these. Victims may also have needs that interfere with receiving treatment, such as a lack of language interpreters, lack of transportation to treatment locations, or not being accessible by phone.

Additional short-term needs include affordable medical and dental care, legal assistance, or employment — issues that otherwise supplant attending to psychological needs. In regards to long-term service, clients may need assistance with job training, job placement, education, family reunification, mental health treatment, and repatriation in some cases[3].

A first impediment is the bureaucracy and fragmentation of social service providers. Victims often cannot manage crises individually and lack the immediate help of a person. The social assistance system has been developed in this respect. The immediate aim of the social assistance system is to find solutions to the immediate problems of victims and their long-term rehabilitation and to achieve a standard of living similar to that existing in society.

[2] Morano-Foadi, S. (2016) 'Human trafficking and the position of 'vulnerability' for victims in Europe', Int. J. Migration and Border Studies, Vol. 2, No. 3, p.299–303

[3] Pascual-Leone, A. (2016) "Working with Victims of Human Trafficking" The Journal of Contemporary Psychotherapy, p.132

Social assistance is extremely important in helping the victim's psychological support, overcoming their traumas, reintegrating into society and reducing the risk of a new trafficking situation.

THE NATIONAL SYSTEM FOR THE PROTECTION OF VICTIMS OF TRAFFICKING IN HUMAN BEINGS.

The present work refers to several reports by The National Agency Against Trafficking In Human Beings (ANITP), mainly the social study "Analysis of assistance services for victims of trafficking in human beings" - 2016[4] and the "National report on the evolution of trafficking in Human beings" - 2018[5].

According to the data contained in the 2016 study in Romania, there were nine government centres to assist and protect adult victims of trafficking in human beings established under Law 678/2001, but the quality of the social services provided was considered problematic.

The main dysfunction mentioned is that 5 out of the 9 centres did not function in 2015. Furthermore, the operational centres provided incomplete or financially conditional services, which did not meet the serious needs of victims. A particular problem was the assistance of victims in counties without assistance centres. The alternative solution for these victims was short-term emergency assistance (72 hours) provided by the county social assistance institutions (DGASPC). The quoted study points to situations where victims have been denied support against the background of budgetary inadequacies and lack of funds.

The study also notes that victims of trafficking in human beings were conditioned to participate in the criminal proceedings to be able to receive social assistance for a period longer than 90 days, despite the recommendations of the European Union. We consider this practice to be devoid of any empathy to the psychological complexity of the status of victim and the trauma suffered by them. As studies showed there are factors "which are of subjective relevance for the victims, influencing their willingness to cooperate with the police and to testify against traffickers in court. The factors were related to offender strategies (e. g. violence, deception), to police action (e. g. checks, interrogations) or to the person of the victim herself (e.g. residence status, migration goals, language, attitude towards prostitution)"[6]. Moreover, the deprivation of victims of assistance can increase the risk of re-trafficking exponentially, making all activities with the victim unnecessary by social workers.

After 2016, national authorities have made efforts both to prevent and protect victims and to bring national legislation in line with Community law. As a result of these approaches, the "national report on the evolution of trafficking in Human beings" 2018 States that 236 beneficiaries have benefited from services tailored to their individual needs, as set out in the aid plans.

Assistance services were offered to victims based on their informed and freely expressed consent, and the waiver of assistance was also their option. The majority of victims were protected in public institutions (133) while 70 were NGO beneficiaries and 33 received public-private partnership services.

Services provided to victims, where appropriate, by public institutions, by NGOs or in public-private partnerships are: Accommodation, assistance centers for victims of trafficking in human beings or other residential centers; health care; psychological counselling; financial aid; material aid (clothing, medicine, food, hygiene-health products); legal advice/assistance; school reintegration; professional counselling; professional retraining; reintegration into employment. According to ANITP, protection and assistance services have been provided to

[4] http://anitp.mai.gov.ro/p3336/

[5] http://anitp.mai.gov.ro//ro/docs/studii/Raport%20national%202018.pdf

[6] Helfferich, C. Kavemann, B. Rabe, H. (2011) "Determinants of the willingness to make a statement of victims of human trafficking for sexual exploitation in the triangle offender–police–victim" Trends in Organized Crime, Vol. 14, p.125

victims of trafficking in human beings either in government/public assistance and protection centres or shelters of non-governmental organizations or in public-NG partnership. The options for services to victims are individualized, in each particular case, according to the needs and situation of each victim.

Local authorities and NGOs shall, whenever necessary, identify the most favourable opportunity for hosting and assisting each victim. The assistance aimed to ensure conditions for the normalization of the life of victims, noting that Romanian legislation and social practice do not discriminate, in assisting victims of trafficking in human beings, based on nationality. Foreign citizens' victims benefit from the same assistance services as Romanian citizens.

Another necessary observation is that there is no longer any legal conditionality for the protection and assistance of victims, which is determined by the time or the participation of victims in criminal proceedings or their cooperation with judicial authorities. We welcome this change of approach as studies show that, not all the time, excessively punitive legislation leads to the eradication of a phenomenon. Such an example could be the Spanish system, described as having ”a harsh punishment component but little support for victims, and which lacks the resources to promote their social integration, and specifically, to promote human rights (...) a system destined to perpetuate the problem, allowing thousands of people to be reduced to mere objects that are bought and sold”.[7]

The protection services for recovery and reintegration are planned and provided based on an individualized victim assistance plan, periodically reassessed and adapted to the evolution of the situation of victims and how to achieve the objectives set.

This plan shall be followed by the specialists involved, pending completion, with the participation and consent of the victim. It is also not without importance that the level of protection of victims against possible retaliation by traffickers is dimensioned concerning the risk assessment carried out by specialized structures to combat trafficking in human beings.

DEVELOPMENTS IN NATIONAL LEGAL REGULATIONS.

The identification, protection and fulfillment of the immediate needs of victims of trafficking in human beings (THB) are an essential requirement for a trafficked person to get access to victim’s protection and victim’s rights established in international instruments, including EU Directive 2011/36/EU.[8]

The impact of this phenomenon is not strictly limited to the Romanian population. Romania's entry into the European Union in 2007 and the large influx of trafficked persons forced Member States to change their internal policies to prevent and protect victims[9].

As an EU country and a signatory to European and international rules on preventing and combating trafficking in human beings, Romania has implicitly assumed an obligation to comply with them and to report regularly to various European and international bodies on the responsibilities assumed by the content of these regulations.

National authorities are working on trafficking in human beings with a series of concepts and regulations common to state and institutional partners. We will briefly review some applicable legal concepts and definitions.

Trafficking in human beings is defined in Article 210 of the Romanian Penal Code as: (1) The Recruitment, transportation, transfer, accommodation or receipt of a person for the purpose of its exploitation, committed: A. by coercion, kidnapping, deceit or abuse of authority; B. taking advantage of the impossibility to defend or express the will or the

[7] Javier De León, F. (2010) ”Spanish legislation against trafficking in human beings: punitive excess and poor victims assistance”, Crime Law Soc Change, Vol. 54, p.342

[8] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1.

[9] Caneppele, S. Mancuso, M. (2013) ”Are Protection Policies for Human Trafficking Victims Effective? An Analysis of the Italian Case”, European Journal on Criminal Policy and Research, Vol. 19, pp. 265

manifest vulnerability of that person; by offering, accepting, accepting or receiving money or otherwise giving consent to that person. The offence is punishable by imprisonment from 3 to 10 years and a prohibition on the exercise of rights. (2) Trafficking in human beings by a public official in the performance of his duties shall be punishable by imprisonment from five to 12 years. The victim consent shall not be justifiable.

Trafficking of minors as defined by Article 211 Penal Code: (1) Recruitment, transportation, transfer, housing or reception of a minor for his or her exploitation shall be punishable by imprisonment from 3 to 10 years and a prohibition on exercising rights. (C) the act has endangered the minor's life; (d) the act has been committed by a minor's family Member; (e) the act has been committed by a person in the education, child, or a recognized minor, or a recognized minor's place of care. The Victim'S Consent shall not be justifiable.

Exploitation of a person means, in the sense of Article 182 Penal Code: (A) forced labour or service; (b) slavery or other similar means of freedom or servitude; (c) obligation to practice prostitution, pornography for the production and dissemination of pornographic materials or other forms of sexual exploitation; (d) obligation to practice begging for human beings, or illegal remove of organs;

We see the conceptual harmonization of national legislation with the provisions of Article 4 of the Council of Europe Convention on the fight against trafficking in Human beings, Warsaw, 2005, Article 12 of Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims and Article 3 of the Protocol on the prevention, repression and punishment of trafficking in human beings, in particular women and children, supplementing the United Nations Convention against transnational organized crime, transposed into national law by Law 678/2001 on the prevention and fight against trafficking in human beings, as amended and supplemented by Law 230/2010 - also taken up in the Penal Code Article 210 (3).

As of 2019, the government has extended the protection measures that victims of crime will have access to, through an emergency ordinance that came into force on 10 April. Among the most important new measures is the creation of specialized compartments to support victims of crime or the provision of individualized services, depending on the victim.

The Emergency Ordinance No 24/2019 for amending and supplementing Law No 211/2004 on certain measures to ensure the protection of victims of crime, as well as other legislation, was published in Official Gazette No 274 (of 10 April 2019) and introduced many additional safeguards for victims of crime.

Firstly, it is about measures to set up the structures referred to above. They will be set up both within the Directorate-General for Social assistance and Protection of the Child (where psychologists, lawyers and social workers will exist) and in other institutions (for example, in the case of victims of domestic violence, support and protection measures will be provided by institutions specializing in preventing and combating domestic violence).

Also, support and protection services can be provided by private providers of social services.

In terms of tasks, these structures will: Inform victims of their rights; inform and advise victims of crime of the risks of secondary or repeat victimization, of intimidation and retaliation; inform victims of crime of the financial and practical aspects of the crime after the crime; provide social integration/reintegration services, and emotional and psychological support for social reintegration; inform and advise the victim of their role in criminal proceedings (excluding legal assistance); and provide advice, if needed, or advice.

Before accessing such services, the victim will also be assessed to be able to provide support according to the victim's needs. Evaluations will also be carried out to avoid secondary victimization. Thus, medical/psychological assessments or statements, for example, will be kept to a minimum.

Secondly, the order also introduced other protective measures. One example is the creation of a special register of victims of crime to be supported by specialist services. That

register will be organized at the level of the Directorates-General for Social assistance and Child Protection. The register will contain data on victims benefiting from protection and support measures. These data will be maintained for one year and can also be used by criminal bodies. The EO No 24/2019 aimed to fully transpose European Directive No 2012/29/EU[10], that has not been fully transposed by April 2019.

CONCLUSION

Trafficking in human beings can be considered one of the most complex crimes. It has a multitude of operating modes that share the specific mentality of both the trafficker and the victim. More seriously, the minimum risks and investments and consistent profits make this crime the preference of transnational criminal groups.

Beyond the complexity that distinguishes this crime from others is the psychological impact on the victim, de-humanized and transformed into a means of gain. In the case of trafficking in human beings, unlike other crimes, the exploitation of victims sometimes occurs until their death. It is thus clear that any approach to trafficking in human beings must focus on the rights of the victim. We therefore welcome the recent legislative changes and the desire of the domestic legislator to emphasize social assistance for victims of human trafficking.

Even if that the victim's participation in criminal proceedings is essential, the special circumstances of the case must not be ignored, such as: the fear that victims feel when they leave the trafficking process, distrust in law enforcement bodies, trauma that they have suffered, and the direct or indirect influence of traffickers on them.

We believe that a 90-day assistance period provided by law is not enough to remove the traumas suffered. From the human rights perspective, any conditionality of access to assistance should be abandoned through participation in criminal proceedings.

European law also stipulates that victims have the right to have access to existing mechanisms for compensation for victims of violent and intentional crimes, and Member States should promote measures to encourage offenders to properly compensate victims in criminal proceedings. In Romania, the authorities are finding it difficult to deal quickly with human trafficking judicial trials and the victims are finding it difficult to access any civil compensation. At the same time, this situation also affects the ability of victims to recover their own assets under seizure in the course of criminal proceedings.

It would be appropriate to introduce simplified judicial procedures to require traffickers to pay compensation for victims and to establish a State aid fund for victims of trafficking in human beings.

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[10] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57.

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1.
Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57.
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FUTILITY OF THE REGULATORY FRAMEWORK ON THE ORGANIZATION AND OPERATION OF PUBLIC GATHERINGS – THE RIGHT TO PROTEST IN ROMANIA

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ABSTRACT:

If in the introductory part of the paper we present the constituent elements of the right to protest in relation to constitutional or conventional provisions and by analyzing some jurisprudential elements of the national courts and of the European Court of Human Rights, in the second part we carry out a detailed analysis of the solutions pronounced by the relevant national courts, based on which we concluded the uselessness of the sanctions regulation regarding the participation in protest actions carried out in a peaceful context.

KEY WORDS: freedom of expression, freedom of assembly, right to protest, jurisprudence.

INTRODUCTION

The recent events in the Romanian society's history regarding considerable assemblies of people, resulting in a strong civic awareness compels the institutional actors involved in ensuring the orderly climate in the public space to show an increased interest in the legislative framework by which they act, overcoming in the end the security of each individual.

However, it is imperative that there is a balance between guaranteeing by the state a favorable environment for the exercise of fundamental rights and freedoms and their justified limitation, meaning that *(...) state authorities are obliged to take not only reasonable measures, but both firm and adequate ones, in order to ensure the peaceful conduct of lawful manifestations of its citizens and to oversee the public order keeping (...)*[1].

We underscore that the chosen topic is of high interest in relation to the section concerned in the conference, given that by presenting the values put into debate by the national courts, we carry out a detailed analysis of the normative framework in which citizens exercise some of their basic constitutional rights that sparkled the public attention of the contemporary Romanian society, more precisely the right of freedom of expression and assembly.

Moreover, we advocate in the study conducted for the reconfirmation of these rights, carrying out a thorough study of the solutions given by the national judicial forums in relation to the exercise of these rights, in antithesis to the coercive attribute of the state authority.

[1] *Civil Decision no. 732/23.05.2018 of the Suceava Tribunal, available at www.rolii.ro, accessed on 22.11.2019.*

DECODING THE RIGHT TO PROTEST

As far as the right to protest of citizens, this can be understood as a merger of the constitutional provisions that consecrate *the freedom of expression* and *the freedom of assembly*.

According to article 30 paragraph (1) of the Romanian Constitution[2], *The freedom of expression of thoughts, opinions or beliefs and the freedom of creations of any kind, verbally, in writing, through images, sounds or other means of public communication are inviolable*, but to these freedoms, the constitutional text opposes a series of restrictions by paragraph (6) and (7) of the same article, according to which *Freedom of expression cannot harm the dignity, honor, private life of the person nor the right to one's own image*, as well as *They are forbidden the defamation of the country and the nation, the urge to wage war, to national, racial, class or religious hatred, incitement to discrimination, territorial separatism or public violence, as well as obscene manifestations, contrary to good morals*, in other words, the right to free expression *(...) is not an absolute one but it has some limitations, especially when they are needed to protect: the rights or reputation of others, public order, public healt or morals*[3].

In this respect, it arouses interest the solution of the court in which the constitutional and conventional limits of the right to free expression are argued, noting that *the action of posting on the personal Facebook page expressions of insult respectively* "slave" *and* "clipped pansy" *to an identified gendarme through a photograph in the military outfit, (...) meets the constitutive elements of the contravention provided by article 2 point 1 of Law no. 61/1991, in the manner of publicly expressing offensive phrases against people, which could damage the dignity and honor of theirs or of public institutions*[4].

Therefore, as regards the right to free expression, according to the provisions of article 11 paragraph (2) of the Constitution, the national law must also be interpreted by reference to the European Convention on Human Rights[5], meaning in which we show that according to article 10 of the Convention, *1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority (...) 2. The exercise of these freedoms (...) may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law (...)*.

Subject to these provisions, even if freedom of expression applies not only to information or ideas considered harmless, but also to those who *shock or upset the state or any segment of the population*[6], the citizens benefiting from the right to express their dissatisfaction *in a virulent and plastic way*[7], the interference with the exercise of their right to free expression pursues a legitimate purpose, the sanctioning norm (article 2 point 1 of Law no. 61/1991) being unable to affect the freedom of expression of the persons[8], also keeping in

[2] Republished in the Official Monitor no. 767/31.10.2003.
[3] Civil sentence no. 8548/21.06.2017 of the Iasi Court, available at *www.rolii.ro*, accessed on 22.11.2019.
[4] Civil sentence no. 4538/03.05.2019 of the District 3 of Bucharest Court, available at *www.rolii.ro*, accessed on 22.11.2019.
[5] Law no. 30/1994 concerning the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, published in the Official Monitor. no. 135/31.05.1994.
[6] Paragraph 32 of the ECHR Decision of Papaianopol against Romania from 16.03.2010, available at *hudoc.echr.coe.int/eng?i=001-123207*, accessed on 22.11.2019.
[7] Civil Decision no. 3845/14.10.2019 of the Bucharest Tribunal, available at *www.rolii.ro*, accessed on 22.11.2019.
[8] Romanian Constitutional Court's Decision no. 476/10.05.2012, published in the Official Monitor no. 465/10.05.2012.

mind that the acts sanctioned in this case are not actions against people, but against norms of social coexistence, against public order and peace[9].

Thus, it will enjoy the protection offered by art. 10 of the Convention *an opinion which is not totally devoid of a factual basis or a logical argumentation and is not expressed in insulting terms*[10], but *a value judgment can prove excessive if it is totally devoid of factual basis*[11], for which, it appears on fully justified the sanctioning of the petitioner in the case presented, for the use of expressions containing exclusively insulting terms.

Turning our attention to the constitutional context of the right to protest, we also emphasize that according to art. 39 of the Constitution, *Rallies, demonstrations, processions or any other gatherings are open, but they can be organized and carried out only peacefully, without any weapons*.

In relation to such interference with the rights of citizens, the constitutional forum has ruled that *the exercise of the freedom of assembly may involve certain restrictions and conditions, according to the law, precisely because the rights and freedoms guaranteed by the Constitution to citizens, their interests and, implicitly, to public order and national security should not be affected*[12], such restrictions and conditions being imposed *in order to protect the fundamental rights of other members from society, who do not participate in the respective gatherings (...) thus preventing disorder and maintaining order in traffic (...)*[13].

Likewise, the case law of the European Court of Human Rights highlights the state's attribute to take reasonable and adequate measures to ensure the peaceful conduct of lawful manifestations of its own citizens[14], even when the message transmitted by protesters irritates or disturbs other people who have opinions and claims contrary to their own promoted through the envisaged public demonstration[15].

It is worth mentioning the essential role of freedom of expression as a precondition for a functional democracy, meaning that the effective exercise of the rights deriving from it does not only require the task of the states not to intervene, but may involve the undertaking of positive activities by the state authority for the protection of those involved[16], being necessary to establish a balance between the general interest of the community and the individual one[17].

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[9] Romanian Constitutional Court's Decision no. 74/07.03.2002, published in the Official Monitor no. 283/26.04.2002.

[10] Paragraph 109 of the ECHR Decision of Grivna Newspaper Redaction against Ukraine, available at *hudoc.echr.coe.int/eng?i=001-192461*, accessed on 22.11.2019.

[11] Paragraph 59 of the ECHR Decision of Niculescu-Dellakeza against Romania of 26.03.2013, available at *hudoc.echr.coe.int/eng?i=001-176285*, accessed on 22.11.2019.

[12] Romanian Constitutional Court's Decision no. 199/23.11.1999, published in the Official Monitor no. 76/21.02.2000.

[13] Paragraph 19 of Romanian Constitutional Court's Decision no. 687/24.11.2016, published in the Official Monitor no. 137/23.02.2017.

[14] Paragraph 34 of the ECHR Decision of Plattform "ÄRZTE FÜR DAS LEBEN" against Austria, available at *hudoc.echr.coe.int/eng?i=001-57558*, accessed on 22.11.2019.

[15] Paragraph 86, 2nd thesis of the ECHR Decision of Stankov and the United Macedonian Organization Ilinden against Bulgaria, available at *hudoc.echr.coe.int/eng?i=001-59689*, accessed on 22.11.2019.

[16] Paragraph 23 of the ECHR Decision of X and Y against the Netherlands, available at *hudoc.echr.coe.int/eng?i=001-57603*, accessed on 22.11.2019.

[17] Paragraph 43 of the ECHR Decision of Özgür Gündem against Turkey, available at *hudoc.echr.coe.int/eng?i=001-58508*, accessed on 22.11.2019.

Making a mixture of the two concepts, the special law in this matter[18] establishes the limits in which public gatherings can take place in public premises, respectively *only after a prior declaration*[19], conditioned by the unfolding *without disturbing the normal use of public roads, public transport, except for authorized ones, the functioning of public or private institutions, those of education, culture and health, economic units or by degenerating into turbulent actions that endanger the public order and the public peace, the safety of persons, their physical integrity, life and their goods or of the public domain, and cannot be continued after 23.00 hours*[20].

JURISPRUDENTIAL EXAMINATION ON THE RIGHT TO PROTEST

A first problem of interest on the restrictions that the state can impose on its citizens with reference to their right to protest is the obligation to declare such a manifestation, meaning that the legislator lists the exceptional situations that derive from this obligation, in the sense that *it should not previously declared public meetings (...) that are held outside or inside the premises or buildings of legal persons of public or private interest*[21], constituting contraventional acts *the organization and conduct of undeclared, unregistered or prohibited public meetings*[22], as well as *participation to undeclared or banned public gatherings (...)*[23].

Considering these legal limitations as a violation of the constitutional freedoms, establishing *a real obstacle in organizing peaceful public demonstrations*[24], within the legislative approach, it was submitted a motion proposal for amending article 3 of Law no.60/1991, which intended to supplement the list of exceptions regarding the prior declaration of public demonstrations also for *political protests, as well as those taking place in public squares*[25].

With respect to the legislative initiative envisaged, the Chamber of Deputies Committee for Defense, Public Order and National Security submits the report rejecting the proposal, reasoning that the rule of prior declaration of public gatherings would thus become an exception, which may burden the law[26], considering the rulings of the Romanian Constitutional Court, according to which the rule of their declaration does not contravene the constitutional and conventional freedom of assembly[27], as well as the solution given by the Romanian Supreme Court vested with the settlement of an appeal in the interest of law, by which it was stated that *(...) if a public gathering is held outside the premises or buildings of legal entities of public or private interest, and this exterior coincides, overlapping with one of the places mentioned in article 1 paragraph (2) of Law no. 60/1991* (markets, public roads or

[18] Law no. 60/1991 regarding the organization and conduct of public gatherings, republished in the Official Monitor no. 186/14.03.2014.
[19] article 1 paragraph (2) of Law no. 60/1991.
[20] article 2 of Law no. 60/1991.
[21] article 3 of Law no. 60/1991.
[22] article 26 paragraph (1) letter a) of Law no. 60/1991.
[23] article 26 paragraph (1) letter d) of Law no. 60/1991.
[24] Reason for the Legislative Proposal to amend article 3 of Law no.60/1991, available at *www.cdep.ro/pls/proiecte/upl_pck2015. project? cam = 2 & idp = 17399*, accessed on 22.11.2019.
[25] The legislative proposal for the alteration of article 3 of Law 60/1991 regarding the organization and conduct of public gathering, available at *www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=17399*, accessed on 01.11 .2019.
[26] Report on the legislative proposal for the modification of article 3 of Law no. 60/1991, p. 2, available at *www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=17399*, consulted on 22.11.2019.
[27] Paragraph 19 of Romanian Constitutional Court's Decision no. 687/24.11.2016.

other outdoor places, red.), *the rule establishing the obligation to prior declare the public gathering becomes applicable*[28].

Through the solution thus pronounced, the Supreme Court makes a dissonant note with regard to the ordinary courts' majority orientation invested with casuistry on sanctioning misdemeanors according to article 26 paragraph (1) letter a) and d) of Law no. 60/1991 prior to the ruling of the supreme court, according to which *the public meetings held in a public place outside the premises of legal entities should not be declared*[29], by reference to the exemption from the obligation of prior declaration of public gatherings established by article 3 of Law no. 60/1991.

Thus, finding that *(...) if it was considered that no prior declaration was necessary (...), there would be a risk that the public authorities vested with ensuring the public order of the gathering could not fulfill these duties*[30], the supreme court lends itself to the minority opinion outlined on this subject, according to which if we accept the thesis that sidewalks and the driveway, elements of a public communication route disposed in the proximity of a public institution, could be considered as belonging to the outside of its headquarters, *(...) this means that no manifestation should be declared, practically emptying the content of the legal regulation, because any public space is outside the headquarters of an institution*[31], therefore the exception established by article 3 of Law no. 60/1991 continuing to operate only for *(...) the area between the access points in the building* (representing the headquarters/building of the legal entitz, red.) *and its fence (...)*[32].

If on this issue, according to article 517 paragraph (4) of the Code of Civil Procedure, the solution given by the supreme court becomes imperative, the debate remains on the problem of incriminating the participation to undeclared or forbidden public protest gatherings, given that it became a notoriety factor of the Romanian society's recent years, the high number of protesters who actively participate in such public gatherings, organized most of the times in the vicinity of legal entities headquarters (town halls, political parties, central authorities, etc.).

In relation to the provisions of article 26 paragraph (1) letter a) of Law no. 60/1991, the competent authorities have the capacity to identify and sanction a person or an organizing group of such a protest gathering undeclared, unregistered or prohibited, but compared to the deed of participating to protests under the conditions of article 26 paragraph (1) letter d) of Law no. 60/1991, we point out the inequity, as well as the material and operational inability of the public authorities to identify and sanction a considerable number of protesters, which in some cases can reach as high as tens of thousands of participants[33].

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[28] Concluclusion of the Supreme Court's Decision no. 19/15.10.2018, published in the Official Monitor no. 1055/13.12.2018.

[29] Final paragraph, page 2 of the Bucharest Court of Appeals Address no. 6/1784/C of 02.07.2018 for the notification of the Supreme Court on an appeal in the interest of law, available at *www.scj.ro/CMS/0/PublicMedia/ GetIncludedFile?id=20047*, accessed on 22.11.2019.

[30] Paragraph 93 of the Supreme Court's Reasonings no. 19/2018.

[31] Civil Decision no. 3993/17.09.2018 of the Bucharest Tribunal, available at *www.rolii.ro*, accessed on 22.11.2019.

[32] Civil Decision no. 2048/05.04.2017 of the the Bucharest Tribunal, available at *www.rolii.ro*, accessed on 22.11.2019.

[33] For example, the peaceful protest that took place on the evening of 31.01.2017 on Victory Square in Bucharest, where about 20.000 protesters attended, according to the Minister of Internal Affairs press release from 02.02.2017, available at *www.mai.gov.ro/declaratie-de-presa-a-ministrului-afacerilor-interne-carmen-daniela-dan/*, consulted on 22.11.2019.

Therewith, observing the jurisprudential orientation on recognizing the legitimacy of undeclared, peaceful, small-scale protests, in which a limited number of persons participate, either by canceling the sanctioning act[34], or by noting the need to replace the fine with a "warning" in relation to the given circumstances *(the gathering to which the petitioner participated was a peaceful one, unsold with major disturbance of institutions' activity in the area or of car and pedestrian traffic, thus not producing a very dangerous situation*[35]*)*, we point out the inefficiency of such a sanctioning norm for the activity of taking part into a protest.

CONCLUSIONS

Thus, in relation to European principles set out in the incipient part, as well as the ordinary courts' orientation regarding the solutions pronounced in accordance with constitutional provisions, we stress out the necessity of the legislator's intervention in order to expressly abrogate the provisions of article 26 paragraph (1) letter d) of Law no. 60/1991.

Such a solution must also be considered by taking into account the hypotheses in which disturbing elements of protest manifestations may arise, either by instigating or resorting to acts of violence, or by other antisocial activities, law enforcement agencies having sufficient sanctioning instruments (article 26 paragraph (1) letter e) and i) of Law no. 60/1991, the Penal Code and the Code of Criminal Procedure) for solving specific situations as the ones described above.

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ECHR Decision Grivna Newspaper Redaction against Ukraine, *hudoc.echr.coe.int/ eng?i=001-192461*.

[34] Civil Decision no. 2839/02.09.2019 of the Bucharest Tribunal, available at *www.rolii.ro*, accessed on 22.11.2019 (see also civil decision no. 2322/03.06.2019 and civil decision no. 2955/09.09.2019 of the Bucharest Tribunal).

[35] Civil Decision no. 2381/05.06.2019 of the Bucharest Tribunal, available at *www.rolii.ro*, accessed on 22.11.2019 (see also civil decision no. 1780/16.04.2019 of the Ilfov Tribunal).

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JURISPRUDENTIAL PERSPECTIVES ON THE FOUNTAIN OF NIGERIA LEGAL SYSTEM

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ABSTRACT

The basis of the Nigerian legal system appears multi-faceted, the fact that the country had contact with colonialism and the intervening military rule as against a truly democratic arrangement bequeathed at the independence of the country are source of concern. The paper adopts the doctrinal research method to attempt a critique of perspectives of the actual basis of the Nigeria legal system. The paper looks at some relevant concepts, the fountain in term of the grundnorm, customary law together with brief historical facts, and characteristic nature of Nigeria legal system to interrogate some perspectives. The paper founds that the fountain of the legal system is more of being jurisprudential in nature and concludes that the basis of Nigerian legal system is multi-faceted but ultimately founded on the constitution.

KEYWORDS: Law, Jurisprudence, Custom, Nigeria Legal System

1.INTRODUCTION

The basis of the Nigerian legal system cannot be divorced from the idea of a legal system. Foundation is the basis of which something is supported, founded on - having as a basis.[1]Besides, legal connotes, of or relating to law, falling within the province of law.[2] A system on the other hand, is described as considered principles or procedures of classification. A legal system encapsulates the principles or procedures for the classification of laws, procedures, including the principles and rules that have the force of law in a given society.[3]Thus, the Nigeria legal system is an embodiment of the laws, courts, legal personal and the totality of the administration of justice generally. The foundation or the fountain of something may be argued to presuppose the basis, the fountain, or spring from which anything rises from. However, it is argued by Asien[4] that the idea of a legal system comprises of a legal order of normative rules. Okonkwo posited that the Nigeria legal system comprises of the totality of the laws or legal rules and the legal machinery which obtain within Nigeria as a sovereign and independent African country.[5] One may therefore conclude that the foundation of Nigeria legal system is the basis / fountain of the laws, principles, procedures, courts and the basis of the totality of the Nigerian administration of justice as known and validated under the prior and present legal order in Nigeria.

2. PERSPECTIVES ON THE FOUNDATION AND CRITIQUE OF THE GRUNDNORM

[1] A. Bryan, Garner, ed., *Black's Law Dictionary,* 9th edn., West Publishing Company, US, 1990, p. 727
[2] Ibid, p. 975
[3] P. D. Mission, *Nigerian Legal System*, www.nigerianlawclaz.blogspot.com accessed 11th April, 2019
[4] O. J. Asien, *Introduction to Nigerian Legal System,* 2nd edn., Ababa Press, Lagos, 2005, p. 1
[5] C. O. Okonkwo, ed., *Introduction to Nigerian Law*, Sweet & Maxwell, London, 1980, p. 40

Sovereignty and the idea of a state are two important concepts that are inseparable. A state presupposes an association of men and women with a definite territory and an organized system / structure of government.[6] The organized system of government presupposes inclusion of the legal system. Thus the idea of a foundation of all the rules in a legitimate, valid or organized legal system has been argued in the light of the grundnorm, which has been described by some scholars as the ultimate rule or basic norm, due to its essence as it establishes and legalizes the structure and workings of the institutions and legal principles within the legal structure because it is seen as the ultimate legal authority and the highest norm.[7] Although further deductions can be distilled from the analysis of Hans Kelsen when he offered the Pure Theory of Law, he argued that by basic norm he meant the higher law in a legal system. That law is valid in so far as it is created by a higher norm, the norm should be traceable to a non-law created entity known as the grundnorm. He concluded by holding that grundnorm is the ultimate norm in the multiplicity of norms. Although scholars are not unanimous on the argument surrounding grundnorm but Orji[8] held the view that constitution of the Federal Republic of Nigeria is the grundnorm because any act or law contrary to it will be declared null and void and of no effect whatsoever.[9]The constitution is supreme with an overriding authority over all other law to the extent that any inconsistency with the constitution renders the law null and void and of no effect whatsoever.

2.1 Perspective on the Fountainhead / the Foundation

The idea of a fountain or foundation of the Nigeria legal system is more jurisprudential in nature than a mere critique of the foundation of the legal system simpliciter. This is so, in that, the foundation may be stretched so far to encapsulate the premise or basis of the Nigeria legal system to ascertain the *fons et origo* (source) of the legal system. However, before delving into the main discourse it is apposite to loosely conclude that the basis or the fountainhead of the legal system cannot be too far from the major spring or fountain of the primary sources of law as in the constitution, statutes and cases.[10]

However, the Nigeria legal history may not validly and necessarily support this form of sweeping conclusion but to inferably necessitate a peep exposition into the legal history of the country. Nigeria as a country was formerly a British colony, and presently it has a population of over 180 million people, over 250 ethnic groups with different religious belief.[11] The country has a history of a rich cultural background that is still very much embedded in the country's daily life. Thus, to appraise the basis of Nigeria legal system, it is a fact that custom / customary law played a significant role in the pre-colonial life of Nigeria.

3. PERSPECTIVE ON CUSTOM / CUSTOMARY LAW

It is pertinent to state that there had been established legal system in Nigeria before the British's introduction of the English law into Nigeria, although the system is one that seeks to promote communal welfare and social well-being by maintaining social equilibrium.[12] Customs are the general rules of behavior that develop in a community without being

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[6] See Section 318 of the Constitution of the Federal Republic of Nigeria 1999

[7] O. J. Asien., Op. Cit. p. 1. See also, O. Abiola, *Constitutional Law and Military Rule in Nigeria*, Evans Publication, Ibadan, 1987, pp.82-84, K. Eso, Is There a Nigerian Grundnorm?, Lecture delivered at the First Justice Idigbe Memorial Lecture, University of Benin, 31st January, 1985, p.5

[8] S. I. Oji, *Introduction to Legal Method*, Ababa Press, Nigeria, 2011, pp. 9-10

[9] Section 1, Constitution of the Federal Republic of Nigeria1999, see also Olakanmi & Co., *The Nigerian Constitutions 1963, 1979 & 1999, a Compendium*, 3rdedn., LawLords Publications, Abuja, 2008, p.iii

[10] S. I. Oji, Op. Cit., p.144

[11]A.A. Oba, Religious and Customary Law in Nigeria, *Emory International Law Review*, Vol. 25, p.882, 2011.

[12] T. Niki, *Sources of Nigerian Law*, MIJ Publishers, Lagos, 1996, p. 1, see also L.A. Ayinla, The Nigerian Living Law and Its Relegation, the Sociological and Historical Perspectives, *University of Ilorin Law Journal*, Vol.1, p. 201 2006

invented deliberately. In fact, historically they are effectively the basis of the common law.[13] The truth is that custom is known to many jurisdictions of the world although in different forms, Martin stated that:

- the law of England and Wales has been built up very gradually over the centuries. There is not just one way of creating or developing law; there have been, and still are, a number of different ways. These methods of developing laws are usually referred to as sources of law. Historically, the most important ways are customs and decisions of judges. Then, as parliament became more powerful in the eighteenth and early 19th centuries, Acts of Parliament were the main source of new laws, although judicial decisions were still important as they interpreted the Parliament law and fill in gaps where there was no statute law[14]

The position is the same with Nigeria and it will be safe to conclude that the law common to the whole of Africa and Nigeria in particular is the customary law. This is the law known to the natives, in that this is the common law of Nigeria as found in the various localities within the various ethnic groups in Nigeria as it regulates[15] the lives of the inhabitants (Africans / Nigerians) particularly in the area of personal law[16] and by necessary implication, customary law was the law known to the natives ever before the introduction of English law and the attendant validity tests by the colonial masters.[17] It is a fact that in the various communities there were organized structures of government, although in various forms and degrees of perfection in tune with the level of development of the communities.[18] It should be stated that when the colony of Lagos was created in 1862[19] and by virtue of order No.3 of 1863, English law was also introduced. The customary law on ground was allowed to operate side by side with the introduced laws but was later relegated due to its unwritten nature and the advent colonialism that brought about new situations and new persons to whom customary law was grossly inadequate. However, it may be asserted that customary law is not uniform but the uniformity is only peculiar to the individual community, thus cannot be universal due to the multi-cultural ethnic groups that existed in the different parts of Nigeria.[20] The introduction and acceptance of English law was not because English law was the greatest juridical system or a reflection of the traditional and cultural legal system of the local populace but by sheer dictate of history and irresistible imposition on the country vide colonization.[21]The fact is that, although the colonial masters viewed English law as the foundation and cynosure of justice[22], whereas, in Africa, law is seen as an integral part of the totality of the African culture. It is so much embedded that it is perceived as an instrument of maintaining social equilibrium with emphasis on distributive justice rather than formal justice as emphasized under the western jurisprudence. Thus African philosophy of law entails the pursuit of wisdom or of knowledge of law as obtainable in African societies, including the study of the law.[23] It is worthy of note to state that the pronouncement of the Supreme court of Nigeria in Joseph Ohai v. Samuel Akpoemonye[24] is commendable in showing the peculiarity of the law where it held that customary law is:

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[13] M. Jacqueline, *The English Legal System*, 7thEdn., Hodder Education, Italy, 2013, p.15
[14] Ibid
[15]A.E.W. Park, *The Sources of Nigerian Law*, African University Press, Lagos, 1963, p.1
[16]A. Emiola, *The Principles of African Customary Law*, Emiola Publishers, Nigeria, 2005, pp. 5-75
[17]A.E.W. Park, Op. Cit., p.11
[18]Emiola A., Op. Cit., p.1
[19] O. J. Asien, *Introduction to Nigerian Legal System*, Sam Bookman Publisher, Ibadan, 1997, pp. 109-110
[20]W. Kamau, *Customary Law and Women's Right in Kenya*, www.theequitysffect.org>uploads>2014/12 accessed 14th March, 2019.
[21]L. A. Ayinla, The Nigerian Living Law and Its Relegation, the Sociological and Historical Perspectives, *University of Ilorin Law Journal*, Vol.1, pp. 202-203, 2006.
[22] H. F. Morris, J.S., *Indirect Rule and the Search for Justice*, 1972, pp.72-83, cited in T. Niki, Op. Cit, pp.17-18
[23]L. A. Ayinla, African Philosophy of Law: A Critique, *Journal of International and Comparative Law*, Vol.6, p. 147, 2002,
[24] (1999) 1SCNJ 73

- any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject of its sway.

4. PERSPECTIVE ON BRIEF HISTORICAL FACTS, FACTORS NECESSITATING ENGLISH LAW AND THE CONSTITUTION

A number of scholars[25] have identified the factors that were responsible for the introduction / reception of English law as earlier stated. Other factors include the arrival of Europeans in fairly large numbers together with large scale commercial activities. The acquisition of power by Britain and the attendant introduction of new practices and new institutions as well as the unwillingness to be bound by tribal / native laws and custom contrary to the background and society in which they were nurtured.

As rightly observed, there was a system of administration of justice in Nigeria prior to colonization in Nigeria. Before 1862 in the now Northern State of Nigeria, the Islamic law of the Maliki School of Thought was applied[26] as it is still in practice up till the present day. In the Southern parts the unwritten customary law was applied, although customary courts in place appears strange to the British merchants / foreign traders which was contrary to the common law of England that they were already well acquainted with. Thus the bulk of English law- the common law, equity and English statutes were received.

Sequel to the formation of the Southern protectorate on 1st January 1900 and Northern Protectorate, and the later amalgamation of the Colony and Protectorate of Lagos and the Protectorate of Southern Nigeria to form the Colony and Protectorate of Southern Nigeria in 1906. The year 1914 was spectacular in that it ushered in the amalgamation of the Colony and Protectorate of Southern Nigeria and the Protectorate of Northern Nigeria to form the Colony and Protectorate of Nigeria therefore marking the coming into existence of Nigeria. A cursory perusal of the following order reveals the formal coming into being of Nigeria:

By order (Nigeria Protectorate Order in Council 1913) of His Majesty George the 5th, made on the 22nd November, 1913, by virtue and in the exercise of the powers vested in his majesty by the Foreign Jurisdiction Act, 1890, the country known as Nigeria was legally born with effect from the 1st of January, 1914 because, the order was made to come into operation on the 1st day of January, 1914.[27]

Sequel to the official birth of Nigeria as a political unit having been unified, ever since then the country has consistently lived with the reality of the various courts in form of the Supreme Court, Provincial Court and Native Courts. Although in view of the criticisms of the system, the establishment of a High Court and Magistrate Court were effected in 1933 vide the protectorate court ordinance No. 45 of 1933.[28] However, the 1954 Federal Constitution brought about the introduction of three Regions, a Federal Territory in Lagos, a Federal Supreme Court, a High Court for each region and Magistrate Courts. Customary Courts were established for the Western and Eastern region and Native court for the Northern region. On the 1st of October, 1960 Nigeria gained independence and by 1963 another constitution came into being by virtue of which the country became a Republic and the constitution abolished monarchy and ceased to be under the Queen. Besides, a new Supreme Court of Nigeria was established as the highest court in Nigeria. [29]

It should be stated that the wheel of progress of the country was clogged by the military vide coup deta't on 15th January, 1966. This was justified by the military junta on the

[25] T. Niki, A.E.W. Park, Op. Cit. pp.16-17
[26] A.O. Obilade, *The Nigerian Legal System*, Spectrum Books Ltd, Ibadan 1979, reprinted 2011, p.17
[27] See G. Fawehinmi, *Courts' System in Nigeria – A Guide (1922)*, Nigerian Law Publications Ltd., Lagos, 1992, p.2
[28] A. O. Obilade, Op. Cit., pp. 32-33
[29] Ibid

unhealthy political crises and the need for an intervention to stabilize the polity. This military revolution led to the suspension of the constitution vide the Constitution Suspension and Modification Decree 1966. This is how Military intervention found its way into the administration of government in Nigeria. The 1979 constitution was midwife by General Olusegun Obasanjo. There was also a military take over from the military government of Gen. Muhammadu Buhari that ushered in the military regime of General Ibrahim Babangida who later step aside. The important aspect here is that the emergence of Gen. Abdulsalami Abubakar enhanced a revisit to the 1979 constitution for possible review, modification and amendment to return Nigeria back into a democratic government, this objective was achieved and produced the 1999 constitution.[30] It must be stated here that notwithstanding the operation of a democratic government in Nigeria under a constitution, a lot of arguments have ensued generally on the validity of the constitution, on the premised that the constitution under which the present dispensation is being administered is not democratic but a decree so named a constitution. Thus necessitating the call for a revisit of the current constitution by convening a properly constituted constitutional conference to bring about a democratic constitution in Nigeria. A comparism of the two provisions of the following constitutional provision may better illustrate the argument:

> Having firmly resolved to establish the Federal Republic of Nigeria, with a view to ensuring the unity of our people and faith in our fatherland. For the purpose of promoting inter-African co-operation and solidarity,
>
> In order to assure world peace and international understanding, and so as to further the ends of liberty, equality and justice both in our country and in the world at large,
>
> We the people of Nigeria, by our representatives here in Parliament assembled, do hereby declare, enact and give to ourselves the following Constitution;-[31]

The above provision clearly shows that it is the people of Nigeria through their representative in parliament duly constituted that produced a constitution that reflects that yawning and aspirations of the people of Nigeria, unlike this other provision which is a decree, as embedded in the 1999 constitution. The constitution is therefore made a schedule to the said decree as promulgated by the military:

> NOW THEREFORE, THE FEDERAL MILITARY GOVERNMENT hereby decrees as follows:-
>
> 1.(1) There shall be for Nigeria a Constitution which shall be as set out in the schedule to this Decree.
>
> (2) The Constitution set out in the schedule to this Decree shall come into force on 29th May 1999.
>
> (3) Whenever it may hereafter be necessary for the constitution to be printed it shall be lawful for the Federal Government Printer to omit all parts of this Decree apart from the schedule and the Constitution as so printed shall have the force of law notwithstanding the omission.[32]

It is apposite to say *caveat emptor*, although this is not a contractual obligation or discussion on tort but it is valid to say *res ipsa loquitor*- that the thing has spoken for itself. It is logical to ensure that a constitution that reflects the values, yawning and aspiration of the people of Nigeria should be enacted to capture the various alterations to the constitution which is also an effort to produce a good democratic compliant and democratically enabled and informed constitution.

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[30] Olakanmi & Co., Op. Cit., pp. i-ii

[31] Constitution of the Federal Republic of Nigeria 1963, No. 20 (AN ACT TO MAKE PROVISION CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA)

[32] Constitution of the Federal Republic of Nigeria 1999, Decree No. 24, CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (PROMULGATION) DECREE 1999

5. CHARACTERISTIC NATURE OF NIGERIAN LEGAL SYSTEM, COMPLEXITY, MULTIPLICITY AND UNIFICATION

As already identified, in the present day Nigeria and particularly based on the historical / legal antecedent of the country, the Federal Republic of Nigeriais basically a constitutional republic and by necessary implication the Nigeria legal system is based on the English common law and legal tradition due to the legal transplant occasioned by colonization and the eventual reception of English law into Nigeria. The above notwithstanding, which is a reality that continue to dwell with us because English law forms the basis and the yard stick with which the standard of the Nigerian legal system is measured, this has not in any way change and remove completely the reality of the character and complexity of the Nigerian legal system.

It must be borne in mind that the determination of the applicable laws at times reveals the difficulty in choosing an applicable law in situations where there is the likelihood / possibility of the application of a variety of applicable laws. Actually, this is a situation where the knowledge of the application of conflict of laws becomes relevant. However, in view of the multiplicity of legal system, the determination of an applicable law may require the ascertainment of the personal law of the party. In Nigeria for example, there are different personal law determinable by reference to – under common law, domicile is employed, under civil law reference is made to nationality, while under Islamic law, reference is made to religion. The preceding are the important connecting factors that are employed in the determination of personal law generally, but in Nigeria, domicile is usually employed to determine the personal of law of a *propositus*.[33] In the case of Omotunde v Omotunde, the perfect idea of domicile under the Nigeria private international law was captured in the following words:

> Everybody at birth becomes a member of both a political and of a civil society, the former determines his political status and nationality, and the latter determines his civil status. The law which governs the civil society into which he is born is the law of his country of domicile.

The problem of determination of applicable law is as a result of the problem usually posed by the challenges of internal conflict of laws occasionally. The multiplicity nature of the Nigerian legal system is so unique that the courts have validated recognition of the various laws. In Re Sarah Adadevoh v In the Estate of Macaulay,[34] the court held that:

> Legitimate is to be determined by the native law and custom applicable to the deceased and not the English Law

This further informed the pronouncement of the Supreme Court of Nigeria in Adeyemi v Bamidele,[35]in distinguishing between legitimacy in England and the concept of legitimacy in Nigeria as two different concepts. The same position had earlier been taken by the court[36]to the effect that legitimate children in Nigeria are not confined or limited to children born in wedlock or children legitimated by subsequent marriage of the parents as in England but extends to issue born without marriage and can be a legitimate child in so far as the paternity of the child is acknowledged by the putative father.

The courts have well validated the recognition of the pluralistic nature of our legal system by recognizing English law, Customary Law and Islamic Law. The practicability of this may be seen in the cases of Ajibaiye v. Ajibaiye, Olowu v Olowu[37], IlaAlkamawa v

[33]L.A. Ayinla, G.H. Olusola, Domicile and The Determination of Personal: A Critique, *EBSU Journal of International Law and Juridical Review*, Vol.3, pp. 9-11, 2014.Ssee also R.H. Graveson, *Conflict of Laws*, 6th edn., Sweet & Maxwell, London, 1969, p.20

[34](1950-51) 13 WACA 304

[35](1968) 1 ALL NLR 31 at 37

[36]Lawal v Younan (1961) 1 ALL NLR 145

[37](1985) 3 NWLR (pt. 13) 372

Hassan Bello.[38] Thus the necessary implication of the foregoing is that other laws are being recognized as forming part and parcel of the Nigerian legal system.

It is must be noted that with the reception formula, there appear a history of reception that favours the application of law to suit local circumstance, a look at the Interpretation Act reveals this analysis. Section 45(1) of the interpretation Act is as follows:

> 45(1) Subject to the provisions of this section, and except in so far as other provision is made by any Federal law, the common law of England and the doctrine of equity, together with the statute of general application that were in force in England on the 1st day of January 1900, shall be in force in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the federation.
>
> (2) Such imperial laws shall be in force so far only as the limit of the local jurisdiction and local circumstances shall permit and subject to any Federal law.
>
> (3) For the purpose of facilitating the application of the said imperial laws they shall be read with such formal verbal alterations not affecting the substance as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.

The above provision is argued to leave room for some possibilities as in, received English law can be amended or repealed even by enactments of the Nigerian legislature, it may also provide reference to English law in the absence of a local legislation and it as well allowed for the continued operation of customary laws.[39]

However, notwithstanding the multiplicity nature of the legal system, the current situations / circumstances favours repealed / amendment of laws in line with current realities, the constitution having empowered the various legislature in this regard.

6. APPRAISAL OF PERSPECTIVES

As rightly observed that the Nigerian legal system cannot be divorced from the grip of colonialism totally, it continues to reflect the tradition / customary character of the country. Some writers have observed certain peculiarity of Nigerian legal system. Daniel[40] argued generally that the feature of the Nigerian legal system may be seen in its duality, duality by comprising English law, Islamic law and Customary law. It is therefore the contention of this writer that this proposition can be better ascribed to as the pluralistic nature of the Nigerian legal system which has been validated both in law and practice as already discussed.

The idea of external influence is further argued as the importation of both Islamic law from the Middle East as a result of trans-border trade / commercial interactions which has permanently influenced the various customary practices / customary laws to favour the practice of Islamic law particularly in the generality of the Northern Nigeria with relatively few exceptions in some states like Kaduna, Jos among others where Christianity is well rooted in some areas. The reason may be adduced on the importation of English laws into Nigeria due to the arrival of the European traders and the subsequent and eventual colonization of Nigeria.

The other argument put up by Daniel is the identification of the Geo-Cultural diversity of the country. The heterogeneous nature of Nigeria with over 250 ethnic nationalities together with the unwritten nature of the custom, this is argued to have made it difficult to achieve uniformity of the various customs thus prompting different attempt at either codification / restatement of customary laws. Besides, the system of precedent is also a significant character of the Nigerian legal system. The idea of precedent entrenches the

[38]Alhaji Ila Alkamawa v Alhaji Hassan Bello & 7 Ors. (1998) 6 SCN 126-136. See also A.A. Oba, Islamic Law as Customary Law: The Changing Perspective in Nigeria, *International and Comparative Law Quarterly*, Vol. 51, No. 4, pp.817- 850, 2002.

[39]A.E.W. Park, Op. Cit. pp.18-19

[40]P. D. Mission, Op. Cit. 2019

doctrine of *stare decisis*, this is a latin word that is also peculiar to the English legal system, it is written in full as- *stare decisis et non quietamovere* and usually abridge as *stare decisis* meaning to stand by what has been decided and do not unsettle the established.[41]It is to ensure fairness, guide against bias and ensure certainty in practice. It must be noted that judicial precedent refers to the source of law where past decisions of the judges create law for future judges to follow and abide, it is also known as case law. It is a major source of law both historically and up till the present day.[42]Under the Nigerian legal system it is clear that the judicial powers of the State is vested in the courts. Section 6 (1) of the Constitution is explicit on this that:

> The judicial power of the federation shall be vested in the courts to which this section relate being courts established for the federation." And as well, "The judicial power of the state shall be vested in the courts to which this section relate being courts established, subject as provided by this constitution, for a state[43]

The above sections are meaningful in furtherance of the entrenchment of the doctrine of stare decisis in Nigeria to ensure certainty and predictability of cases with similar fact. This has also strengthened the hierarchy of courts as enshrined in the constitution together with a good law reporting system.

Another issue identified is military influence that has in ways affected the legal system by imputing military flavour vide the various military take overs which had infected the system with various decrees and edicts as the case may be. This is believed to have distorted the democratic nature of the country in term of legal development, economic growth and development. This intervention is already shown to have fueled assertion of scholars to hold that the present Nigerian constitution is brought about vide a military decree and can only be better operated in that light, hence the need for a democratically processed constitution for Nigeria becomes imperative.

The above perspectives may summarily be understood from the pluralistic nature of the legal system that favours the recognition of Islamic Law and Customary Law, English law (particularly principles of common law).[44] It is a fact that the multiplicity of law, particularly the disparity in the various system operated in the South and North as seen in the Criminal Code and the Penal Code, as well as the Criminal Procedure Code and the Criminal Procedure Act are also part of the nature of the system, although recent attempt is made to ensure unification in law and practice. One of such attempt is the Administration of Criminal Justice Act.

CONCLUSION

The totality of the above discussion is towards an attempt at critiquing the basis / fountain of the Nigerian legal system. However, in the contemporary day, the basis of the Nigerian legal system can validly be said to rest on the above arguments / discussions as embedded in the historical legal traditions of Nigeria as painstakingly analysed and espoused by scholars. Thus to be specific and direct, the Nigerian legal system is premised on the received English law that comprises of- the principles of common law, the doctrines of equity and statute of general application. It is as well based on Nigerian legislation as enacted by the federal and state legislatures- including the Acts, Laws, rules and regulation, as well as the various delegated legislations. Islamic law is also a valid law on which the legal system is founded in so far as it does not in any way contradicts the constitution and other laws in force. Case law in term of judicial precedent is also a major base upon which the Nigerian legal system is founded, in view of the doctrine of *stare decisis*. The Nigerian legal system is as

[41]M. Jacqueline, Op. Cit., p.23
[42] Ibid
[43]Section 6 (2) CFRN 1999
[44]See Section 1 (1), 1(3), 21, 315 CFRN 1999, see the cases of Saraki v FRN (2016) LPELR 40013 (SC) p. 109 & NCP v National Assembly, FRN (2016) 1 NWLR (pt. 1492) 1 at 21.

well based on international laws to which the country is signatory as validated in the celebrated case of Fawehinmi v Abacha, the law must as well comply with the dictate of section 12 of the Nigeria constitution, in that the constitution determines the extent of the application of international instruments. However, much had been said on customary law, it is as well a major base of the Nigerian legal system provided it is in consonance with the law and having satisfied the validity tests.

Ultimately, the Nigerian legal system is based on the primary and secondary sources of law. It is important to reiterate that the Constitution of the Federal Republic of Nigeria is supreme and it is the *fons et origo* of all laws in Nigeria, it has an overriding authority over persons and authorities and by necessary implication the fountainhead of all laws and the basis of the Nigerian legal system.

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PERSONAL SAFETY. PROTECTION OF THE VICTIMS OF CRIME

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ABSTRACT:

The impact of the crime phenomenon on the persons affected by it can be a profound one transposed into physical, mental, emotional and financial injuries, of which some victims can never recover. The actions that make up the criminal act can be harmed on the victims, witnesses or their families, and the most serious of the threats are those against the person's life. The paper focuses, first and foremost, on the measures to be taken to protect the victims of crime, as well as on the means of support offered to the victims so that they can enjoy the right of access to justice in order to cover their harm.

KEY WORDS: victims of crime, protection of victims of crime, access to justice, compensation for victims of crime

INTRODUCTION

Every year, about 15% of the European population or 75,000 people in the European Union are charged as victims of crime[1]. This fact shows us that some protection measures are necessary to adopt in favour of victims or possible victims of crimes (and a relative of the main protected person), in criminal matters, taking into appropriate consideration to the needs of victims, including particularly vulnerable persons (e.g. minors, person with disablities). However, it should not apply to measures adopted with a view to witness protection.

The United Nations Declaration on the Basic Principles for Victims of Crime and Abuse of Power (1985) defines the term victim as those people who, individually or collectively, suffered any harm, physical or mental, emotional experiences, economic losses or the material injury of their fundamental rights, by action or inaction that violates the criminal law in force, within the Member States, including those laws that stipulate the illicit abuse of power. The person is considered a victim whether the perpetrator is identified, arrested, investigated or convicted and, regardless of the relationship between the perpetrator and the victim.

By the term injured person in Romanian law we understand the person who suffered an injury of his interests or rights by an anti-social deed committed against her. That person has this quality as long as the prosecution has not begun. In the criminal trial the victim can be constituted:

– The injured party, as a person who suffered through the criminal act a physical, moral or material injury and participates in the criminal process;

[1] See *Victim's rights, Suport and protection of victims*, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/victims-rights_en, accesed on 8.11.2019.

– Civil party, designating the injured person who exercises the civil action in the criminal trial;

– Witness, if it is not a civil party or does not participate in the trial as an injured party. In this quality, the person can be heard with a protected identity, when there is good evidence or evidence that his or her life, bodily integrity or freedom could be endangered.

The victim's statement is a means of proof and can be used to find out the truth, in conjunction with the other means of proof. Also during the criminal trial the victim is questioned regarding the material and moral damages suffered, in order to solve the civil side of the case.

On the one hand, the problem that arises is that some crimes are not reported in official statistics - rape is an example - but they can be revealed in some surveys. However, just as those arrested or who admit to committing the crime are not necessarily all the offenders, those who report being victims of the crime are not necessarily typical of the whole range of victims.

However, some basic facts gathered from the official reports and from the surveys attributed to the victims, offer a reasonable portrayal of the victims of the crime. Most of the times, the groups that are most likely to be victims of the crime are the same groups that are most likely to commit the crime. In particular, victims of crime can be young people, people from a lower socioeconomic class and members of ethnic or racial minority groups[2].

On the other hand, another important issue is the fact that both victims of crime and witnesses of serious crimes are reluctant to provide information and investigation bodies because of apparent or real intimidation or threats against them or their family members. In this case, it is essential to analyze the needs of the victims, which vary from victim to victim. In this way, we can say that a certain type of crime gives rise to special needs and specific problems that are correlated with the type and nature of that crime. These needs and problems may be different or may resemble those of other victims[3].

Also, the victims do not have knowledge, information regarding the applicable judicial and administrative procedures, which is why they may be reluctant when identified by the criminal prosecution bodies. Moreover, as a result of the multiple abuses suffered and the complex consequences on their psyche, victims may show distrust in working with the police or other authorities.

Moreover, the victim's cooperation with the justice will be effective only when the internal obstacles, but also the pressures, threats and risks to which she is exposed will be eliminated, ensuring her full physical and social protection, guaranteeing her fundamental rights.

Each victim must be treated individually to meet their needs, and yet we can categorize the needs into five broad categories:

– respect and recognition;

– protection against intimidation, repression and subsequent injury by the suspect or defendant and against injury during criminal investigations and judicial proceedings;

– immediate assistance after the crime, as well as long-term physical and psychological assistance;

[2] Bernard J. Thomas, Thomas A. David, *Characteristics of victims*, https://www.britannica.com/topic/crime-law/Characteristics-of-offenders#ref932044, accesed on 12.11.2019.

[3] Juncker Jean-Claude, *Strengthening victims' rights: from compensation to reparation*, Publications Office of the European Union, Luxembourg, 2019, p. 27, https://ec.europa.eu/, accesed on 12.11.2019.

– ensuring access to justice so that victims are aware of their rights and understand them, to be able to participate in proceedings;

– compensation and putting in the previous situation when it is possible, either through financial damages paid by the state or by the offender or through mediation or other form of reparative justice.

THE RIGHTS OF VICTIMS OF CRIME

The new European Union rules on the rights of victims that apply from 16 November 2015 bring major changes in the way victims of crime are treated in Europe. The Victims Rights Directive establishes a set of mandatory rights for victims and clear obligations for EU Member States to ensure these rights in practice.

The goal is for all victims of crime and their family members to be recognized and treated in a respectful and non-discriminatory manner, based on an individualized approach tailored to the needs of the victim. They change the attitude towards the victims and place the victims in the center of the criminal trial. The rules improve the situation of millions of victims in Europe.

These apply to all persons who are victims of crime in Europe, regardless of their nationality[4].

1. Rights of victims' family members

When victims die as a result of the crime, their family members become victims too. Under the new rules, family members of deceased victims will enjoy the same rights as direct victims, including the right to information, support, protection and compensation. Family members of surviving victims also have the right to support and protection. For example, if a person's husband was killed in a terrorist attack, from that moment on, he or she has exactly the same rights as any other crime victim under the directive, including the right to information, support, protection and compensation.

2. Right to understand and to be understood

Under the new rules, all communication with victims must be provided in a simple and accessible language. The form of communication must be adapted to the specific needs of every victim, including, for example, needs related to age, language and any disability.

3. Right to information

The new rules require that national authorities give victims a range of information concerning their rights, their case and the services and assistance available to them. For example, they must be informed about the type of support they can obtain, the procedure to make a complaint, how and under what conditions they can obtain protection, legal advice or compensation. The information must be given from the first contact with a competent authority and without delay. If criminal proceedings are launched, victims - if they so wish - must be informed about their case including the time and place of the trial, any final judgement or important steps in the case. The victims should also be offered the possibility to receive notification about the release or escape of their offender.

4. Right to support

Member States must guarantee that victims have access to support services and must facilitate the referral from authorities to such services. Support must be free of charge and confidential and available also to victims who do not officially report the crime. Support must include both general support services and specialist support services, such as shelters, trauma support and counselling specifically adapted to different types of victims. For example, a girl is a refugee fleeing from Syria. She falls victim to violence in Europe but does not want to

[4]Juncker Jean-Claude, *Ibid*, p. 27.

officially report the crime to the police. A social worker gets into contact with her. The social worker refers her to a specialist support service, where she will find shelter and will receive information, advice and emotional and psychological support[5].

5. Right to participate in criminal proceedings

Victims are entitled to get a more active role in criminal proceedings. They have the right to be heard and be informed about the different steps of the proceedings. In particular, they must be informed if the offender will not be prosecuted and have right to have such a decision reviewed if they do not agree with the decision. They also have the right to compensation and if restorative justice proceedings are used in the national system, there are now safeguards in place to ensure victims' safe participation.

6. Right to protection and to individual assessment

Victims must be protected from both the offender and from risk of further harm by the criminal justice system itself. In order to determine their protection needs, all victims must receive an individual assessment to see whether they are vulnerable to further harm that may arise during the criminal proceedings. If so, special protection measures must be put in place to protect them during the proceedings and against any possible threat from the offender. Special attention is given to the protection of children[6].

7. Right to compensation

Another important right that a victim of a crime can claim is to apply to compensate for the damages due to the suffering he went through. All states offer compensation to victims of crime, and the purpose of compensation is to recognize the financial losses of victims and help them recover some of these costs. All states have a ceiling for granting full compensation for each crime. However, most of the time the costs of the crime are not covered. To be eligible for compensation, victims must file a claim, usually over a certain period of time, and show that the losses they claim have occurred without any fault of their own. Some types of losses that are usually covered include: medical and counseling expenses, lost wages, as well as funeral expenses[7].

COMPENSATION TO VICTIMS OF CRIME

In European Union, it has adopted several legal instruments, establishing common rules aimed at protecting and supporting victims of crime: horizontal instruments that deal with victims' rights in general, more specific instruments on measures to protect and compensate victims of crime and the instruments of material law regarding the trafficking of human beings and the sexual exploitation of children. A document of major importance in this regard is Directive 2012/29[8] of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

In a common area of justice without internal borders, it is necessary to ensure that the protection provided to a natural person in one Member State is maintained and continued in

[5]Jourová Věra, *The Victims' Rights Directive*, Directorate-General for Justice and Consumers, 2017, https://ec.europa.eu, accesed on 12.11.2019.

[6] Jourová Věra, *Ibid.*

[7] See The National Center for Victims of crime website, https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victims'-rights, accesed on 15.11.2019.

[8] Directive 2012/29 / EU replaces the 2001 Framework Decision on the status of victims in criminal proceedings and considerably strengthens the rights of victims and their family members to information, support and protection, as well as procedural rights in criminal proceedings.

any other Member State to which the person moves or has moved. It should also be ensured that the legitimate exercise by citizens of the European Union of their right to move and reside freely within the territory of Member States does not result in loss of their protection[9].

The Directive applies to protection measures which aim specifically to protect a person against a criminal act of another person, which may, in any way, endanger that person's life or physical, psychological and sexual integrity, dignity or personal liberty and which aim to prevent new criminal acts or to reduce the consequences of previous criminal acts.

The recognition of the European protection order by the Executing State implies – inter alia – that the competent authority of that State, subject to the limitations set out in the Directive, accepts the existence and validity of the protection measure adopted in the Issuing State, acknowledges the factual situation described in the European protection order, and agrees that protection should be provided and should continue to be provided in accordance with its national law.

Any request for the issuing of a European protection order should be treated immediately, taking into account the specific circumstances (e.g. urgency, the date of the arrival of the protected person, degree of risk).

The Directive contains an exhaustive list of prohibitions and restrictions which, when imposed in the issuing state and included in the European protection order, they should be recognized and applied in the executing state:

– a prohibition from entering certain localities, places or defined areas where the protected person resides or visits,

– a prohibition or regulation of contact, in any form, with the protected person (by phone, electronic or ordinary mail, fax etc.)

– a prohibition or regulation on approaching the protected person closer than a prescribed distance.

The Directive provides a high degree of flexiblity in the cooperation mechanism between Issuing and Executing States.

In Romania, one stage by which the state approached the victims of the crime was the adoption of law no. 211/2004 regarding some measures to ensure the protection of victims of crime. Thus, the free psychological counseling, upon request, was introduced for:

– the victims of the attempted murder and qualified murder;

– the victims of the crime of domestic violence, provided in art. 199 of the Romanian Criminal Code;

– the victims of the deliberate crimes that resulted in the personal injury of the victim;

– victims of rape, sexual assault, sexual intercourse with a minor and sexual corruption of minors;

– victims of the crime of ill treatment applied to the minor;

– victims of trafficking and exploitation of vulnerable persons and of the attempt on them.

The request for granting free psychological counseling is submitted to the probation service of the court in which the victim's domicile is located.

This request can be filed only after the notification of the criminal prosecution bodies regarding the commission of the crime.

[9] Kenéz Andrea, *European Union framework for victims' protection in the criminal proceedings. What the judicial practitioner should know?*, https://www.ja-sr.sk/, accesed on 15.11.2019.

FINANCIAL COMPENSATION FROM THE STATE

The financial compensation from the state is a way to compensate for the damage suffered by the victims of certain types of crime in cases where these damages cannot be obtained from the offender.

This can be obtained by the persons on whom one of the following offenses was committed:

- attempted criminal offenses and qualified murder;
- a crime of personal injury;
- an intentional crime that resulted in the bodily injury of the victim;
- a crime of rape, sexual intercourse with a minor or sexual assault;
- a crime of trafficking in persons or trafficking in minors;
- a terrorist offense;
- any other intentional crime committed with violence[10].

The financial compensation from the state can also be obtained by the spouse, children and persons in the care of the deceased persons by committing the above offenses.

Compensation is granted to the victim only if she has notified the criminal prosecution bodies within 60 days from the date of the offense or, if she was unable to notify the criminal prosecution bodies, within 60 days of on the date when the state of impossibility ceased.

The financial compensation from the state is granted, on the one hand, if the perpetrator is known, if the perpetrator is insolvent or missing, so that no compensation can be obtained from it and the damage was not obtained from either insurance company; and on the other hand, even if the perpetrator is unknown.

During May-June 2018, Romanian Law 211/2004 on some measures to ensure the protection of victims of crime was amended by introducing provisions that will further improve the situation of victims. Among the novelties introduced was the fact that the victim can be accompanied by a person chosen by her in order to facilitate communication with them, on the occasion of first contact with the authorities.

Also, the submission of the complaint according to art. 289 of the Romanian Criminal Procedure Code, the victim will receive a written confirmation thereof. The confirmation will include the registration number of the complaint, as well as data regarding the fact for which the complaint was filed[11].

If the victim does not speak or understand romanian, he or she may request to receive a written confirmation later.

Moreover, the document regulates the arrangement of separate waiting rooms / spaces for the victims of the crimes, in the headquarters of the courts. A provision has been introduced according to which the judicial bodies have the obligation to inform the victims of the crimes and about:

- the right to call a mediator in cases permitted by law;
- the judicial authority to which they may be addressed in the future for obtaining information on the status of the case, as well as its contact details, if the victim understands to file a complaint.

One year later, the emergency ordinance no. 24/2019 for amending and supplementing Romanian Law no. 211/2004 regarding some measures to ensure the protection of victims of

[10] See the Romanian **Ministry of Justice website,** http://www.just.ro/en/drepturile-victimelor-infractiunilor/, accesed on 17.11.2019.

[11] Hogaş Elena, *MEMENTO: Noi măsuri pentru protecţia victimelor infracţiunilor, aplicabile din această lună*, iunie 2018, https://legestart.ro/memento-noi-masuri-pentru-protectia-victimelor-infractiunilor-aplicabile-din-aceasta-luna/, accesed on 15.11.2019.

crime, as well as other normative acts was published in the Romanian Official Gazette no. 274 (as of April 10, 2019) and introduced a series of additional protective measures regarding victims of crime.

Among the most important measures newly introduced are those related to the creation of specialized compartments to support the victims of crime or the provisions regarding the supply of individualized services, depending on the victim. The measures will be established both within the general directorate of social assistance and child protection (where there will be psychologists, lawyers and social workers) and within other institutions (for example, in the case of victims of domestic violence, support and protection measures will be granted by institutions specialized in the prevention and combating of domestic violence). In addition, support and protection services can also be provided by private social service providers.

Support and protection services provided to crime victims and their family members can be:

- information on the rights of the victim;
- psychological counseling, counseling on the risks of secondary and repeated victimization or intimidation and retaliation;
- counseling on the financial and practical aspects of the crime;
- social insertion / reintegration services;
- emotional and social support for social reintegration;
- information and advice on the role of the victim in criminal proceedings, including preparation for participation in the trial. These information and counseling services do not include the free legal assistance of victims of crimes provided for in art. 14-20 times the legal assistance of the injured person provided in Romanian Law no. 135/2010 on the Romanian Criminal Procedure Code, with subsequent amendments and completions;
- guiding the victim to other specialized services, when appropriate: social services, medical services, employment services, education services or other services of general interest provided under the law[12].

As we have stated before, victim evaluation is a very important and preliminary step for these services to be provided according to their needs. The assessments will also be made in order to avoid secondary victimization. Thus, medical / psychological statements or evaluations, for example, will be minimized.

Another example of a protective measure introduced by emergency ordinance no. 24/2019 is the creation of a special register of the victims of the crime who will benefit from the support of the specialized services. That register will be organized at the level of the general directorates of social assistance and child protection.

The register will contain data on victims who benefit from protection and support measures. The respective data will be kept for one year and can be used by the criminal bodies.

CONCLUSIONS

[12] Paragraph (4), article 7 of the Emergency Ordinance of Romanian Government no. 24/2019 for amending and supplementing Law no. 211/2004 regarding some measures to ensure the protection of victims of crime, as well as other normative acts, published in the Official Gazette no. 274/10, Apr. 2009, amended by: L. no.211 / 2004 regarding some measures to ensure the protection of victims of crime, published in the Official Gazette no. 505/4 June. 2004, L. no.192 / 2006 regarding the mediation and organization of the profession of mediator published in the Official Gazette no. 441/22 May. 2006 and L. no.254 / 2013 regarding the execution of the punishments and the deprivation measures of freedom ordered by the judicial bodies during the criminal trial published in the Official Gazette. no. 514/14 Aug. 2013.

Protecting victims is just as important as tracking down terrorists or preventing violence. Caring for victims of violent acts does not just mean fulfilling legal obligations and ensuring the rights of individuals. Caring for victims of violent acts is, above all, a matter of human dignity, respect and solidarity. It is the symbol of a real democracy for which every person counts and deserves to be protected, supported, helped, integrated and reintegrated. The way we treat the victims of crime measures the depth and humanity of our civilization.

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REGIONAL SECURITY IN THE MIDDLE EAST AREA IN THE PERIOD OF THE COLD WAR. TURKEY'S CONTRIBUTION TO REGIONAL SECURITY

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ABSTRACT

The alliance belt between Turkey, Iran, Pakistan and Iraq led to the creation of the political-military bloc nicknamed the Baghdad Pact, which aimed to limit Soviet expansionism to the warm seas and the Gulf and to ensure peace and security in the Middle East region.

Another trio of non-Arab states in the East: Turkey, Israel and Iran formed an influential military alliance in the late 1950s under the name of the Phantom Pact or the Peripheral Alliance in order to coordinate the activity of the three secret intelligence services, to coordinate their activities. express their anti-Soviet stance and maintain regional security. Equally, Turkey's involvement in regional affairs played an essential role. Today, the presence of the UN in the area, is facing a new danger of our times: terrorism.

KEYWORDS: military alliance, expansionism, regional security, terrorism.

INTRODUCTION

The Baghdad Pact, whose official name is "Treaty of the Middle East", was founded on February 24, 1955 between Iraq, Turkey, Pakistan, Iran and the United Kingdom, which acceded in 1958, renamed the Central Treaty Organization. or Cento after the Iraqi withdrawal on March 24, 1959. Another country in the Middle East with which Turkey had close traditional ties was Israel. Being the first Islamic country to recognize the Jewish state of Israel on March 18, 1949, less than a year after the official proclamation of Israel's independence, on May 14, 1948, Turkey's changing relations with Israel reached the climax of an alliance with Israel. trilateral security in 1958, nicknamed the "Peripheral Alliance". The two pacts are part of the international alliances of the western camp in the context of the Cold War.

THE CHALLENGES OF THE ARABIC AND TRANSATLANTIC DIPLOMATION POLICIES

During the rule of Menderes, Turkey initiated an assertive foreign policy in the region and to some extent renewed its importance in the Arab and Islamic world. Turkey's foreign

policy in the Cold War years has generally focused on the Middle East's policy of working closely with the US and N.A.T.O. to limit any Soviet influence on Turkey.

Turkey's involvement in Middle East affairs in the 1950s was deliberately chosen by the Menderes government to break with Turkey the foreign policy of regional non-intervention in regional affairs and to resume its neglected relations with neighboring Islamic countries.

On the other hand, the Middle East, with strategic bases adjacent to the Soviet Union, vital communication links and significant oil wealth, has been a valuable region for Western interests. This is a common, open pact, as it was intended for other countries in the region establishing that Turkey and Pakistan will consult each other on international issues. Moreover, it is in fact a treaty of military alliance, under the auspices of art. 51 of the Charter of the United Nations[1].Thus, the alliance belt created by Iran, Pakistan and Iraq was intended to limit Soviet expansionism to the warm seas and the Gulf, but the Middle East considered such cooperation to be an absurdity, as opposed to the ongoing battle against the colonial powers still present, and especially against Israel[2] .

DIPLOMATIC INTERFERENCES OF THE TWO CONTINENTS CONCERNING THE PACT

The aim of the Baghdad Pact was ,,to maintain peace and security in the Middle East region"[3] and urged the Member States to ,,cooperate for their security and defense" and to refrain from any interference in the internal relations of the business"[4].

,,Open for accession to any member of the Arab League or for any other purpose actively pursuing security and peace in this region"[5], the US alliance was designed to meet several goals[6]. He appealed to its members for very different reasons, although the growing influence of the Soviet Union and Arab nationalism was widespread. By granting this treaty, Turkey has improved its relations with Western powers and Iraq has strengthened its position vis-à-vis Egypt[7].

The 1950s is a troubled period and it is relatively difficult to succeed in granting everyone's interests in this area of conflict, the development of Arab nationalism and the rejection of colonial powers, hostility towards the countries that support Israel.

Thus, the U.S. he worked for the treaty as an unofficial observer and signed individual agreements with each of the countries in this Pact. Iran, in the early 1950s, was shaken by the turmoil of nationalist and communist circles, which demanded nationalization of oil. In Jordan, demonstrations are becoming more and more important, a state that has renounced and rejected the treaty, to the great satisfaction of Egypt and Saudi Arabia. The stages that the "Baghdad Pact" went through are:

- Turkey signed a Mutual Cooperation Pact with Pakistan in February54;

[1] Benoist-Méchin, Le Roi Saud ou l'Orient à l'heure des relèves, Paris, 1960, p.108.
[2] François Massoulié, Conflicts in the Middle East, translation by Radu Gâdei, BIC ALL Ed., Bucharest, 2003.
[3] The Pact of Baghdad, Preamble, p.9.
[4] Pact of mutual cooperation between the Kingdom of Iraq, the Republic of Turkey, the United Kingdom, the Dominion of Pakistan and the Kingdom of Iran of February 24, 1955, art. (1) and art. (3).
[5] Idem.
[6] Europe, the Middle East, London, 1960, p. 102.
[7] Waldemar J. Gallman, Iraq under General Nuri, Baltimore, 1964, pp. 21-65.

Area signing a military agreement between Iraq and Turkey, and using the term "Baghdad Pact" on February 24, 1955. Iran, Pakistan and the United Kingdom join the Baghdad Pact;

- The establishment of a new republican regime, entails the withdrawal of Iraq from the alliance starting with February 24, 1955;
- The Baghdad Pact is renamed CENTO, starting August 19, 1959;
- Pakistan has been trying to get help from its allies in its war against India since 1965.

The United Nations Security Council adopted Resolution 211 on September 20, and the United States and the United Kingdom supported the O.N.U. by interrupting the supply of weapons for both belligerents.

In 1971, through a new war with India, Pakistan again unsuccessfully attempted to obtain Allied assistance. The US offers Pakistan limited military support, but not under CENTO. The new government of the Islamic Republic, Iran in 1979 withdrew the country from CENTO[8].

The first official step towards the conclusion of the Baghdad Pact was the treaty of April 4, 1954, between Turkey and Pakistan. The treaty was followed by US military aid agreements with Iraq (April 21) and Pakistan (May 10). Turkey and Iraq signed a mutual assistance pact on February 24, 1955. This was the Pact in Baghdad and it was open to all members of the Arab League and other states interested in peace and security in the Middle East. The United Kingdom also joined on April 5, 1955, and Pakistan and Iran in September and October. However, no other Arab state has followed the example of Iraqi Interior Minister Nuri to join the Western camp.

Syria's rejection of the pact led to the creation of a counter-alliance of Egypt, Syria and Saudi Arabia. In order to establish the Baghdad Pact, as well as to raise the prestige of Turkey, and especially in the face of Arab countries, the Americans put pressure on Pakistan to enter the Baghdad Pact[9].

The meeting of the Pact Council in Baghdad was held on November 21-22, which established the form of organization of the Pact. Thus, the permanent Political Council is established "where each participant will have a permanent representative with the rank of ambassador, economic adviser and military adviser"[10].

The British insisted on economic issues, and the US through Turkey insisted on the military side of the pact, because by providing even more armament and technicians, they could more easily subjugate these countries.

At first the American imperialists tried to achieve a political unity within the Arab countries, but they were struck by the English imperialism which sought to maintain its political and economic influence in this part of the world at all costs.

None of the Muslim countries except Iraq and Pakistan agreed to join the Turkish-Iraqi Pact. Thus, at the end of February 1955, the heads of the two governments, the Turkish and the Iraqi, signed the text of the treaty at the beginning of March[11].

Here is what the attitude of the main Arab countries was, in relation to the Turkish-Iraqi pact:

[8] https://en.wikipedia.org/wiki/Baghdad_Pact.
[9] DAMFA, Turkey Fund 71, File 20/1955, Row 13.
[10] Idem.
[11] Ibidem, p. 4.

- regarding Egypt, it started in its action, from the principle that, the Arab world must form a unity separate from any blocs linked to Western countries and even America and not make any alliance with any country that is linked to such blocs[12].
- in the beginning, Syria has somewhat adopted an expectant attitude;
- Saudi Arabia opposed the Turkish-Iraqi pact and later agreed with Egypt's proposal to conclude a political, economic and military agreement with all Arab countries[13].

As for the attitude of the other Arab countries, it was quite opposite to the attitude adopted by the three states above, as follows:

IstanPakistan was already linked to Turkey by the Ankara-Karaci pact and sooner or later would join the Turk-Iraqi pact. Libanon had a somewhat favorable position on the Turkish-Iraqi pact and the position of Trans-Jordan was about the same as Lebanon and its entry into the Turkish-Iraqi pact did not bring any essential change within the Arab world, so it was kept in reserve.

Iran did not show itself to be quite favorable to the Turkish-Iraqi pact, but it also did not take a very unfavorable attitude. On the one hand, the British who dominated this part of the world sought to maintain their economic positions and political influence in these countries, and American imperialism was constantly seeking to eliminate English imperialism from the Middle East market.

The stage of the Turkish-Iraqi pact was quite shaky, even with the accession of England to it and probably soon to be Pakistan.

As regards the accession of Iran, it will renounce the policy of neutrality, and on October 10, 1955, Iran officially announced the accession to the Turkish-Iraqi pact[14].

The fact that Turkey has given such a great popularity to the accession of Iran, had two main objectives: the attempt of the Turkish government to gain its prestige in front of the Americans and to obtain new loans with which they hoped to emerge from the economic and political bankruptcy, which was at that time.

CONCLUSIONS

The formation of the Baghdad Pact greatly destabilizes the region and disrupts inter-Arab relations. By linking an Arab country to a Western power, the pact contravenes the pan-Arab ambitions of which Nasser is the spokesperson. He becomes a champion of the opposition to the pact.

Saudi Arabia ranks on the Egyptian side. The same was true for Syria. Lebanon, in the end, finally rejected the pact. Jordan was facing a strong popular opposition that forced him to give up accession. The Arab world was divided on the issue of the pact. In addition, the pact reinforces the Arab nationalist sentiment and paradoxically, the influence of the USSR in the region.

The Baghdad Pact cannot be considered a success, the goals set out being far from being achieved. It, evolving into more economic than military cooperation, taking the name CENTO, the Central Treaty Organization on August 21 of the same year. The Iranian revolution of 1979 and the withdrawal of Iran marks the end of the alliance.

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[14] Ibidem, p. 16.

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CHALLENGE FOR ANNULMENT

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ABSTRACT:

The challenge for annulment - an extraordinary legal remedy of withdrawal by which the parties or the prosecutor can obtain the cancellation of a court ruling in the cases exhaustively provided by law. It can be exercised for the purpose of withdrawing court rulings (judgments) that were pronounced in disregard of certain procedural rules, not for reasons of groundlessness. This article aims to highlight the object of the challenge for annulment, the persons who may advance a challenge for annulment, the conditions imposed by the law for the admissibility of such a challenge, and the possible solutions rendered by the court.

KEYWORDS: challenge for annulment, categories of challenges, grounds and conditions of admissibility, court solutions.

INTRODUCTION

Initially absent from the Civil Procedure Code of year 1865, the challenge for annulment came into being and crystallized in the judicial practice of the time (1865-1948), by using a legal fiction, known as "action for annulment", which was based on the former provisions of Art. 735 of the Civil Procedure Code of 1865. Noting the unequivocal usefulness of the practice in question, the institution of the challenge for annulment "was legally enshrined as an extraordinary legal remedy" through the amendment of the Civil Procedure Code of 1865 by Law no. 18/1948.

The challenge for annulment was defined as "an extraordinary legal remedy of withdrawal, which requires the very court that pronounced the ruling being challenged, in the cases and under the conditions provided by law, to cancel its own ruling and to proceed to a new trial"[1].

Some authors have mentioned another feature specific to the institution, namely that it is "non-suspensive of enforcement"[2].

[1] PhD Prof. Ion Deleanu, *Tratat de procedură civilă (Civil Procedure Treatise),* Servo Sat Publishing House, 2000, p. 440;
[2] Florea Magureanu, *Drept Procesual Civil Român (Romanian Civil Procedural Law),* All Beck Publishing House, 1998, pp. 436-437;

According to a more recent definition, the challenge for annulment is "an extraordinary, common remedy of withdrawal, whose exercise is aimed at withdrawing (annulling) the ruling being challenged and retrying the case or supplementing the trial"[3].

In the context of the entry into force of the new civil procedure code, it was considered that the legal remedy concerned meets the requirements of being "an extraordinary withdrawal remedy, within the reach of the parties to the trial, non-devolutive and non-suspensive of enforcement, which may be exercised only against final rulings, in the cases and under the conditions provided by law"[4].

The new Civil Procedure Code does not bring fundamental novelties in terms of the remedies that can be exercised against court rulings, so that, just like in the Civil Procedure Code of 1865, the appeal, the second appeal, the challenge for annulment, the revision are to be found here, but their purpose (object) is substantially changed, by drawing a clear delineation between extraordinary remedies and appeal. Having been created by the case-law (jurisprudentially) in our procedural law, the challenge for annulment was initially accepted in application of the former provisions of Art. 735 of the Civil Procedure Code of 1865, which made no distinction between procedural documents and court rulings.

In application of Art. 317-321 of the previous Civil Procedure Code, the challenge for annulment was and still is frequently used in practice, especially against the rulings of the courts of second appeal, by invoking procedural irregularities that could hardly be included in the hypotheses of the texts in the matter. The tendency of the subjects addressed by the procedural rule, of turning an extraordinary remedy into one which is open to certain situations that would finally result in the change of the substantive solution, is defeated in the enforcement of the law by a restrictive interpretation of the provisions regulating the extraordinary remedies, which the new Civil Procedure Code has restricted even further, especially in the matter of the (second) appeal.

In the matter of the challenge for annulment, on the basis of the case-law and the doctrine which have noticed the absence, among the hypotheses of the text of Art. 317 of the Civil Procedure Code of 1865, of the one regarding the violation of certain rules of judicial organization, the legislator added this situation as well, but without such extension having any consequences on the extraordinary nature of this remedy. On the contrary, "the clarifications brought in the matter by the terms used determine the restriction of the possibility of exercising this remedy in the already established cases, but the usefulness of the challenge for annulment appears as evident in the context of the pronouncement of certain irrevocable rulings, within the new wording of the code, final rulings, which can no longer be appealed against, and have been pronounced by a court not legally constituted"[5].

The usefulness of the challenge for annulment, proved by the very manner in which it is regulated in the new Civil Procedure Code as well, justifies our attempt to analyze it as follows.

OBJECT OF THE CHALLENGE FOR ANNULMENT

[3] Viorel Mihai Ciobanu, Gabriel Boroi, Traian Cornel Briciu, *Drept Procesual civil (Civil Procedural Law)*, C.H.Beck Publishing House, 2011, p. 365;
[4] Viorel Mihai Ciobanu, Gabriel Boroi, Traian Cornel Briciu, *Drept Procesual civil (Civil Procedural Law)*, C.H.Beck Publishing House, 2011, p. 366;
[5] Sebastian Spinei, *Reglementarea căilor de atac în dreptul procesual civil (The Regulation of Remedies in Civil Procedural Law)*, Universul Juridic Publishing House, 2013, p. 140;

CHALLENGE FOR ANNULMENT

According to Art. 503 par. 1 of the New Civil Procedure Code, "final rulings can be contested through a challenge for annulment when the challenger was not legally summoned and was not present at the time when the trial took place"[6].

Paragraph 2 of the same Article states that, "The rulings of the courts of second appeal can also be contested through a challenge for annulment in cases where:

1. the ruling rendered in the second appeal was delivered by a court having an absolute lack of jurisdiction, or in violation of the rules regarding the composition of the court and, although the appropriate exception had been invoked, the court of second appeal omitted to rule on that aspect;

2. the solution given to the second appeal is the result of a material error;

3. the court of second appeal, in rejecting the second appeal or admitting it in part, omitted to investigate any of the grounds for quashing (cassation) invoked by the claimant in the second appeal within the time limit set;

4. the court of second appeal did not rule on one of the second appeals filed in the case.

The provisions of par. (2) points 1, 2 and 4 of the New Civil Procedure Code properly apply to the rulings of the courts of appeal which, according to the law, cannot be challenged by second appeal.

Therefore, according to the stated text, the challenges for annulment is classified as an extraordinary legal remedy of withdrawal, which is common and non-suspensive of enforcement.

Under the rule of the previous regulation, the doctrine distinguished between two categories of challenges for annulment, depending on the type of court rulings that were their object: the ordinary, common-law challenge for annulment, and the special challenge for annulment.

This distinction remains relevant in the new Code, the ordinary challenge for annulment being regulated in par. (1) of Art. 503 of the New Civil Procedure Code, and the special one, in the following paragraphs of the same Article.

The object of the challenge for annulment is regulated differently depending on the grounds on the basis of which this extraordinary remedy can be exercised. According to par. (1) of Art. 503, for the grounds related to the irregularity of the summoning procedure, the rulings which are likely to be appealed against through challenge for annulment are all the final rulings (irrevocable rulings, according to the terminology of the Civil Procedure Code of 1865). Final rulings are those defined in Art. 634 of the New Civil Procedure Code and, as the text relied upon shows, these may be judgments rendered in first instance, on appeal or on second appeal, which, for various reasons, cannot be or can no longer be challenged by appeal or second appeal.

Paragraphs (2) and (3) of Art. 503 regulate other reasons on the basis of which the challenge for annulment can be exercised, but these concern only the rulings of the courts of second appeal and the rulings of the courts of appeal which, according to the law, cannot be challenged by second appeal.

In support of the challenge for annulment, only irregularities of a procedural nature can be invoked, such as: the illegal summoning and absence of the party, the lack of

[6] Civil Procedure Code – MJR official edition 2015, pp. 195-196

jurisdiction, the illegal composition of the court, the omission to rule on one of the second appeals filed or the omission to investigate any of the grounds for quashing.

Judicial practice has ruled that the challenge for annulment in support of which other reasons than those provided by the procedure code are invoked is not admissible, such reasons being: the lack of legal standing of one of the parties, the omission to summon the party for the hearing to which the pronouncement of the ruling was postponed, the non-observance of the principle of orality of the debates, the serious violation of the right to defense or the court's omission to order, *ex officio*, the production of evidence.

ORDINARY CHALLENGE FOR ANNULMENT.

Grounds: illegal summoning. The ordinary challenge for annulment, which can be brought against any final ruling, is limited to a single reason: the challenger was not legally summoned and was not present at the time when the trial took place. Paragraph (1) of Art. 503 of the New Civil Procedure Code takes over the idea of the former Art. 317 par. (1) point 1 of the old Civil Procedure Code of 1865, but resorts to a more rigorous wording, making use of the jurisprudential solutions generated by the imperfections of the former text.

Thus, it is stipulated that the irregularity of the summoning procedure should concern specifically the challenger, not the party in general, which excludes *de plano* the possibility of a challenge for annulment being filed by a party who invokes the illegal summoning of another party to the trial. The negative condition that the challenger concerned should not have been present at the time when the case was tried must be met cumulatively with the irregularity of the summoning procedure. This rule considers, on the one hand, that the presence of the party at the hearing covers the complete absence of summoning and, on the other hand, that any other flaw of a defective summoning could have been invoked by the party at that time.

In practice it has been decided, for example, that the following are cases of illegal summoning:

- the death of one of the parties was not brought to the attention of the court, with the consequence of the non-summoning of the heirs of the deceased person;

- the non-summoning of the challenging party at its main office, if such an obligation was established by law;

- the summoning of the party by publicity, although the conditions for this have not been fulfilled;

- the failure to comply with the legal requirements regarding the content of the summons.

SPECIAL CHALLENGE FOR ANNULMENT. GROUNDS.

According to the current regulation, the rulings of the courts of second appeal and those of the courts of appeal not subject to second appeal can be contested through a challenge for annulment on grounds of illegal summoning, as provided by par. (1), and also for a number of other reasons provided expressly and exhaustively, just like in the previous regulation, by the current par. (2) of Art. 503 of the New Civil Procedure Code.

As compared to Art. 318 of the old Civil Procedure Code of 1865, the new text presents as grounds for a special challenge the lack of jurisdiction, and it also adds the reasons that consist in the violation of the rules regarding the composition of the court and the omission to rule on one of the second appeals or appeals filed in the case.

LACK OF JURISDICTION

The reason regarding the lack of jurisdiction, provided in Art. 503, par. (2), point 1 of the New Civil Procedure Code, refers exclusively to the lack of jurisdiction of the court which pronounced the judgment being challenged, namely the court of second appeal or, as the case may be, the court of appeal, under the conditions of par. (3) of the same Article.

Therefore, it is not possible to invoke, by means of a challenge for annulment, reasons regarding a possible lack of jurisdiction of the court that has adjudicated in a previous procedural stage. This new regulation is integrated into the vision of the current code, which has significantly limited the possibility of invoking the exception of lack of jurisdiction at various stages of the civil lawsuit. Also, it should be noted, in the context described above, that the lack of jurisdiction of the court which rendered the judgment being challenged should have been absolute, and the exception of lack of jurisdiction should have been invoked before that court, but the court should have omitted to rule on it. The text does not provide for the circumstance according to which the exception should have been invoked by the challenger himself, so it can be inferred that it is sufficient for it to have been invoked by any disputing party or even *ex officio*. As for the reason regarding the absolute lack of jurisdiction of the court – a ground for the common-law challenge for annulment in the previous regulation –, in the judicial practice it has been ruled that the challenge for annulment is admissible in the event that the court, by exceeding its jurisdiction, has solved an exception of unconstitutionality.

COMPOSITION OF THE COURT

The violation of the rules regarding the composition of the court is a new ground for the challenge for annulment and a ground for reconsidering the practice of the law courts in recent years, which, quite rightly, did not assimilate the illegal composition of the court with its lack of jurisdiction. The reason provided by point 1, second thesis of Art. 503, par. (2), is also found as a ground for quashing the ruling in a second appeal, being provided by Art. 488 par. (1) point 1 of the New Civil Procedure Code, but, as we have also shown for the reason regarding the lack of jurisdiction, the illegal composition of the court must concern the very court of second appeal or of appeal that delivered the ruling being challenged, and the exception of illegal composition must have been invoked before that court, which has omitted to rule on it.

MATERIAL ERROR

The reason according to which the contested judgment must be the result of a material error is taken over from the former regulation of Art. 318 of the Civil Procedure Code of 1865, the word "mistake" being replaced by its synonym "error".

The case-law generated by the application of that Article has preserved its relevance: this ground for the special challenge for annulment refers to the committing of a material error, in the sense of a mistake of a procedural nature that consists of confusing important elements or material data – such as wrongly rejecting the second appeal as not stamped, as late or as filed by a person without legal standing, resolving the second appeal in the absence of the grounds for second appeal, which were not transmitted by the court whose judgment is challenged, incorrect statements regarding procedural incidents, ruling on a judgment other than the one subject to the second appeal –, for the verification of which it is not necessary to re-examine the merits or to reassess the evidence and which have determined the solution

rendered, not errors of judgment, or errors in the assessment of the evidence, in the interpretation and application of the legal provisions. The challenge for annulment cannot be used to censure the material errors that have slipped in the content of the court rulings/judgments, for the rectification of which the legislator has made available the procedure for rectification of judgments regulated by Art. 442 of the New Civil Procedure Code. In order to solve the challenge for annulment on this ground, the court must refer to the situation existing in the file on the date of the judgment being challenged, without analyzing any such grounds that occurred subsequently.

THE OMISSION TO INVESTIGATE A REASON FOR QUASHING

As regards this reason for the special challenge for annulment, it should be noted first of all that it concerns exclusively the rulings of the courts of second appeal, not those of the courts of appeal which are not subject to second appeal, as expressly provided in par. (3) of Art. 503. We believe that the explanation lies in the fact that only the second appeal can be triggered by reasons for quashing that are expressly and exhaustively provided by law; otherwise, the failure to analyze certain reasons for appeal, within the limits of devolution (transfer of rights), may cause a similar prejudice to the party, given that the possibility of second appeal is not available to it.

Secondly, we note that, unlike the regulation in Art. 318 of the old Civil Procedure Code of 1865, the provisions of Art. 503 par. (2) point 3 of the New Civil Procedure Code no longer expressly stipulate the requirement that the omission to investigate the reason for quashing should have occurred by mistake. We believe that the removal of the phrase "by mistake" does not cause any change in the meaning or purpose of the regulation and that the interpretation given to the former text, according to which the failure to investigate the reason should have been the result of an omission, not deliberate, remains valid.

Thus, under the rule of the former regulation, in practice it was decided that, in cases where the court of second appeal actually analyzed only a reason for quashing which it found to be unfounded and showed, in the reasoning of its solution, why the other reasons could not be analyzed, the failure to analyze all the reasons invoked by the claimant in the second appeal is not due to an omission committed by mistake by the court, but it was of a deliberate nature, and the reasons why the court of second appeal proceeded in this way cannot be censured by means of the challenge for annulment, because such remedy cannot be used as a second appeal against second appeal. In the case-law[7], it has also been stated that the regulation of this ground of challenge had in view the possibility of censuring the ruling of the court of second appeal exclusively and by limitation to the omitted reason for quashing, otherwise the remedy of a second appeal against second appeal being available. The challenge for annulment based on this reason can be advanced only by the claimant in the second appeal, if the respondent in the second appeal did not prove he had a legitimate and current interest, and the decision rendered in the retrial, following the cancellation of the judgment of the court of second appeal, will be limited, from the standpoint of the analysis, to the reason for quashing whose non-investigation has led to the cancellation. The investigation of the reasons for quashing consists in the analysis of the grounds of second appeal, as stated by the

[7] See also the Decision of the Constitutional Court of Romania (CCR) no. 483 of 23 June 2015, published in the Official Journal of Romania, Part I, no. 633 of 20 August 2015, as well as Decision 673/2017, published in the Official Journal of Romania, Part I, no. 92/2018 of 31 January 2018.

party in the application for second appeal, not of the court's omission to respond to each factual and legal submission invoked by the claimant in the second appeal, as these must be subsumed by one of the grounds of second appeal provided by law.

On the other hand, the investigation to which the legal text makes reference, without being interpreted as imposing on the court the duty to respond to each individual submission, must be an actual examination of the criticism subject to judicial review, not just a repetition of the conclusions of the lower courts, otherwise the guarantees of the right to a fair trial enshrined in Art. 6 par. 1 of the European Convention on Human Rights[8] might be prejudiced.

The remedy of the challenge for annulment for this reason cannot be used to censure the manner in which the court of second appeal, in analyzing the reason for quashing, responded to it or the court's omission to investigate reasons for quashing that were filed late or which should have been invoked by the court *ex officio*.

Also, the omission of the court to award the legal fees cannot be subject to censure for this reason, because the entitled party has access to the remedy of an action for the recovery of the legal fees determined by the guilty conduct of the other party, nor can the refusal of the court to grant a hearing for lack of defense be subject to censure. The challenge for annulment may be advanced only in the event that the second appeal has been admitted only in part, not in cases where it has been fully admitted or cancelled as unstamped. On the other hand, if the omission concerns the public order grounds orally invoked by the claimant in the second appeal, or submitted to the parties for discussion by the court *ex officio*, the challenge for annulment for this reason is admissible.

The corresponding former text, namely Art. 318 of the old Civil Procedure Code of 1865, has been the subject to a judicial review of constitutionality[9], the Constitutional Court ruling that the legal provisions governing the special challenge for annulment for the reason consisting in the omission of the court of second appeal to rule on any of the reasons for quashing, do not contravene the Constitution, the principle of the right of the party to a fair trial, or the principle of the authority of *res judicata* – a principle that has not been enshrined in the Constitution –, since the court vested with the adjudication of the challenge is called

[8] See - The Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up within the Council of Europe, opened for signature in Rome, on 4 November 1950, which entered into force in September 1953. According to the intentions of its authors, it is about adopting the first measures meant to ensure the collective guarantee of some of the rights listed in the *Universal Declaration of Human Rights of 1948*.
The Convention enshrines, on the one hand, a number of civil and political rights and freedoms, and, on the other hand, it establishes a system meant to guarantee them and to ensure the compliance of the contracting states with the obligations assumed by them. By Law no. 30 of 18 May 1994, Romania ratified the *European Convention for the Protection of Human Rights (ECHR), as well as its Additional Protocols No. 1, 4, 6, 7, 9, 10*. Separately from the enshrinement of the integration of international law into the domestic legal system, the fundamental law of Romania contains specific regulations regarding international treaties on human rights. According to the provisions contained in Art. 11 and 20 of the Constitution, the Convention and its additional protocols have become an integral part of domestic law, taking precedence over it, in other words, ECHR and its additional protocols have become a source of mandatory and primary domestic law, which, at national level, has as an immediate consequence the application of the convention and of its protocols by the Romanian courts, and at the international level, the acceptance of the review provided by the ECHR with regard to domestic court judgments/rulings. As a guarantee of the respect for human rights, the Convention provides, in Art. 6, point 1, the right of any person to a fair trial: "*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law […]*".

[9] See the Decision of the Constitutional Court of Romania no. 1033 of 9 July 2009 regarding the exception of unconstitutionality of the provisions of Art. 318 of the Civil Procedure Code of 1865, published in the Official Journal of Romania, Part I, no. 634/2009 of 25 September 2009.

upon to examine the reasons for quashing that the court of second appeal has omitted to investigate.

THE OMISSION TO RULE ON A SECOND APPEAL/AN APPEAL

This is a newly introduced reason, provided in point 4, par. (2), Art. 503 of the New Civil Procedure Code, according to the logic that, if in the case of non-investigation of a reason for second appeal, a challenge for annulment can be brought, then, *a fortiori*, the same remedy should be available in cases where an entire second appeal is omitted.

The same regulation applies in cases where the ruling on one of the appeals filed in the case, according to par. (3) of Art. 503 of the New Civil Procedure Code, is omitted. In order for this reason to apply, instead of the one provided for in point 3 of the aforementioned legal text, the mention regarding the solution given to the remedy concerned (admission, rejection/dismissal, cancellation, obsolescence), must be missing from the operative part of the decision rendered by the court of second appeal or of appeal.

We believe that such absence may be exploited by the remedy of the challenge for annulment, even if in the recitals of the decision there is mention of that second appeal or appeal or of the reasons that would trigger one solution or another with regard to that remedy, because the lack of mention in the operative part is equivalent to the lack of certainty that a deliberation and consensus of the members of the panel of judges with regard to the solution of that legal remedy even took place.

The challenge for annulment is inadmissible if the reason provided in Art. 503[10] par. (1) could have been invoked by way of appeal or second appeal. However, the challenge may

[10] See the Decision of the Constitutional Court of Romania no. 828 of 11 December 2018, which was published in the Official Journal of Romania, Part I no. 263 of 05 April 2019 – referring to the rejection of the exception of unconstitutionality of the provisions of Art. 503 par. (2) point 1 of the Civil Procedure Code, according to which: *"(2) The rulings of the courts of second appeal can also be contested through a challenge for annulment in cases where: 1. the ruling rendered in the second appeal was delivered by a court having an absolute lack of jurisdiction, or in violation of the rules regarding the composition of the court and, although the appropriate exception had been invoked, the court of second appeal omitted to rule on that aspect*;" *they were subject to the judicial review of constitutionality,* the court holding in its recitals that, as regards the conditions for exercising the remedies, the legislator can regulate the time limits for filing them, the form in which the filing must be done, its content, the court to which it is submitted, the jurisdiction and the method of adjudication, the solutions that can be adopted and other things of the kind, without thereby infringing the law in its substance or the constitutional principles and texts of reference. Thus, the Strasbourg Court, in its Decision of 12 November 2002, rendered in the case of Beles and Others v. the Czech Republic, paragraph 61, found that the right of access to a court is not absolute and is subject to limitations permitted by implication, given that it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. For these reasons, the criticism regarding the violation of Art. 21 of the Constitution and Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms cannot be retained as valid. Moreover, the criticism of the exception's authors that the legal provisions criticized are unconstitutional, because "the possibility that the party seeking justice can request that the second appeal be adjudicated *in absentia*, in which case the exception of the lack of public order jurisdiction of the court cannot be invoked, is not taken into account", does not concern constitutionality issues, but the application of the legal provision to their concrete situation in the litigation in which the exception of unconstitutionality was invoked. The fact that a certain procedural provision does not regulate all the hypotheses that may arise in practice does not constitute a violation of the right to a fair trial of the parties, who have the possibility to avail themselves of all its guarantees, by proposing, approving and producing relevant and useful evidence in the case, under the conditions established by the legislator. The Court also holds that, according to Art. 10 and Art. 12 of the Civil Procedure Code, "the parties have the obligation to submit the procedural documents under the conditions, in the order and within the deadlines established by the law or the judge, to prove their claims and defenses, to contribute to the unfolding of the trial without delay, pursuing its completion in the same manner", and "the procedural rights must be exercised in good faith, according to the purpose for which they were recognized by the law and without infringing the procedural rights of another party". At the same time, the provisions of Art. 22 paragraphs (1) and (2) of the Civil Procedure Code

be accepted if the reason was invoked by the application for second appeal, but the court rejected it because it required factual checks that were incompatible with the second appeal or if the second appeal, without this being the fault of the party, was rejected without being investigated on the merits.

THE COURT HAVING JURISDICTION AND THE TIME LIMIT FOR RESORTING TO LEGAL REMEDIES

According to Art. 505, par. (1) of the New Civil Procedure Code, the jurisdiction for resolving the challenge for annulment rests with the court which delivered the judgment thus challenged[11]. As a novelty, in par. (2) of Art. 505, the legislator expressly regulates that, in the event that there are reasons invoked which pertain to different jurisdictions, the prorogation of jurisdiction shall not operate.

As regards the time limit for resorting to the legal remedy, Art. 506 of the New Civil Procedure Code maintains the two conditions that have to be fulfilled cumulatively (which were demanded even by the former regulation, in Article 319, par. (2) of the Civil Procedure Code of 1865, namely: (1) the actual time limit for resorting to the legal remedy should not exceed 15 days, calculated from the date of communication of the judgment, and (2) it should not exceed a period of one year, calculated from the date on which the judgment became final.

According to par. (2) of Art. 506 of the New Civil Procedure Code, the grounds on which the challenge is based must be specified within a 15-day time limit, which is a limitation period, prescribed for its filing, under the sanction of nullity. It was held that the New Civil Procedure Code brings novelties in the matter of incompatibility, so that, according to Art. 41 of the New Civil Procedure Code, the judge who delivered a judgment (interlocutory judgment or judgment by which the case was resolved) cannot adjudicate the same case either in the challenge for annulment or in the revision procedure[12].

THE TRIAL PROCEDURE (ART. 508 OF THE NEW CIVIL PROCEDURE CODE)

The adjudication of the challenge for annulment is done with urgency and priority, with the application of the procedural stipulations relevant for the trial that led to the judgment being challenged. The statement of defense is compulsory according to the provisions of Art. 508 par. 2 of the Civil Procedure Code, having to be filed at least five days prior to the first court hearing. It is not communicated to the challenger, the latter becoming familiar with its content from the case file. The doctrine has pleaded for the avoidance of a *stricto sensu* interpretation of the provisions of Art. 508, par. (2) of the New Civil Procedure Code. In this regard, an opinion was expressed that, in order to ensure equal treatment, the

enshrine the active role of the judge in solving the case, the latter having the duty to insist, by all legal means, in order to prevent any mistake regarding the finding of the truth in the case.

[11] See Decision no. 1163/2017 - High Court of Cassation and Justice - Civil Division I - published on scj.ro

[12] See Decision no. 830/2017 - recusation - High Court of Cassation and Justice (HCCJ) - Civil Division I - Published in the HCCJ of 18 May 2017, as well as Decision no. 2/2007 regarding the examination of the second appeal in the interest of the law, filed by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, on the compatibility of participation in the adjudication of the application (motion) for revision or of the challenge for annulment of the judge who previously solved the case on the merits - High Court of Cassation and Justice - HCCJ - Published by the HCCJ on 15 January 2007- published on scj.ro

challenger should at least benefit from the permission to obtain, upon request, a copy of the statement of defense[13] .

Art. 508, par. (3) operates a distinction, depending on whether or not it is possible to annul the challenged judgment/ruling and to settle the case within the same hearing: a) Whenever possible, only if the reason for the challenge is well-founded, the court will issue a single judgment, by which it annuls the judgment being challenged and resolves the case; b) Otherwise, the court pronounces the annulment of the judgment being challenged and sets a hearing in view of resolving the case through the delivery of a new judgment, in which case the annulment judgment cannot be appealed against separately (but only together with the judgment resolving the case)[14]. The last provision was welcomed, as it was pointed out that, under the rule of the Civil Procedure Code of 1865, the doctrine used to express different opinions, regarding the options for solving the situation: either by ordering the admission of the challenge through an interlocutory order, or – according to another opinion – through a judgment of admission in principle, which had to remain irrevocable, as a prerequisite of the judgment on the merits. From the text, it is univocally clear that the annulment of the judgment challenged occurs by effect of a judgment, not of an order. The judgment which resolves the challenge for annulment is likely to be appealed against by using the same remedies that were available for the judgment being challenged. A judgment against which the challenge for annulment was exercised cannot be contested by the same party by means of a new challenge for annulment, even if new reasons are invoked.

In conclusion, we can say that, in New Civil Procedure Code, the extraordinary legal remedy of the challenge for annulment, as currently structured, has put forward the doctrinal and jurisprudential solutions advanced in the last decades. The two forms of the challenge for annulment that have become traditional were merged into a single text. Also, the time limit for exercising the challenge for annulment according to Art. 506 of the Civil Procedure Code was reconsidered, and the distinction between judgments susceptible to be enforced by coercion and those not susceptible to be enforced by coercion was removed. The innovations brought by the New Civil Procedure Code in the matter, which were subject to the above considerations, are interesting, and some are quite original. This is, for example, the case of the provisions regarding the judgments to be pronounced in case of admitting the challenge [Art. 502 par. (2)]. In this study, we have also noted the existence of other procedural stipulations meant to bring important clarifications for the correct application of the legal provisions regarding the challenge for annulment, which we consider to be an extremely useful institution of civil procedural law.

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13 See Civil Decision no. 303/2016 pronounced by the High Court of Cassation and Justice - Panel of 5 Judges - Published by the HCCJ on 31 October 2016- published on scj.ro

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METHODOLOGIC DIRECTIONS IN CRIMINALISTIC RESEARCH FOR THE OFFENCE OF TRAFFICKING AND ILLICIT DRUG CONSUMPTION

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ABSTRACT:

The criminal activity of trafficking and illicit drug use is developing rapidly, new psychoactive substances are emerging at a rapid pace and represent a major threat to the health and safety of individuals. The actual crime in the case of trafficking and illicit drug use offence must be determined in terms of size the participants and causes. The distinction between real crime and apparent crime is defined as the "dark number or hidden figure of crime" (Rădulescu S., 1999, 189) The use of this concept is specifically used in the case of the number of crimes committed and remained unknown to the society, for various reasons. In the forensic investigation of the crime of trafficking and illicit drug use, the research activity is carried out with great difficulties, because one of the forms of crime with the highest rate of the dark number of crime and almost impossible to estimate is the illicit trafficking and consumption of drugs, as victims are most often accomplice in this form of crime, and establishing the diversity of substances that fall into the narcotic sphere is relative.

KEYWORDS: forensic research, drugs, psychoactive substances, drug trafficking, illicit drug use.

INTRODUCTION:

Illicit drug trafficking and consumption is a form of criminality that is in the attention of both national and international organisation and which must be effectively addressed and combated by all countries whose persons are involved as perpetrators or victims of drug trafficking crime. The scale of the current problem of narcotics goes beyond the control power, constituting a threat both for the health and safety of the people and for the economic and social order of the world. The main cause of drug trafficking and illicit drug trafficking is the tendency of criminals to obtain significant illegal income, criminal activity being one of the most profitable, being ranked, according to income, second in the world, after the trafficking of weapons.

GENERAL CONSIDERATIONS:

Drugs are narcotic or psychotropic plants and substances, or mixtures that they contain, their definition in Romania being given by Law no. 143 of 26 July 2000 on combating trafficking and illicit drug use. According to the World Health Organization, the drug is the substance that is absorbed by a living organism, modifying one or more functions of it. In the pharmacological sense, the drug is a substance used in medicine, the abusive use of which can create physical or mental dependence, or serious disorders of mental activity, perception and behavior. Adoption of Law no. 143 of 26 July 2000 represented a qualitative leap from the previous regulations, changing both the conceptions and the strategies to fight against what was called the " the scourge of the contemporary world". The need to harmonize national and international legislation required the elaboration of Law no. 143 of 26 July 2000 which establishes the categories of drugs under control, the facts that constitute drug trafficking, but also contains procedural dispositions applicable in the field of discovery and investigation of this type of crime. The categorizing of psychotropic products or substances is important for the legal classification of the offence. The number of psychotropic substances on the list of those under control has increased steadily (*Sabău G. V., 2007, 224*). This aspect highlights the concern of traffickers for research, identification and use of new substances such as drugs, but also the interest of the authorities in keeping the trafficking and illicit drug use under control. The criminals involved are constantly improving their methods of action, always being one step ahead of the authorities. They adapt quickly and flexibly to the new geostrategic, legislative, economic and technological evolution conditions, by using the entrepreneurial structures and by combining the illegal business activities with the legal commercial ones (*Niță N., 2001, 78*).

The International Narcotics Control Strategy Report (INCSR) shows that Romania is not a major source of drugs, but has the role of a transit country for narcotics. In order to carry out the terrestrial transport, the traffickers resort to both vehicles destined for freight transport and those for passengers. Also, as element of novelty, there was an evolution in the Romanian market of drugs and synthetic psychotropic substances, called designer drugs or spice (*Buzatu N. E., 2016, 10*).

According to the European report on the nature of drugs, heroin that arrives in Romania is intended for consumption for the internal market and for transit to Western Europe. This drug enters the territory of the country with the help of international transport companies of persons and freights or through the use of vehicles registered in Romania and driven by Romanian citizens, after which it is dispatched further by similar means (*Stanciu V., 2002. 101*). The most common destinations are the Netherlands, Germany and the United Kingdom. Cocaine is still an expensive drug for the intern market of Romania, which is also why it is brought in small quantities from Western Europe or South American countries. At the same time, the traffickers of this category of drugs turned their attention to the port of Constanta as an entry point into Europe and bypass the classic routes where the control is carried out more carefully, the evidence being, the significant catches from this port. Cannabis remains the most commonly used drug in Romania, the intern market being supplied from both European producing countries (Moldova, Holland, Belgium, etc.) and from intern production (with an increase in the number of indoor cultures throughout the country). The hashish is brought to Romania in the most part from Spain, through regular courses (by carriages or packages) or by air, especially the low cost ones.

INVESTIGATION: The investigation of the crime of trafficking and illicit drug use is carried out with great difficulties, the criminals permanently improving their methods of action, because the huge profit they obtain mobilizes them to intensify the research in discovering other derivatives and new methods of trafficking. The production of drugs is bought and distributed throughout the world by the so-called "traffickers" (*Rădulescu S., 1999, 164*). They are the main beneficiaries of the drug trade and are the hardest to capture. In Romania, and not only, there are so-called "area dealers", then on smaller areas there are "local dealers", followed by "sellers" and finally "street distributors", who are also most exposed to be captured. Many of the street distributors are consumers themselves and carry out this activity in exchange for the daily dose (*Buzatu N. E., 2016, 121*). The structure of a drug trafficking network is of the organizational pyramid type and the capture of the street distributors does not solve the problem of illicit drug trafficking and consumption, them being at the base of the pyramid. Moreover, the legislation provided to halve the limits of penalties for people who, during the criminal prosecution, denounce or facilitate the identification and criminal prosecution of other perpetrators involved in operations with narcotic substances. Thus, the capture of the street distributors does not solve the problem of illicit drug trafficking and consumption because they, in order to benefit from the reduction of the penalty, denounce other street consumers or distributors and not higher hierarchical persons from the pyramid level, thus not reaching the capture of the area dealers, local dealers, sellers or traffickers. In the conditions in which the way of committing traffic offenses and illicit drug use presents increasingly distinct forms, it was necessary to introduce in the Romanian legislation new modalities of forensic investigation, meant to increase the possibilities of the judicial bodies in discovering, combating this phenomenon (*Sabău G. V., 2007, 274*). Therefore, Law no. 143 of 26 July 2000 on the prevention and control of trafficking and illicit drug provides special investigative methods and techniques, such as supervised delivery, use of undercover investigators and collaborators, the surveillance of telecommunications systems (*Buzatu N. E., 2016, 186*).

Supervised delivery: In recent years, international interest has been observed in the cooperation of different states in the fight against drugs, whose main objective is to detect and combat the illicit activities of drug traffickers. In article 1 (k) of the Convention against the illicit trafficking of narcotics and psychotropic substances, of December 20, 1988, it is shown that the expression supervised delivery indicates the methods by which drugs, substituted substance or psychotropic substances may be passed through the territory of one or more countries, with the consent and under the control of the competent authorities of the indicated countries, in order to establish the identity of the persons involved in the crime. The supervised delivery method is the cooperation of the states for the detection and arrest of drug traffickers, who carry out their criminal activity entirely or partially within the territory of these states. The main objective of the supervised deliveries is the discovery of the entire drug trafficking network, from the cultivator, producer, trafficker to dealers, buyers and consumers (*Stancu E., 2007. 113*). The supervised deliveries can also be of two types, respectively the supervised delivery with the substitution of drugs, which in turn can be with total or partial substitution of the substances and the supervised delivery without the substitution of the drugs (*Dima T., 2000, 75*). The method of delivery is chosen according to the particularities of each case. When there is data, information or suspicion that a substance is being exported, imported or in transit through the territory of a country for the purpose of the manufacture of

psychotropic substances or drugs, each signatory State must inform the competent authorities as soon as possible and make the information available to the authorities regarding the name and address of the exporter, respectively of the importer, the indication of the substance, the quantity of substance exported, the point of entry and exit from the country, the date of dispatch, the payment methods used and all other essential elements. When organizing supervised deliveries, it is important that immediately after the information and data have been communicated to the countries in which the drugs will be transited, to obtain the approvals from the authorized institution. The organization of supervised deliveries cannot be authorized by using this method of investigation if the national security, public order or public health would be endangered. The operation of the supervised delivery is considered to be performed when the substances reach the consignee, and the objectives proposed in terms of tactical-informative and judicial-operative aspect have been reached (*Buzatu N. E., 2016, 196*).

The undercover investigator and collaborator: From the category of new methods successfully practiced in the fight against illicit drug trafficking by the judicial bodies and the competent authorities of our country, there is the infiltration of investigators and undercover collaborators in the groups of criminals. This method is particularly useful in criminal cases, where there is little evidence and no persons are willing to testify. The infiltration operations of investigators and collaborators can be short or long term and can take various forms. These can be operations of pseudo-purchase, flash-roll, pseudo-sale and penetration of networks or groups. The pseudo-purchase is materialized by presenting to a person as a potential buyer the product or object of the crime. The flash-roll consists of exposing the amounts of money to potential sellers of prohibited goods or of illicit origin in order to simulate the intention to buy. The pseudo-sale consists in the plan in which the agent tends to sell substances that are the product or object of an offense. Infiltration of the undercover investigator and collaborator in the criminal groups can be done when information about the intentions and ways by which the crimes are committed cannot be obtained, in case no evidence can be obtained regarding the activity of the criminal group and in the situation that using this method would reduce the expenses incurred during the research (*Buzatu N. E., 2016, 193*). In the making of the request of the authorization addressed to the prosecutor, the data referring to the facts and persons against which there is a suspicion that he is dealing with illicit drug trafficking, as well as the period for which authorization is requested will be mentioned. Regarding the duration for which this authorization can be issued, Law no. 143 of 26 July 2000, specifies that the authorization period is "no more than 60 days and can be extended for duly justified reasons, each extension may not exceed 30 days". The real identity of the undercover investigator and collaborator cannot be disclosed during or after the completion of the action. Their identity can be known by the competent prosecutor to authorize the use of the undercover investigator, while respecting professional secrecy. After obtaining the authorization, the undercover investigator or collaborator may procure the psychotropic drugs or substances registered in the authorization issued by the prosecutor only in the express quantity mentioned. Any other activity that the undercover investigator or collaborator carries out other than the one provided in the authorization issued by the prosecutor is in the falling within the illegal activities (*Buzatu N. E., 2012, 101*). It is indicated that the infiltrated policeman does not participate in other activities that could be a criminal offense. In the situation in which undercover investigator or collaboratorit is coerced and there is a risk of committing any

action that constitutes a criminal act, must be informed immediately the policeman of the situation, to cease the whole activity.

Audio or video intercepts and recordings: Like any other way of proof, the audio and video interceptions and recordings aim to identify the truth in question, with the purpose of proving the circumstances that preceded, accompanied or succeeded the offense, the participants in the illegal activity, the degree of participation, the substances that committed the object of the criminal activity, the means used to implement the crime, etcetera (*Stancu E., 2007. 184*). The authorization for the interception and the registration is issued for a maximum of 30 days, with the possibility of extension in the same conditions for duly justified reasons, each extension not exceeding 30 days. The total duration of authorized interceptions and records, regarding the same person and the same act, may not exceed 120 days. In order to carry out the activity of intercepting and recording audio or video, logistic support from the specialists in the field is required. They have the obligation to maintain professional secrecy regarding the operations performed. In urgent situations, when the delay in obtaining the authorization would damage the criminal activity, the prosecutor supervising the criminal investigation may decide, on a provisional basis, by a motivated ordinance, to intercept and record on the magnetic tape or on any other media the calls or communications, for a maximum of 48 hours. The prosecutor has the obligation within 48 hours to submit to the court the order along with the technical system on which the intercepts and records are made as well as a report in which the essential of the intercepted conversations is transcribed. The judge must rule within a maximum of 24 hours on the legality and well founded of the ordinance issued by the prosecutor and in the case in which he confirms it and it is necessary, the further authorization of the interception and registration will be ordered. If the interception and registration were done in a language other than Romanian, the calls will be translated and their transcription will be made in the Romanian language (*Stancu E., 2007. 174*). The translation must be certified by an authorized translator. The magnetic tape or any other device on which the recording of the call was made, its transcript and the written report is presented to the court. After hearing the prosecutor and the parties, the court decides which of the obtained data is of interest in investigating and resolving the case. The provisions of the special laws in the field of combating organized crime expressly indicate, as evidence, access to telecommunications or information systems, establishing the authorization mode and conditions. The research method by using video recordings represents a superior technical way of judicially fixing the operative moments of the criminal activity. The videomagnetic tape ensures an overall and continuous recording, so that it can be considered as having a higher degree of objectivity and accuracy compared to other recording techniques (*Stancu E., 2007. 213*). In order to prove the authenticity of the audio recordings, two tactical and methodological rules must be observed, respectively to present the original audio recording and the technical recording system that was used at the time of the interception.

CONCLUSIONS

At the nationwide, taking into account the unfortunate consequences of drug trafficking and illicit drug use, it is necessary to intensify the study of the forensic investigation of the drug problem, in order to identify the most effective ways of combating this scourge, so that it can be reached up to the top of the pyramid, in each case subjected to criminal investigation, which would allow the networks of traffickers to be annihilated and not just to take action

against small distributors, street dealers and consumers. At the international level, the difficulties of cooperation in the fight against drug trafficking are also due to the fact that there is still no legal uniformity in classifying substances as narcotic, although at the international level numerous conventions have been adopted in this area, precisely for this purpose.

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THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE - AN INSTITUTION WITH A FUNDAMENTAL ROLE IN DEFINING THE EUROPEAN SECURITY SPACE

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ABSTRACT:

The security of the European space involves both an external and an internal component. The European authorities play an essential role in ensuring the internal security of the Community through both the security policy and the efficiency of the Community institutions. The European Public Prosecutor's Office represents a newly established institution, which through its form of organization as well as its attributions aims to ensure the internal security of the Community in the aspect of combating offenses against the financial interests of the European Union. By cooperating with the other European institutions and state authorities, the European Public Prosecutor's Office will play a decisive role in the fight against corruption.

KEYWORDS: security, EU financial interests, European Prosecutor's Office, cooperation, European institution.

INTRODUCTION. CONSIDERATIONS REGARDING THE SECURITY OF THE EUROPEAN COMMUNITY AREA

Democratic state in the XXI century has as one of its key pillars ensuring the security of its citizens, by reference to all the coordinates of the modern world. Thus, security is aimed at the possibility of exercising and respecting fundamental human rights, such as the right to life, liberty and others. However, the evolution of the concept of "security" has gained new strengths in the contemporary world, often referring not only to respecting certain rights but to the reality considered as a system that includes economic, social, cyber, traffic safety and other aspects.[1]

[1] https://www.caleaeuropeana.ro/editorial-sebastian-sarbu-despre-cultura-de-securitate/ - acces time: 14.11.2019, 20.30;

In this context threats such as terrorism, cross-border crime or organized crime need to be combated by states through specially created institutions for this purpose, as well as by citizens, individually, through their direct participation in the recognition of these phenomena, their prevention and control.[2]

In view of the concrete contribution made by the citizens of the democratic state in maintaining security, it is necessary to bring to their knowledge all the information regarding the security values and needs - which may represent political, economic, military and other aspects. This creates the chance for development and at the same time promotes individual behaviors that work effectively against external or internal hazards.[3] The sum of these actions and behaviors can be defined as the "culture of security", which needs to be constantly popularized in order to fulfill its social role.

From the point of view of the fulfillment by the states of the obligation to ensure the security of its citizens, it is necessary to specify the fact that at present the threats regarding it can be both external and internal, or in the special case of the European Union - of order Community.

With regard to internal threats, it should be specified that they can be generated from several sources, such as inefficiency of authorities and institutions, widespread corruption, political clientelism.

At present Romania as part of the European Union has an important role in ensuring community safety, especially since there is extra space in the immediate vicinity.

At the level of the European Union in 2010, the Internal Security Strategy of the European Union was adopted by the Council of Justice and Home Affairs, which was approved by the European Council in the same year.

The target of the aforementioned strategy is the protection of rights and freedoms, improving cooperation between Member States, reactive approach to security causes, establishing policies to prevent the state of insecurity, involving the whole society in combating the elements that generate the state of insecurity - such as politics, economic or the social, informing EU citizens of the measures taken by the authorities regarding the prevention or elimination of the states of insecurity, as well as the approach of the internal security status in interdependence with the external one.[4]

In order to ensure the security of the European Community space it is necessary to have a very good collaboration between the customs authorities as well as the other judicial authorities, as well as with the various public services existing in a state, such as the health, civil and civil protection sectors.

The Treaty of Lisbon was established Standing Committee on Operational Cooperation on Internal Security (COSI), this one will have a role in coordination and cooperation between law enforcement authorities and managing borders and issues related to operational cooperation in reference to judicial cooperation in criminal matters.[5]

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[2] https://www.caleaeuropeana.ro/editorial-sebastian-sarbu-despre-cultura-de-securitate/- acces time 14.11.2019, 20.45;

[3] https://intelligence.sri.ro/cultura-de-securitate-surse-si-resurse/- acces time 14.11.2019;

[4] www.consilium.europa.eu/infopublic - *Internal Security Strategy of the European Union* (Strategia de Securitate Internă a Uniunii Europene) - page 9, acces time 15.11.2019, 21.00;

[5] www.consilium.europa.eu/infopublic- *Internal Security Strategy of the European Union* (Strategia de Securitate Internă a Uniunii Europene) - page 26, acces time 17.11.2019, 21.00;

At the same time, COSI has the task of ensuring good cooperation between EU agencies and bodies that have as their purpose the activity of internal security of the Union, such as Europol, Frontex, Eurojust, Cepol and Sitcen.[6]

EU security is also interdependent with respect for the rule of law within the Union. In this respect, the Member States have a very important role, the judicial system of each country being essential to be functional and efficient. Moreover, institutions that aim to ensure balance in society and maintain control of the rule of law have a major role in removing the attacks that may exist against the rule of law.[7]

However, the European institutions have an important responsibility in terms of the support they provide to national authorities in respect of the rule of law.

The internal security within the Union is required to be sustained also through European institutions that have direct attributions regarding the violation of the legal order, of the European values enshrined in the legislation. Failure to sanction conduct that violates such rules would represent a true departure from the order established in the rule of law.

In order to achieve an effective involvement of the Union in this regard, several institutions have been set up that play an important role in judicial cooperation, of which we mention OLAF - European Anti-Fraud Office, EUROPOL - European Police Office, EUROJUST and last but not least. EPPO - European Public Prosecutor's Office.

I. BRIEF HISTORY OF THE ESTABLISHMENT OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Given the fact that OLAF, Eurojust and Europol are not competent in terms of carrying out criminal investigation for committing the crimes affecting the financial interests of the EU, the European Public Prosecutor intends to be an independent institution, which has just this task.

The need for the creation of the European Public Prosecutor's Office resulted from the difficulties encountered in the efforts made to protect the common European budget, amplified difficulties and by the different legislation of the EU Member States.

We consider that the establishment of the European Public Prosecutor is brought significant change in relation to how to protect EU funds, the efforts of nation states in this regard will be combined with European efforts.

The idea of setting up an independent body with direct attributions for conducting criminal investigations in the EU came up practically with the project of establishing a European judicial area in 1995.

In 1996, European Parliament President then in office, Klaus Hansch promoted this idea.[8] In 1997 was launched the work "Corpus Juris" which brought together a series of rules

[6] Idem

[7] https://ec.europa.eu/transparency/regdoc/?fuseaction=list&coteId=1&year=2019&number=343&version=ALL&language=ro – Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - Strengthening the rule of law within the Union - Action plan (Comunicare a Comisiei către Parlamentul European, Consiliul European, Consiliu, Comitetul Economic și Social European și Comitetul Regiunilor – Consolidarea statului de drept în cadrul Uniunii – Plan de acțiune) - page.10– acces time 17.11.2019, 21.30;

[8] *www.europa.eu - Press release from the European Commission, Protecting taxpayers' money against fraud (Comunicat de presă al Comisiei Europene,* Protejarea banilor contribuabililor împotriva fraudelor): *acces time 17.11.2019, 20.30.*

of criminal law and criminal procedure that were intended to be applied throughout the European area, while also dealing with the fraud of European funds.[9]

The idea of creating a European Public Prosecutor was reiterated in 2000, although in a different form, by proposing the idea of "European public prosecutor" by the European Commission on the occasion of the Intergovernmental Conference prior to the adoption of the Nice Treaty.

In 2001, the Green Paper on the protection within the criminal law of the financial interests of the Community and the establishment of a European Public Prosecutor was issued by the European Commission[10], however, the idea of setting up the European Public Prosecutor's Office was abandoned.

Subsequently, by the Treaty of Lisbon, pursuant to Article 86 it was decided that "in order to combat offenses which harm the financial interests of the Union, the Council, acting by regulations in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office, starting from Eurojust. The Council decides unanimously, after the approval of the European Parliament "[11]

The European Public Prosecutor's Office (EPPO) thus appears as a structure distinct from Eurojust, decentralized and guided by the principles of efficiency, independence and responsibility.

In the European Commission's vision, EPPO is based on the legal systems of the EU Member States and takes into account the national laws, its purpose being to act in a faster and more coherent way.

Although the Lisbon Treaty is not the one establishing the European Public Prosecutor's Office, it is an important step forward in this regard.

The real act establishing the EPPO is the EU Regulation, adopted on October 20, 2017 by twenty EU Member States, namely Germany, France, Italy, Belgium, Spain, Portugal, Greece, Austria, Luxembourg, Romania, Bulgaria, Croatia, Cyprus, Finland, Slovakia, Slovenia, Czech Republic, Estonia, Latvia and Lithuania, countries where the EPPO is to be competent to conduct criminal investigations.

The aforementioned Council Regulation, 2017/1939 of 12 October 2017 on the implementation of a form of enhanced cooperation regarding the establishment of the European Public Prosecutor's Office was published in the Official Journal of the European Union, series L 283/1.

II. EU REGULATION ESTABLISHING THE EPPO - PROVISIONS AND ISSUES REGARDING ITS IMPLEMENTATION

Since the establishment of the EPPO, it is foreseen that EU Member States that have not participated in this form of cooperation can subsequently join it.

The EPPO headquarters is located in Luxembourg, with EPPO having legal personality and will be effective by the end of 2020.

The regulation stipulates within the scope of art.4 as EPPO's attributions that "it has the power to investigate, prosecute and prosecute offenders who infringe the financial

[9] M. Delmas-Martz, J.A.E. Vervaele, *La mise en oeuvreu du Corpus Juris dans les Etats Membres, In*tersentia, Antwerpen-Groningen-Oxford, 2000;

[10] O. Ținca, *General Community Law*, ed. III, Lex Light Publishing House, Bucharest, 2005 (Drept comunitar general, ediția a III-a, Ed. Lumina Lex, București, 2005*)*, p. 301.

[11] E. Dragomir, D. Niță, *Treaty of Lisbon - entered into force on December* 1, 2009, Nomina Lex Ed., Bucharest, 2010 (Tratatul de la Lisabona – intrat în vigoare la 1 decembrie 2009, *Ed. Nomina Lex, București, 2010)*, p. 176.

interests of the Union [provided in Directive (EU) 2017/1371 and established in this Regulation] and their accomplices. In this regard, the EPPO conducts investigations, carries out criminal investigations and exercises the public action in the competent courts of the Member States, until the end of the case. "

Article 5 of the same regulation establishes the general principles of the EPPO activity. Thus, it is guided by the principles of the rule of law, which will respect the rights provided in the charter. Within the same article it is provided the pre-eminence of the provisions of the regulation with respect to the national law of each state, the latter being applicable only if there are no corresponding provisions in the regulation. At the same time, it is foreseen that the applicable national law is that of the European prosecutor delegated to investigate the case.

Article 6 of the Regulation expressly mentions the independence of the EPPO Chief Prosecutor, Deputy Prosecutors, European and Delegate Prosecutors, as well as other categories of EPPO personnel, as they cannot receive instructions from any other person. outside EPPO.

From the perspective of Romanian national law, the provisions of art.6 of the aforementioned Regulations contradict the depositions of art.132 paragraph 1 of the Constitution of Romania which provide in the case of prosecutors the principle of hierarchical subordination, as well as with the provisions of art.64 paragraph 1 of the Organizing Law Judiciary 304/2004 which enshrines the same principle.

In the Romanian law only the provisions of Law 303/2004 establish the prosecutor's independence, but under the conditions of the law.

However, although according to the provisions of Article 6 of the Regulation, the independence of the institution of the European Public Prosecutor's Office is established, the delegated European prosecutors cannot be considered independent, as they are related to the instructions and decisions of the European prosecutors who supervise them or the permanent chamber.

Art.8 of the Regulation presents the structure of the EPPO, which carries out its activity independently and is organized on two levels, one central or European and one decentralized or state.[12]

Paragraph 3 of Article 8 of the Regulation states that as regards the central level, it consists of the college, the permanent chambers, the European chief prosecutor, the deputy chief European prosecutors, the European prosecutors - those representing the participating states and the administrative director.

The decentralized level is represented by the delegated European prosecutors, according to the provisions of the same article.

As regards the EPPO College, Article 9 of the Regulation provides that its composition includes the European Chief Prosecutor, as well as one European Prosecutor from each Member State.

The tasks of the EPPO College consist of taking decisions on strategic issues and general issues, in order to ensure an effective, coherent and consistent policy of EPPO regarding the stage of criminal prosecution in the Member States, as well as on other matters strictly regulated by the Regulation. . The college cannot have any involvement in direct decisions on individual cases.

[12] Regulation EU (Regulamentul UE) - Annex no. 7 (Anexa nr. 7);

The College also has the task of establishing permanent chambers, as well as the adoption of the internal operating regulations. Decisions within the college are taken by simple majority, in accordance with Article 9 paragraph 5 of the Regulation.

The permanent chambers are chaired by the European Chief Prosecutor, one of the Deputy Prosecutors or a European Prosecutor appointed for this purpose.

The number of permanent rooms is adapted to the specific needs of the EPPO, and the volume of activity is distributed evenly through a random system.

One of the most important tasks of the permanent chambers is to monitor and direct the investigations and activities of criminal prosecution carried out by the delegated European prosecutors.

Article 11 of the Regulation presents the duties of the European Chief Prosecutor, as well as of his two deputies. Thus, according to the aforementioned article "the European Chief Prosecutor organizes the activity of the EPPO, conducts its activities and makes decisions in accordance with this Regulation and the internal rules of procedure of the EPPO". According to paragraph 2 of the same article, the deputies of the chief prosecutor assist him or substitute him in case of impossibility to exercise the powers.

It is worth mentioning that the European Chief Prosecutor has the power to represent the EPPO, both in front of the EU Member States, of the European institutions and of any third party, these powers being delegated to the deputies.

Regarding the attributions and role of European prosecutors, the provisions of art.12 of the Regulation provide that as their main task the supervision of investigations and prosecutions carried out by the delegated European prosecutors, who can also receive instructions. Also, European prosecutors are preparing draft decisions on the cases they supervise that they submit to the permanent chamber.

According to paragraph 5 of the aforementioned article, European prosecutors act as "liaison and information channel between the permanent chambers and the European prosecutors delegated in their respective Member States of origin."

The powers of the delegated European prosecutors are specified in Article 13 of the Regulation. According to the provisions of the aforementioned article, they act in the Member States on behalf of the EPPO, having the same powers as those of the national prosecutors, respecting the limits of the regulation.

In view of the clear provisions of the Regulation which set for example the task of the permanent chamber to issue the decision to refer to the court, the question which naturally arises is if this double status of the delegated European prosecutors (PEDs) is likely to make the activity more efficient for them, or is just a formality lacking in content[13].

This discussion needs to be further deepened as paragraph 2 of Article 13 provides for the responsibility of European prosecutors for investigations or prosecutions with which they have been invested in one way or another, although the fact remains that they must follow the instructions of the standing room or the instructions of the European prosecutor in charge.

Moreover, in the following paragraph it is shown that the PED is responsible for the trial, can plead, participate in obtaining evidence and exercise the remedies in accordance with national law.

[13] M. Coninsx, *The European Commission's Legislative Proposal: An Overview of Its Main Characteristics*, pct. 3.5.1, *An Office at EU Level Directing Double Hatted European Delegated Prosecutors*, p. 32-33, în „The European Public Prosecutor's Office, An Extended Arm or a Two-Headed Dragon?", de L.H. Erkelens, A.W.H. Meij, M. Pawlik, Editors, Asser Press, The Hague and Spriger – Verlag, Berlin, Heidelberg, 2015.

To the extent that practically any act of the EDP is conditioned by authorizations given by the permanent chamber or the European prosecutor, often the instructions being given in written form, it turns out that it is in fact deprived of any decision-making power. Thus, from the opening of the case to the prosecution or the exercise of the remedies, the Regulation provides for detailed procedures, which provide as we have shown the authorization of the acts performed by the PED.

In this context, we naturally consider the question to what extent the PED could be held responsible for all these acts, on which it cannot decide. Eventually we appreciate that the only theme of his responsibility could be the fidelity to the reality of the information offered to the European prosecutor or the permanent chamber. Reported to the multitude of decision-making powers of the permanent chamber (elaboration of instructions to the EDP to initiate an investigation, the allocation or reallocation of a case, the approval of the decision of a European Prosecutor to carry out the criminal prosecution himself, as well as to decide on the trial, the closing or reopening of a case, to apply a simplified procedure and others[14]) the powers of the EDP in terms of the possibility of making decisions are practically non-existent, his dual quality as a national prosecutor having the capacity to give instructions to the authorities of the Member State being practically devoid of any efficiency.

The organization of the EPPO thus appears to be a way in which decisions are most often made at the collegiate level, by majority vote, even the actions of European prosecutors being meant to be authorized under certain conditions. We appreciate that this way of structuring and functioning can ensure a balance in decision making, which are thus carefully analyzed. Moreover, we appreciate that the entire structure of the EPPO has the role of representing within the European community a factor of unity and balance, which has as its final purpose the assurance of the internal security of the community space, in the aspect of combating offenses that harm the financial interests of the European Union or participation in a criminal organization for this purpose.

Regarding the material competence of the EPPO, art.22 of the Regulation states that it is competent to solve the offenses that harm the financial interests of the Union, which are provided in the Directive (EU) 2017/1371, regardless of the form in which they are transposed into national law. of EU member states. Article 22, paragraph 1, thesis 2 -a of the Regulation mentions in respect of the offenses referred to in Article 3 (2) (d) of Directive (EU) 2017/1371, as transposed in the national legislation, that EPPO " it shall be competent only where the intentional acts or inactions defined in that provision relate to the territory of two or more Member States and involve a total damage of at least EUR 10 million. "

In the report of the Framework Decision 2008/841 / JHA EPPO is competent to solve the crimes related to the participation in a criminal organization that are committed in order to harm the financial interests of the European Union, as well as any criminal behavior related to it, so after is mentioned in paragraph 3 of Article 22 of the Regulation.

Article 23 of the Regulation establishes its territorial competence, in the sense that the EPPO is competent to solve cases that have been committed in whole or in part within the European Union, by a national of a Member State that has competence in this regard or outside the EU territories. , if the provisions of the Staff Regulations or the Regime applicable

[14] Council Document no. 10830/16 of Julay 11, 2016 (art. 9) (Documentul Consiliului nr. 10830/16 din 11 iulie 2016 (art. 9), pages.11 - 15

at the time of the offense are incurred against the respective person and the Member State is competent to that effect.

By establishing the object of the EPPO's material competence in offenses that harm the EU's financial interests, it was considered better management of this type of crime, which raises EU-wide because of differences in national legislation and cumbersome procedures for cooperation.

By establishing a unique mechanism for investigating this type of crime, we believe that the EU's financial interests will be better protected, thus ensuring better financial security for EU citizens, whose financial funds are channeled at least to the Community budget.

The possibility of using community funds more effectively, in the absence of fraud, will implicitly lead to a better standard of living, in which the rights of European citizens will be more respected.

Moreover, in order to effectively achieve the purposes for which it was set up, the EPPO by Regulation benefits from a special criminal investigation and prosecution procedure, which is complemented with that of the national states at the trial stage.

Thus, according to article 37 paragraph 1 of the Regulation "The admission of the evidence presented by the EPPO prosecutors or the defendant before a court is not rejected for the simple reason that the evidence was obtained in another Member State or in accordance with the law of another State member. "

The principle of the default value of the evidence is found in paragraph 2 of the same article, which stipulates the right of the court to "... freely evaluate the evidence presented by the defendant or the prosecutors within the EPPO", which is not affected by the provisions of the regulation .

Although the aforementioned provision is appreciated that it considered the efficiency of the EPPO activity, it remains susceptible to critical analysis.

Thus, it can be observed that paragraph 2 of the mentioned article refers only to the probative value of the means of proof and does not concern the examination of its legality. Problems may arise if a sample is presented by the EPPO before the court of a state other than the one where the sample was administered. To the extent that it would be appreciated that the method of administering the evidence is one that is vitiated by the law of the state in which the evidence is presented, the natural solution would be to reject the sample, being struck by nullity. However, the provisions of art.37 of the Regulation do not seem to accept such a solution, from its prism the samples to be analyzed only in terms of solidity and not of legality.

And regarding the EPPO referral, we consider that there may be some problems in practice regarding the effective application of the Regulation.

Thus, according to Article 24 of the Regulation "The institutions, bodies, offices and agencies of the Union and the authorities of the competent Member States under the applicable national law immediately denounce to EPPO any criminal behavior for which it may exercise its competence." There may be problems in relation to the security and legislative system of each Member State insofar as the intelligence services communicate aspects related to the commission of offenses to authorities other than national ones.

To the extent that there is currently no information community at European level and no European regulations implemented at Member State level, the information services may not directly report to EPPO the information they hold, but only communicate it to national authorities.

Of course, the Regulation adopted at present can be considered as vulnerable in terms of its applicability in relation to certain aspects it deals with. Its purpose, however, remains to make EPPO a functional prosecutor's office, which will contribute to the internal security of the Union, through an effective fight against fraud, and thus to the creation of a European security space.

Moreover, in this "fight" EPPO is not alone, the Regulation itself contain several provisions regarding its collaboration with other European or national institutions with a similar purpose.

Thus, according to art.99 of the EPPO Regulation establishes and "maintains cooperative relations with the institutions, bodies, offices and agencies of the Union".

Further, in the art.100 of the same Regulation it is shown that regarding the collaboration with Eurojust it must be based on mutual cooperation and the development of the links between the two institutions, EPPO having access to the information contained in the case management system belonging to Eurojust.

OLAF is another European institution, according to which, according to article 101 of the EPPO Regulation, it maintains a close relationship of cooperation and exchange of information. The provisions of paragraph 1 of the aforementioned article mention that it is important to collaborate with OLAF especially in terms of ensuring "the use of the means available for the protection of the financial interests of the Union". Similarly, EPPO has access to the information contained in the case management system belonging to OLAF.

It is worth mentioning that in the situation where the EPPO conducts a criminal investigation, OLAF can no longer carry out an administrative investigation regarding the same facts.

EPPO also maintains collaborative relations with EUROPOL, the provisions of art. 102 of the Regulation stipulating that an agreement is concluded between the two institutions. EPPO can obtain support from EUROPOL, both in terms of the requested information and analytical support.

EPPO maintains cooperative relations with the European Commission, third countries and international organizations, as well as with the Member States of the European Union that do not participate in the form of enhanced cooperation with regard to the establishment of EPPO, as is clear from the provisions of Articles 103, 104 and 105 of the Regulation.

We appreciate that by establishing cooperative relations between the EPPO and the main European institutions, as well as in relation to third parties, its role is strengthened, its activity optimized, as a final goal the state of internal security of the European Union being strengthened.

CONCLUSIONS

The fight against fraud in the European budget has proven to be quite difficult from its inception, especially given the national laws of the EU Member States which differentiate how to investigate the facts. In view of the annual losses suffered by the Union, it was necessary to identify a solution in this regard. The establishment of the European Public Prosecutor's Office is the answer found by the Union, taking criminal investigations into the offenses that affect the European budget being able to streamline the fight against fraud.

We appreciate that although perfectable, the way of functioning and organization of the European Public Prosecutor's Office, as established by the Regulation, is capable of

effectively combating fraud against European funds. The cross-border character of the EPPO, doubled by the unitary way of conducting the criminal investigation, prefigures a unique model of judicial body, which may represent a perspective for other European institutions.

Effective protection of European funds will lead to a higher standard of living throughout the Union, stimulate the emergence of new jobs, support for medical and education systems in member countries and beyond. The actions of the European Public Prosecutor's Office will inhibit the maintenance or promotion of a state of corruption at the level of the Member States, thus protecting the interests of the European citizen and thus contributing to ensuring a state of internal security, both at national and at Community level.

We appreciate that, in the future, starting from the EPPO model contained in the Regulation, its competence could be extended to other types of crime, especially for those with a cross-border character.

Security at EU level will be strengthened by the creation of a common European judicial space, with a first EPPO institution representing an important step in its development.[15]

At the same time, we appreciate that the impact that the newly established EPPO institution will have on the Romanian judicial system will be an important one, the Regulation being directly applicable.

The fact that currently the European institutions can legislate has contributed to the improvement of judicial cooperation in criminal matters.

Thus, by setting up the EPPO the European Union can intervene in the definition of common procedures, so that certain offenses that have a major impact on the living standards within the Union, such as offenses that harm the EU's financial interests, are easier to combat.

The establishment of the European Public Prosecutor's Office represents an effective guarantee that the rights of the citizens of the European Union will be respected and thus the European space will be better secured.

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[15] F.R. Radu, Some considerations on the proposal for a Council Regulation establishing the European Public Prosecutor's Office and the proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Cooperation in Criminal Justice (Eurojust), in the journal European Legal Affairs, no. 2/2013,(Câteva considerații asupra propunerii de Regulament al Consiliului de instituire a Parchetului European și propunerii de Regulament al Parlamentului European și al Consiliului privind Agenția Uniunii Europene pentru Cooperare în Materie de Justiție Penală (Eurojust)*, în revista Afaceri juridice europene, nr. 2/2013)* p. 15.

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THE PLEA AGREEMENT – A NEW WAY OF NEGOTIATED JUSTICE IN THE EUROPEAN JUDICIARIES

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ABSTRACT:

The aim of this article is to emphasize the main features of the Plea Agreement procedure in the European traditional systems, common law and civil law, as well as the features of this concept as it has been implemented into the proceedings of some European countries and, accordingly, to analyse the reasons for which, the expertise of these already implemented procedures might be a pathway to solve many shortcomings of the national jurisdictions.

KEY WORDS: plea agreement, plea bargaining, guilty plea, negotiated justice, ad-hoc tribunals, adversarial, inquisitorial, common law, civil law.

1. INTRODUCTORY REMARKS

The *Plea Agreement* is a criminal proceeding arising from the Anglo - American judiciaries and consists in the fact that both the prosecutor and the Defense, taking into account the specific circumstances of the case, reach a mutually beneficial agreement. According to this agreement, the defendant accepts a self-incrimination while the prosecutor ensures a more convenient penalty than that the defendant would expect, if found guilty at the final judgment. Subsequently, this agreement must be approved by the court, thus relieving the judicial authorities to conducting adjudicative judgment according to the classical procedure. In such proceedings, in exchange for the defendant's admission of the alleged facts, depending on the jurisdiction to which we refer, the prosecutor have some different bargaining tools: he may waive some charges in exchange for the defendant's admission of committing others; he may offer a reduced penalty; he may offer lighter modes or less coercive forms of penalty enforcement; he can guarantee a range of benefits within the witness protection programs in exchange of the defendant's self incrimination and further cooperation for the prosecution of other criminals.

It is not completely random why this special procedure appeared in the criminal jurisprudence of the Common Law states, also known as the *adversarial judicial systems*. Here, the State, represented by the prosecutor, is only a part within the criminal process, sharing exactly the same statute like the defendant and the pattern of the process appears to be very similar to that of a civil process. In addition to this aspect, the adversarial systems traditionally provided significant procedural rights and safeguards for defendant while the

State did not employ professional criminal investigators until to a later stage[1]. So being, the evidentiary activity of the State representative was quite often difficult. In addition to that, unlike in the inquisitorial systems of the *civil law* countries (known also like the European continental countries) where the professional judges render the verdicts, in the adversarial systems they are traditionally done by a jury, whose predictability in decisions is extremely low. Given these circumstances, the need for compromise came naturally from the both parties, each of them trying to avoid a risk of an absolutely unfavourable decision rendered by the jury.

Plea Agreement procedures have not only evolved over the time in the Anglo-American systems in as much as to become a common practice, especially in specific fields like organized crimes or corporate crimes, but due to the fact they significantly relieve the workload of the judicial bodies, began to be more and more attractive for the *civil law* systems applied in the European continental countries. In the past time, the latest systems were characterized by a clear disproportion between the Prosecutor and the Defense arms and also governed by the ubiquitous principle of mandatory prosecution[2]. So being, until not many years ago, they neither created concern for Prosecutor nor provided a legal possibility for negotiation with the defendant.

During the last decades of the twentieth century, the situation had been gradually changed when the majority of the European countries have amended the procedures in the aim of rebalancing the disproportion of the arms between the Prosecutor and the Defense by loaning some legal instruments from the adversarial systems. The fact many European states became members of the Council of Europe in the latest decades of the twentieth century and accordingly the effect of the European Convention for Human Rights on the national criminal legislations of those countries has determined, also, some significant changes in the sense of ensuring effective rights and safeguards for defendant during the criminal process and even of recommending a lenient conviction for the defendant who admit the facts as result of cooperation with the judicial bodies All the above mentioned circumstances have created a room for negotiating: firstly, because the increasing rights and safeguards of the defendant entailed a more and more difficult evidentiary activity for the Prosecutor, and secondly, because the increased Prosecutors' workload made the means of alternative resolution of the criminal cases more attractive than ever.

2. CONTRASTING FEATURES OF THE *PLEA AGREEMENT* IN ANGLO-AMERICAN AND EUROPEAN CONTINENTAL MODELS

Despite the fact most Anglo-American judicial systems don't use the same patterns of negotiated justice we can say that some common characteristics thereof distinguish them from those adopted in the European continental countries. These differences show us a pervasive presence of the negotiated justice in almost all kind of criminal cases and greater bargaining tools for the prosecutor in Anglo-American systems while a remaining reluctance in accepting the negotiation with the defendant in the European continental countries.

[1] See, G. Fisher, "Plea Bargaining's Triumph", *Yale Law Journal (YLJ) 109*, (2000), pp. 857-897

[2] See, for example, the German Code of Criminal Procedure, Section no. 152, paragraph (2): *"Except as otherwise provided by law, the public prosecution office shall be obliged to take action in the case of all criminal offenses which may be prosecuted, provided there are sufficient factual indications", available on* http://legislationline.org/download/action/download/id/3235/file/Germany_CC_1971_amended_2009_en.pdf

The first different aspect is that related to *the character of the defendant's act of self-incrimination.* While in the Anglo-American countries this is deemed as a defendant's failure to invoke his/her affirmative defence or to raise his/her arguments in fighting the charges in exchange for the concessions offered by the prosecutor, in the Continental pattern, it supposes an in-court confession of the defendant. Thus, the Anglo-American agreement is deemed as a quasi-contract and the other like an informal gentlemen's agreement[3]. The aspect is not almost irrelevant because, while in the Anglo-American systems, the plea agreement is able to avoid a trial, the Continental pattern is only able to shorten the trial.

Another aspect is that of the *field of application* of this concept because within the Anglo-American systems there is no restriction of negotiated justice for all kind of crimes, regardless their gravity, while most of the Continental legislators still don't allow negotiations with the defendants who commit the gravest crimes. Moreover, if the former systems allow the negotiations to affect even the charges, in the sense of their alteration or partial elimination, the latest systems accept only some lenient penalties or less coercive ways of penalty enforcement to be negotiated with the defendant[4].

When analysing *the bargaining tools of the Prosecutor*, we can see more potential of the Anglo-American prosecutor given by the system of formal qualification of the crimes in the Common Law countries. It creates the possibility to charge the defendant with many crimes for one single committed fact and, accordingly, to burden the defendant with a severe final sentence due to the system of arithmetic aggregation of the penalties issued for each charge. So being, the threat of a severe sentence for defendant makes a certain magnitude for the concession offered by the Prosecutor and even a greater availability toward negotiations for defendant. On the contrary, in the civil law countries, where the system of arithmetic aggregation of the penalties is not allowed and sentencing the defendant for many charges means, often, the penalty issued for the gravest charge and possibly an increase of it (taking in account the number and the gravity of the other charges), the room for negotiations is not very large. In addition to it, the prosecutor cannot waive charges and even more the gravest charge which attracts the most severe penalty.

Even though within the both systems, the court is required to approve the agreement between the prosecutor and the defendant, *the involvement of the judge* is different[5]. Within the Anglo-American version, it doesn't need any implication of the judge in the transaction and, accordingly, it doesn't entail any obligation excepting that of assessing the legality and proportionality of the agreement, while the judge in the Continental systems, once the agreement has been approved and accepted the in-court confession of the defendant, as a commitment arising from the deal, is bound to issue a reduced sentence according to the relevant law provision.

A final observation is on *how much reliable are these agreements* in these two systems, from the perspective of the defendant. While both judges are free to disregard the agreement, the problem is what will be the risk faced by the defendant if it even happens? As in the Anglo-American systems the agreement is deemed as a quasi–contract, if the prosecutor renounces on the deal or the judges disapproves of it, then the defendant will be free of

[3] See, M. Damaška, 'Negotiated Justice in International Criminal Courts', in *Journal of International Criminal Justice (JICJ)*, 2 (2004), Oxford University Press, 2004, p. 1027.
[4] *Ibidem*, 1025
[5] *Ibidem*, 1026

revoking the plea. Consequently, the trial is going to proceed without any harm for defendant. Unlike, in the civil law countries, the plea agreement means an in-court confession and therefore, if the Prosecutor waives the deal or the judge disapproves it, the confession will remain valid and, very possible, a harsher than negotiated sentence will burden the defendant[6]. Then, it is quite clear that the Anglo-American pattern is much more reliable than that of the civil law countries because in the former system, in the case of the agreement's breakdown, the out of court self-incrimination of the defendant does not affect its rights and safeguards during the trial.

Taking in consideration the above mentioned differences, plus other less significant, of the concept of *plea agreement* in these two judicial systems, we can conclude the Anglo-American model is better developed, widely practiced in all kind of criminal cases, offers a greater potential in negotiations for the Prosecutor and is, also, more reliable for the defendant. Moreover, the mutual concessions of the parties do not entail any involvement and obligation for the judge, thus not affecting his/her neutrality. Thus, the perspective of the agreement's failure does not affect the defendant rights and safeguards during the trial due to the followings: the out of court self-incrimination can be revoked; it has no any evidentiary weight in the trial; it is not known by the jury; the judge remains neutral in relation to the agreement.

In the Continental systems, *plea agreement* is just a pioneering procedure, allowed only in the cases dealing with less grave offences, without prejudice to the charges, and involving an in-court confession which remains valid evidence, even when the agreement is violated by the prosecutor or disapproved by the judge.

However, despite of the features showing it as a better model in achieving an alternative resolution of the criminal cases, the Anglo-American *plea agreement* is not far away from criticism. The first is related to the asymmetrical position of the negotiating parts, that is, the severity of the threatened penalties as well as the greater informational and financial possibilities of the Prosecutor during the trial and even the psychological imbalance between the parties, might lead to some undesirable situations in which, even some innocent defendants would prefer an agreement with the prosecutor instead of an unpredictable verdict at the end of the trial[7]. This tactic of the prosecutor deliberately exaggerating the number and the gravity of the charges in order to create a larger room for negotiations entails a lot of criticism especially in U.S.A.. In order to prohibit such practice in U.K., the *Code for the Crown Prosecutors*, explicitly provides some rules in this respect[8].

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[6] *Ibidem*, 1027

[7] See M. Yant '*Presumed Guilty: When Innocent People Are Wrongly Convicted'* (1991), Prometheus Books, New York, p. 172

[8] See, Code for the Crown Prosecutors, Selection of charges:

6.1 Prosecutors should select charges which: a. reflect the seriousness and extent of the offending supported by the evidence; b. give the court adequate powers to sentence and impose appropriate post-conviction orders; c. enable the case to be presented in a clear and simple way.

6.2 This means that prosecutors may not always choose or continue with the most serious charge where there is a choice.

6.3 Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.

6.4 Prosecutors should not change the charge simply because of the decision made by the court or the defendant about where the case will be heard.

6.5 Prosecutors must take account of any relevant change in circumstances as the case progresses after charge. Available on http://www.cps.gov.uk/publications/code_for_crown_prosecutors/charges.html

Some other specialists criticize this marked -oriented approach of the *plea agreement* because it means an inter-party arrangement whose outcome might negatively affect the interest of the victims and of the general public in what regarding the transparency of criminal justice[9]. The lenient penalties offered by the prosecutor might, also, create a public sense of injustice. No less important is the discretionary power of initiating and concluding agreements of the prosecutor which might lead to an unequal treatment for those defendants for whom, the prosecutor doesn't have any interest in concluding an agreement with.

Finally, the power to negotiate justice and the bargaining tools to the prosecutor's disposal raise a problematic issue of its role in the administration of criminal justice. In the Common Law jurisdictions, the judge is traditionally deemed as the best positioned in achieving the public interest in criminal matters. However, the out of court inter-party agreements which exclude the judge from attributing criminal responsibility and imposing penalties and the increased case-law of this procedure show a shift of the Prosecutor into the most important decision-maker and also make questionable this traditional role of the judge in doing justice in criminal matters[10].

Undoubtedly, the above mentioned are not necessarily systemic weaknesses of the *plea agreement* procedure in the Anglo-American systems but rather found on a case by case basis, however, the fact there are several opinions of the experts depicting these weaknesses, demonstrates this procedure is not infallible but rather can elicit improvements.

3. *PLEA AGREEMENT* IN THE PROCEEDINGS OF THE *CIVIL LAW* JURISDICTIONS

As said in the above chapters, while the Anglo-American systems have already developed a solid and thorough practice in applying the Plea Agreement procedure, especially in U.S.A.[11] where the greatest majority of the cases are solved in this way, in the European Continental countries, the practice shows us a remaining reluctance for implementing it in many countries as well as some problematic issues in the countries where Plea Agreement has been adopted. In this chapter we propose a brief comparative analysis of these issues and have chosen seven representative countries but not only that adopted or accepted Plea Agreements within their jurisprudence from each European Continental category, that is, France, Italy and Germany from the group of the West European countries, Poland and Romania from the Central and East European countries, Estonia and Georgia belonging to the group of the ex-soviet countries.

3.1 France

In *France*, the Plea Agreement with the name *La comparution sur reconnaissance préalable de culpabilité (CRPC)*, also called *plaider coupable* has been introduced in the French Criminal Procedure Code by the so called *"Perben Act II"* of 9 March 2004, which was designed to adapt the French criminal justice to the evolution of criminality. The plea-bargaining procedure, previewed within Articles 495-7, 495-16 and 520-1 of the French Criminal Procedure Code is a new response to those situations in which, according to the concrete circumstances and the spirit of the criminal legislation, a fully adjudicative trial can

[9] See, M. Damaška, *supra note 3*, p. 1028
[10] See, F. Tulkens, 'Negotiated Justice', in M. Delmas-Marty, J.R. Spenser, *European Criminal Procedures*, Cambridge University Press, Cambridge (2002), p. 74
[11] See, A. Alschuler, W. *'Plea Bargaining and Its History'* in Colombia Law Review 79 (1), (1979) pp. 1–43

be avoided. According to the above-mentioned articles, the prosecutor could make a deal with the defendant who is suspect of committing some relatively minor crimes[12] by proposing a penalty not exceeding one year in prison in turn for the defendant's guilty plea. Once concluded, the deal is a subject of the approval of the president of the *tribunal de grande instance* (High Court) or of another judge appointed for the former. According to the provisions of the Article 495-11, the defendant, assisted by his/her attorney, after concluding the agreement with the prosecutor, has to do an in-court confession of his guilt. The judge, according to the concrete situation and taking in account the supporting evidence of the case, can render an ordinance of confirming the penalty proposed by the prosecutor which has the power of a final sentence. The judge's ordinance must be enforced immediately after its pronouncement.

This new procedure is not very well viewed by the French practitioners. Most of them consider it as creating the premises for the violation of defendants' rights and safeguards because it gives too much power to the prosecutor and would encourage defendants to accept a sentence only in order to avoid the risk of a more severe sentence in a trial, even if they did not really deserve it. A relevant proof of its lack of popularity in France is the statistic of criminal cases in 2011[13] which shows 77,569 criminal cases out of 513,911, representing only 15,09% of the decisions rendered by the correctional courts, were concluded following a Plea Agreement.

3.2 Italy

Italy was a pioneer of the European Continental countries implementing the Plea Agreement, called *patteggiamento*[14], as it is known among the Italian provisions of criminal procedure since 16 February 1987 when the Article 45 point 2 of the Law no. 81, enabling legislative delegation to the Government of the Republic for promulgation of the new Code of Criminal Procedure entered into force and as it was reshaped in the Article 444 of the Italian Code of Criminal Procedure as amended by the Law no. 134 of June 12 2003. Summarizing its content, we can see an opportunity for the defendant to conclude an agreement with the prosecutor when he/she deems that the punishment that would, concretely, be handed down is less than five years imprisonment. In turn for his/her guilty plea, the prosecutor may offer a reduced sentence, an exempt from the payment of the proceeding's fees, a drop of some charges or a change of them with other less severe. Basically, the Italian bargaining is not about the charges but about the sentence in the sense, once concluded and approved, the penalty can be reduced by one third. The deal between the prosecutor and the defendant must be submitted to the Court. The judge is not bound to this deal and after assessing the evidentiary support of the Plea Agreement, he/she can disapprove it, if the evidence shows the defendant's guilt is not sufficiently proved, or in the case, if proved to be guilty, the proposed punishment for defendant is too lenient. If the defendant is deemed guilty and there is

[12] At the moment of its adoption in 2004, the Article 495-7 of the French Criminal Procedure Code provided a limit of punishment of 5 years imprisonment for the crimes which could be a subject of plea agreement. The Article 495-7 has been amended on 13 December 2011 and the limit of punishment has been removed excepting the cases of intentional or unintentional, physical or sexual assault for which, some limits of punishments still remained.

[13] See, *'Les chiffres clés de la Justice – 2012'*, Ministère de la Justice, Secrétariat general, Service support et moyens du ministère sous-direction de la Statistique et des Études 13, place Vendôme - 75 042 Paris Cedex 01, available on http://www.justice.gouv.fr/art_pix/chiffres_cles_2012_20121108.pdf

[14] See, Borasi, Ivan, Il patteggiamento. Approcio di sistema alle implicazioni procesuali, Altalex Editore, Ebook format, chapters I-II

proportionality between the committed facts and the proposed punishment, the judge must approve the agreement. The Italian rules of criminal proceedings provide the possibility for this sentence of approval the plea agreement to be appealed before the *Corte di Cassazione* (Court of Cassation), the highest Italian court which rules only on assessing the legality of procedure and the interpretation of the law.

Even though the Italian practitioners have much more expertise than other European colleagues in negotiating justice and even a reshaping of the relevant law provision according to the practice requirements, they still consider this procedure as very difficult to reconcile with the Italian traditional procedural institutions. A conclusive opinion on this matter is done by the Italian highest court, *Corte di Cassazione* in its sentence *15 Cassazione Penale (1990) 47*, in which, the negotiated admission of guilt was deemed as a 'hypothetical judgment'[15].

3.3 Germany

The *German* approach to doing negotiated justice was the most original among the European Continental countries because, in spite of its obvious presence in the practice, there was no legal provision providing expressly a Plea Agreement procedure since May 2009 when the German Federal Parliament adopted a new provision of the German Criminal Procedure Code, Section 257 c named Negotiated Agreement which explicitly acknowledged plea bargaining. Until then, the so called *Absprachen* (The Agreements) emerged in practice without statutory authorization and, paradoxically, not being bound by some legal limits of the penalties to the offenses on which the *plea guilty* was negotiated, such agreements could be encountered in many kinds of criminal cases, even in those involving serious crimes like drug trafficking and homicide. This is an aspect which demonstrates a less concern of the practitioners in harmonizing their work with the procedural principles but rather in achieving their main goals. Due to the fact that until the explicit adoption of plea agreement in the German Criminal Procedure Code a practice in this respect has been already outlined, the law provision did nothing more than to legislate something which became almost usual. In this respect, it worth mentioning some characteristics of the German Negotiated Agreement, as previewed in the Section 257 c: there is no provision limiting the application of plea agreement to only some kind of offenses or to the offenses with a specific limit of penalty previewed by the law; an in-court confession shall be an integral part of any negotiated agreement; the measures of reform and prevention, may not be the subject of negotiation; on free evaluation of all the circumstances of the case as well as general sentencing considerations, the court may indicate an upper or lower sentence limit and the agreement will come into existence only if both the prosecutor and the defendant agree with the sentence limit proposed by the court; if legal or factually significant circumstances have been overlooked in the agreement, the court is not bound of it and may enter a trial following the classic procedural rules and then the defendant's confession may not be used, a fact the court shall notify to the parties.

As a conclusion, we must remember the former German approach because of its originality and ingenuity to find a way of doing negotiated justice by interpreting the criminal procedure in the sense that something which is not expressly prohibited may be permitted as well as the current formula which does not limit its application only to some less serious crimes and which protects the defendant's right of not self-incriminating, in the case the

[15] See, G. Lattanzi, E. Lupo, *'Codice di Procedura Penale'*, Vol. VI, Giuffré, Milano, 1997, p. 205-215.

agreement fails. However, due to the fact that Plea Agreement has some inaccuracies with the traditional principles of criminal procedures it is not very popular with the German specialists[16].

3.1. Poland

Since 1998, *Poland has* also had a kind of plea agreement[17] which proved to be a very original one because according to the Article 387 paragraph 1 of the Criminal Procedure Code of Poland, the agreement is not concluded in the pre-trial phase of the process but during the hearings before the court. The plea agreement is applicable only to the misdemeanours punishable by no more than 8 years of imprisonment. The procedure allows the defendant, until the conclusion of the first examination at the first-instance hearing, to submit a motion for a decision convicting him and sentencing him to a specified penalty or penal measure without evidentiary proceedings. It is called also the procedure of 'voluntary submission to a penalty' and allows the court to pass the agreed sentence without reviewing the evidence. The proposed penalty will be accepted by the court and afterward enforced only if the prosecutor, the victim and the court, all of them, agree on it. Nevertheless, the court may not accept the terms of proposed plea agreement, in spite of the fact they were already agreed by the victim and the prosecutor and may suggest some changes. If the defendant agrees with the court requirements and submits a new penalty proposition accordingly, the court must approve it and render the sentence according to the plea agreement. Even if the Polish Plea Agreement supposes an all parties deal during the trial and apparently, there is no reason for appealing the sentence, all of them, the prosecutor, the defendant and the victim have, also, the right to appeal. We can mention, as a very interesting feature of this procedure, the key role that has been assigned to the victim because he/she appears as a veritable 'auxiliary prosecutor'. Is well known the fact in Polish criminal proceedings the victim can ask and may act as an 'auxiliary prosecutor' and therefore, among the other similar procedural rights, the victim gains also the right to appeal, exactly like the official prosecutor. Finally, if the Plea Agreement represents, among the others, a concession to the defendant in exchange for his/her conduct, in the sake of the fairness of the justice act, the increased role of the victim within the Plea Agreement procedure appears as being welcomed.

3.5 Romania

The new Code of Criminal Procedure of Romania into force since February 1, 2014 explicitly previews the procedure of plea agreement[18]. According to it, during the pre-trial phase of the criminal process, from the incentive of both the defendant and the prosecutor, can be concluded an agreement of defendant's admission his/her guilt for the charges, or only for part of them, in exchange for a lenient punishment. In Romania, the bargain is not about the charges but only about the sentence that is, a reduced penalty or less coercive forms of

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[16] See, B. Schüneman, 'Wohin treibt der deutsche Strafprozess' in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 114 (2002), p. 570. Paradoxically, in spite of the fact the author Bernard Schüneman is one of the most bitter opponent of introducing plea agreement into the German legislation, he had to admit in his research that 91 per cent of the judges, 90 per cent of the prosecutors, and 53 per cent of the defence lawyers expressed a preference for informal agreements rather than trial in cases involving evidential difficulty.

[17] See, the Criminal Procedure Code of Poland, Act of 6 June 1997, Article 387 para. 1-5, (English version) available on http://legislationline.org/download/action/download/id/4172/file/Polish%_20CPC%201997am%202003 en.pdf

[18] See, the new *Criminal Procedure Code of Romania* as adopted by the Law no.135/2010, published in the Official Monitor of Romania no. 486 of July 15, 2010 and modified by the Law no. 255/2013 published in the Official Monitor of Romania no. 515 of August 14, 2013, Articles 478-488.

penalty enforcement like, for example, the suspending of its enforcement. The written consent of the supervisory prosecutor is necessary as a precondition to conclude the plea agreement. According to the law provision, concluding such agreement is prohibited for the most serious crimes for which the criminal law previews a punishment of more than seven years imprisonment. In order of guaranteeing the legality and the interest of the defendant within negotiations, the law previews as a binding rule, the defendant to be assisted by an attorney. The plea agreement in its written form and accompanied by evidentiary support is submitted to the court of first instance. The judge, once receiving it, commences a public but non-contradictory session in which invite the prosecutor, the defendant and his/her attorney to make opening speeches. After the hearings and examination of the evidentiary support of plea agreement, the court takes a decision which can be: a sentence of convicting the defendant to a punishment no more severe than that proposed in the agreement, if the legality of proceedings, the rights of defendant and the proportionality between the gravity of the facts and the severity of the penalty are provided; a disapproval of the plea agreement and the return of the criminal file to the Prosecutor′s Office if there is not enough evidentiary support for demonstrating the guilt of the defendant, the agreement overlooked some legal requirements or, the proposed penalty is too much lenient in comparison with the committed facts. Whatever of the both above mentioned decisions of the court of first instance would be rendered, the defendant and the prosecutor can appeal it.

In this moment is too early to assess the impact of Plea Agreement in the criminal jurisprudence of Romania but some remarks related only to its legal background can be done. It appears to be in the trend of European Continental model, applied only for some less severe crimes, with scarce bargaining tools for the prosecutor and involving an in-court confession of the defendant.

3.6 Estonia

Since 1 September 2011 when the amendments of the Criminal Procedure Code adopted on 23 February 2011 entered into force, *Estonia* has its own Plea Agreement[19] which is actually called Alternative Proceedings (Articles 233- 238). It supposes a request of the defendant to the Prosecutor's Office to follow this procedure, according to which the court may adjudicate a criminal matter by way of alternative proceedings on the basis of the materials of the criminal file without summoning the witnesses or other qualified persons. Alternative Proceedings is prohibited for the most serious crimes for which the punishment of life detention is previewed, as well as for the cases where several defendants are accused and at least one of them does not consent to the application of alternative proceedings. If the defendant and the prosecutor consent to the application of alternative proceedings, the Prosecutor's Office prepares the statement of charges which is going to be included in the criminal file and the file shall be sent to the court.

Once the criminal file was received and the session was opened, the judge announces the commencement of examination by the court and makes a proposal to the prosecutor to make an opening speech. The prosecutor gives an overview of the charges and the evidence which corroborates the charges and which the prosecutor requests to be examined by the court. After assessing the legality of the proceedings, the judge shall ask whether the

[19] See, the Criminal Procedure Code of Estonia, passed on 12.02.2003 published in the *Riigi Teataja* I 2003, 27, 166 entered into force on 01.07.2004, Articles 233- 238, (English version) available on http://legislationline .org/download/action/ download/id/4709/file /Estonia_CPC_am2013_en.pdf

defendant understands the charges, whether he/she confesses to the charges and whether he/she consents to the adjudication of the criminal matter by way of alternative proceedings. If all the necessary conditions are fulfilled, the judge commences the hearings and the participants in the court session shall rely only on the materials of the criminal file. If a judgment of conviction is made by way of alternative proceedings, the court shall reduce the principal punishment to be imposed on the accused by one-third after considering all the facts relating to the criminal offence.

A short comment on this Estonian Alternative Proceedings is the fact that the bargaining tools of the prosecutor are very scarce. He/she cannot propose a kind or a limit of penalty as long as the law previews a reduction of one-third of the punishment and this is to the disposal of the judge. This procedure does not follow a pattern of Plea Agreement in its European Continental variant but rather it is a variant of the *guilty plea* proceedings which commences during the Pre-Trial phase of the process.

3.7 Georgia

The Plea Agreement was introduced in *Georgia* in 2004 and despite its statute of ex-soviet country, until then under a strong influence of the civil law system, basically the new adopted Georgian plea bargaining, in most respects, is inspired by the Anglo-American models[20]. It consists of an alternative and consensual way of criminal case settlement without an in-court confession of the defendant who agrees to plead guilty in exchange for a lesser charge or for a more lenient sentence or, according to the case, for dismissal of certain related charges (Article 209 of the Criminal Procedure Code of Georgia). The Georgian procedure is based on the principle of the free choice of the defendant, equality of the parties and protection of his/her rights and safeguards. The defendant has the right to reject the plea agreement at any stage of the criminal proceedings before the court renders the judgment and the use in the future of the information provided by the defendant under the plea agreement against him is explicitly prohibited. In concluding the agreement, the prosecutor is obliged to take into consideration the public interest, the severity of the penalty, and the personal characteristics of the defendant and as a guarantee of these aspects, the procedure previews the consent of the supervisory prosecutor as necessary precondition to conclude plea agreement and to amend its provisions. The court is not bound by the agreement and if the presented evidence is not sufficient to support the charges or if other requirements stipulated by the Criminal Procedure Code of Georgia are violated by the agreement, the judge can return the case to the prosecution, not before offering to the parties the possibility to change the terms of the agreement. If the court satisfies itself that the defendant fully acknowledges the consequences of the plea agreement, he/she was represented by the Defence council, his/her will is expressed in full compliance with the legislative requirements without deception and coercion, also if there is enough body of doubtless evidence for the conviction and the agreement is reached on legitimate sentence - the court approves the plea agreement and renders guilty judgment. If any of the abovementioned requirements are not satisfied, the court rejects to approve the plea agreement and returns the case to the prosecutor. Another important aspect which deserves to be mentioned is the position of the victim in relation to the plea agreement. Under Article 217 of the Criminal Procedure Code of Georgia, the prosecutor

[20] See, Alkon, C, 'Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?' in *Transnational Law & Contemporary Problems*, a Journal of University of Iowa College of Law, vol. 19, Spring 2010, 363-369

is obliged to consult with the victim prior to concluding the plea agreement and to inform him/her about this and is, also, obliged to take into consideration the interests of the victim and as a binding rule, to conclude the plea agreement only after the damage is already compensated.

As a conclusion, we can see a very unusual and courageous legislative action from the Georgian legislator when adopting this procedure in very relative terms with the Anglo/American Plea Agreement, in spite of the judicial tradition inspired by the civil law systems and the lack of adversarial expertise in the Georgian criminal jurisprudence.

4. FINAL REMARKS

Taken from the Common Law legal systems, the *Plea Agreement* procedure began to be implemented in the European continental judiciaries, especially in the last decade and it succeeded to be already a common practice within these countries. Even if the models adopted in these above mentioned judiciaries differ from those implemented in the Anglo-American systems, that is, a weak implementation, only in minor criminal cases and not just to avoid the trial but actually to shorten it, most likely, in the future, after the assessment of its application in practice proves to be a positive one, for sure, this procedure will be expanded to the cases involving serious crimes and the limits of negotiating will be allowed to a wider range. So far, the issue of justice negotiation is inconsistent with certain traditional principles and institutions of the criminal proceedings in the civil law countries and is still hard to be accepted for some specialists.

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See M. Yant '*Presumed Guilty: When Innocent People Are Wrongly Convicted'* (1991), Prometheus Books, New York,

See, Code for the Crown Prosecutors, Selection of charges:

6.1 Prosecutors should select charges which: a. reflect the seriousness and extent of the offending supported by the evidence; b. give the court adequate powers to sentence and impose appropriate post-conviction orders; c. enable the case to be presented in a clear and simple way.

6.2 This means that prosecutors may not always choose or continue with the most serious charge where there is a choice.

6.3 Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.

6.4 Prosecutors should not change the charge simply because of the decision made by the court or the defendant about where the case will be heard.

6.5 Prosecutors must take account of any relevant change in circumstances as the case progresses after charge. Available on http://www.cps.gov.uk/publications/code_for_crown_prosecutors/charges.html

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See, *'Les chiffres clés de la Justice – 2012'*, Ministère de la Justice, Secrétariat general, Service support et moyens du ministère sous-direction de la Statistique et des Études 13, place Vendôme - 75 042 Paris Cedex 01, available on http://www.justice.gouv.fr/art_pix/chiffres_cles_2012_20121108.pdf

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See, the new *Criminal Procedure Code of Romania* as adopted by the Law no.135/2010, published in the Official Monitor of Romania no. 486 of July 15, 2010 and modified by the Law no. 255/2013 published in the Official Monitor of Romania no. 515 of August 14, 2013, Articles 478-488.

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EUROPEAN CERTIFICATE OF SUCCESSION

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ABSTRACT

The newly created European Certificate of Succession is applicable in almost the entire EU. It is primarily used to verify an heir's status and is designed to serve alongside the existing national inheritance certificates (such as the German Erbschein), making it easier for heirs to settle inheritance matters abroad. This EU Succession Regulation does not, however, affect the provisions of individual Member States in the areas of substantive inheritance law (e. g. the question of who is a legal heir) and inheritance tax law.

This paper aims to analyze how the regulation of the European inheritance certificate interacts with the regulation of the national inheritance certificate. Thus it does not replace documents such as the Romanian inheritance certificate but is rather a supplementary inheritance document.

KEYWORDS: European Certificate of Succession, succession case, heir, transnational succession cases, habitual residence, disposition of property upon death.

1. INTRODUCTORY CONSIDERATIONS

Regulation (EU) 650/2012 introduced new rules of jurisdiction in matters of succession, applicable in all Member States. However, these rules apply only to the courts and other authorities and legal professionals with jurisdiction over inheritance matters, who exercise judicial powers or act on the basis of the delegation of powers by a judicial authority or act under the control of a judicial authority.

The diversity of the judicial organization between the states of the European Union is known and clearly observed with respect to the competent authorities in the different Member States. This legal variety of the competent authorities in the field of inheritance and the fact that they have different sovereign powers impede the universal effect of the court decisions in this matter or of the authentic acts and of the certificates issued. Their cross-border effects depend on the procedures for recognition, exequatur, and over-legalization, procedures that can be initiated and made often difficult either by bullshit or exaggerated nationalism.

The advent of the European Certificate of Succession ("ECS") has also proven to be an extremely important component of the European inheritance law system. The new solution

was highly desired because the previous practice of documenting rights to inheritance was extremely varied. [1]

Regulation (EU) no. 650/2012 aims to avoid or accelerate all these time-consuming procedures, regulating both the recognition of court decisions in succession matters, or of authentic acts, as well as their enforced execution and the European Certificate of Succesion.

Regulation (EU) 650/2012 introduces this new instrument at Member State level - the European Certificate of Succession - intended for use by heirs and executors who must prove their status in another Member State or exercise their rights or duties.

Major innovation in European inheritance law, the European Certificate of Succession is a standard form designed to allow the heirs, legatees, executors or administrators of the inheritance to prove their quality and rights (art. 63), in open successions starting on August 17, 2015. Materializing the freedom circulation of judgments, it facilitates the efficient and rapid resolution of succession problems, especially due to its probative and legitimation effects[2]. The purpose of introducing this instrument at the level of the Member States has been highlighted in recitals (7) - (9), (27), (32), (34), (59) and (67) of Regulation no. 650/2012, of which the following results:

(32) In order to simplify the lives of heirs and legatees habitually resident in a Member State other than that in which the succession is being or will be dealt with, this Regulation should allow any person entitled under the law applicable to the succession to make declarations concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or concerning the limitation of his liability for the debts under the succession, to make such declarations in the form provided for by the law of the Member State of his habitual residence before the courts of that Member State. This should not preclude such declarations being made before other authorities in that Member State which are competent to receive declarations under national law. Persons choosing to avail themselves of the possibility to make declarations in the Member State of their habitual residence should themselves inform the court or authority which is or will be dealing with the succession of the existence of such declarations within any time limit set by the law applicable to the succession.

(67) In order for a succession with cross-border implications within the Union to be settled speedily, smoothly and efficiently, the heirs, legatees, executors of the will or administrators of the estate should be able to demonstrate easily their status and/or rights and powers in another Member State, for instance in a Member State in which succession property is located. To enable them to do so, this Regulation should provide for the creation of a uniform certificate, the European Certificate of Succession (hereinafter referred to as 'the Certificate'), to be issued for use in another Member State. In order to respect the principle of subsidiarity, the Certificate should not take the place of internal documents which may exist for similar purposes in the Member States.

In national law, the European certificate of heir is regulated by Law no. 206/2016 for the completion of the Government Emergency Ordinance no. 119/2006 regarding some measures necessary for the application of some Community regulations from the date of

[1] Mariusz Załucki, *Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future, 103 Iowa L. Rev. 2317 (2018), article available at: https://ilr.law.uiowa.edu/print/volume-103-issue-5/attempts-to-harmonize-the-inheritance-law-in-europe-past-present-and-future/;*

[2] Dan A. Popescu, *Guide to private international law in the field of succession*, Notarom Publishing House, Bucharest, 2015, pp. 26;

Romania's accession to the European Union, as well as for the modification and completion of the Law of public notaries and of the notarial activity no. 36/1995.

2. CONCEPT, CONTENT AND EFFECTS

The European Certificate of Succession represents the document that is fully recognized in all European Union states except the United Kingdom and Denmark, which allows the heirs, legatees, executors and administrators of the estate to prove their quality and to exercise their duties in other states of the Union. European (Articles 62 and 63 of the Regulation). This certificate is optional, it does not replace the internal documents for similar purposes of each Member State, but once issued by a Member State it can replace these internal documents in the issuing State.

The existence of a European Certificate of Succession necessarily implies the debate of a succession that includes an element of foreignness, such as the existence of a good from the succession mass on the territory of another Member State. If the goods / goods are in the territory of a third country of the European Union, the certificate of national heir is subject to recognition (the procedure of the European certificate does not apply) being necessary to follow the procedure of recognition by the jurisdiction of the court.

The content of the certificate is outlined in art. 68 of Regulation (EU) no. 650/2012. Depending on the characteristics of the succession case, this certificate may include up to fifteen elements of which we mention: the name and address of the issuing authority, the elements justifying the competence of the respective authority, the date of issue, information on the applicant, deceased and beneficiaries, data on the matrimonial property regime of decuius, the law applicable to the succession, the character of the inheritance and the share or the list of rights and property belonging to each heir as well as the powers of the executor or of the administrator of the estate. The standard form is set out in Annex no. 5 of the Implementing Regulation (EU) no. 1329/2014 and bears the name of the Form no. V. This form has five annexes, also provided by the implementing regulation.

More importantly, the European Certificate of Succession must contain information regarding the elements from which the rights and / or prerogatives of executors or administrators of the inheritance are derived, to heirs and legatees, to the existence of a matrimonial agreement, an eventual will, an statements of acceptance or renunciation of succession. He should mention the share of the inheritance and the corresponding rights due to each heir, the eventual list of assets due to a certain heir or legatee, but also the possible incidental restrictions (an inalienability, a dismantling of the property, the possible reducibility of the rights of the legatees due to existence) for this, it is imperative to consider the applicable succession law[3].

The effects of the certificate are described in detail in art. 69 of the regulation. Thus, it produces effects directly in each Member State bound by the regulation and is presumed to faithfully attest to all the elements mentioned. At the same time, it cannot be requested to legalize it or another similar formality for it to take effect. Moreover, the certificate cannot be controlled in a state other than that of origin from the perspective of the competence of the issuing authority, the observance of the public order of private international law and cannot be the object of an appeal in the state where it is invoked. Also regarding the effects produced by the European Certificate of Succession, we mention that they are especially of a probative

[3] Dan Andrei Popescu, *op.cit.*, p. 103-104;

nature. These mainly concern elements established according to lex successionis (determining the heirs / legatees, the rights of each, the powers of the executor or the administrator), but also issues that, even governed by their own laws, directly influence the content of the certificate (eg conditions of the certificate). fund of a disposition for cause of death)[4].

Subsequently, also in the light of the effects of the certificate, the persons designated herein as heir, legatee, administrator or executor are presumed to have the status and rights mentioned in the certificates and the third parties who have entered into legal operations under the information in the certificate are protected, with unless they knew that the information was false or did not know this because of their gross negligence.

At the same time, wishing to promote the European Certificate of Succession, the Regulation allows access to public records through it: according to art. 69 par. 5, the European certificate of heir constitutes a valid title (in the Romanian, Italian, Spanish versions), respectively a valid document (in the French, English, German, Portuguese versions) for the registration of the transfer of the succession assets in the corresponding registers of a state member (land books, trade register, register of inventions or trademarks - OSIM), without the need for a particular procedure. However, the rule must be correlated with that in art. 1§2.lit.l), which excludes from the scope of the regulation the problems regarding the entries in the public registers. This allows the safeguarding of national requirements (especially regarding the form of the documents presented, quite strict) and will require, at least sometimes, the appreciation of the equivalence of nature between the European certificate and the documents required by national law.

3. OPTIONAL CHARACTER

According to art. 62 of the regulation, the use of the European heir certificate is optional; it can be used in conjunction with national certificates of heir or other internal documents used for similar purposes, which are not substituted, or even in countries where such certificates could not previously be issued (eg Italy). If its issue is conditioned by the certificate's vocation to be used in other Member States, it will produce effects including in the state of origin (art. 62, paragraph 3, second sentence); avoiding a possible reverse discrimination, the solution acquires a particular importance especially in the states that do not know the institution of the heir certificate, with whose internal successor law it interacts, and for this reason it has been criticized.

4. RELATIONSHIP WITH THE NATIONAL CERTIFICATE OF HEIR

The relationship between the European Certificate of Succession and the National Certificate of Inheritance is not fully clear. Thus, the regulation does not specify which of these should take precedence in case of conflict or how it should be done when authorities from different states were requested at the same time for their issuance. The possible punctual interventions of the European Court of Justice will clarify things, but in their absence the uncertainty persists.

The relationship between these two certificates can be highlighted also from the point of view of the functions performed by the two acts. The certificate of heir, including the European one, fulfills three functions in the law: a means of proving the quality of heir, a

[4] Ioana Olaru, *European law of international successions. Practical Guide*, Notarom Publishing House, Bucharest, 2014, p. 193;

means of proving the right of ownership of the accepting heirs over the share due to them from the succession assets and a means of securing the non-heirs' heirs.

Thus, it can be stated that the two certificates fulfill the same functions, this, since, art. 63 paragraph (2) of this normative act has the following meaning: "the certificate can be used, in particular, to prove one or more of the following: a) the status and / or the rights of each heir, or, as the case may be, of each of the said legatees in the certificate and the respective shares of the inheritance inheritance; b) the attribution of a certain good or of certain goods that are part of the inheritance patrimony to the heir / heirs or, as the case may be, to the legatee mentioned (the legatees mentioned) in the certificate; c) the attributions of the person mentioned in the certificate as executor or administrator of the estate ". Thus, it seems that the European certificate of heir represents, as well as the national one, a means of proving the quality of heir and the property right of the universal heirs and with universal title on the quota that is appropriate to each one, respectively of the legatee by title particularly on individual assets. Referring to this type of certificate, we believe that we are not mistaken if we affirm that it is merely a title property lato sensu and, necessarily, a means of proof of ownership over certain parts of the inheritance, in the case of universal heirs and title universal, respectively on some particular goods, in the case of the binders with a particular title[5].

The relationship between the two certificates is also confusing from the perspective of domestic law, since in Law no. 206/2016 for the completion of the Government Emergency Ordinance no. 119/2006 regarding some measures necessary for the application of some Community regulations from the date of Romania's accession to the European Union, as well as for the modification and completion of the Law of public notaries and of the notarial activity no. 36/1995 where in art. 3 a. (1) it is provided that the European Certificate of heir shall be issued, in accordance with the provisions of Chapter VI of Regulation no. 650/2012, at the request of any of the persons provided for in art. 63 paragraph (1) of the regulation, by the notary public who issued or in the archive the certificate of heir is kept. Thus, it can be interpreted that the issuance of the European certificate of heir is conditional upon the issuance of the national certificate of heir, the procedure being a contradictory one and conditioned by the agreement of all the heirs, a solution that violates the provisions of Regulation 650/2012, according to which the European certificate can be issued at the request of any heir, only with the notification of the other heirs.

5. COMPETENT AUTHORITY

According to art. 64, the European Certificate of Succession may be issued not only by the judicial authorities (as defined in Article 3§2 of the Regulation), but also by other authorities which, under national law, are competent in matters of succession; this means that even notaries from countries such as Romania, the Czech Republic, Austria (where they are not considered as "judicial authorities") qualify for the issuance of the certificate. The international competence will be assessed in accordance with the general rules of competence established in chapter II of the regulation (art. 64 paragraph 1), and the internal territorial competence according to the rules in force in the state of the forum. The certificate must contain a statement of competence.

[5] Bogdan Pătrașcu, Ilioara Genoiu, *Some reflections on the functions of the inheritance certificate, including the European certificate*, in LEGAL STUDIES AND RESEARCH Year 5 (61), Nr. April 2 - June 2016, p.15;

A hypothesis debated in the doctrine refers to the competence of the notaries public in Romania to issue the European certificate of heir, in the light of the provisions of the Regulation. In the doctrine it was emphasized that in some states of the Union, the notaries public have jurisdiction or act on the basis of delegation from a court (which is why the regulation includes them in the concept of "courts"[6]), while in others , public notaries are authorities independent of the courts, without jurisdictional powers, but with preventive role and guaranteeing the security of the civil circuit[7].

The certificate can be issued only by the State whose courts are internationally competent to settle the succession with an element of foreignness according to articles 4, 7, 10 and 11 of the regulation. Therefore, the international competence regarding the issue of the Certificate is:

a). The State in which the deceased was habitually resident at the time of death;

b). The state of citizenship of the deceased in the case in which he designated the law of this state as competent to regulate his succession according to art. 22 of the regulation (the cases in which the jurisdiction falls to this state are detailed in article 7 of the regulation);

c). The Member State in whose territory the successor property is located, in the event that the deceased did not reside in the EU, at the time of death, if the respective state was the state of nationality of the deceased at the time of death or if he was the national of the citizenship, was the state of the habitual residence of the deceased in at least part of the interval of the last five years before death. In these situations, the Member State is competent to issue an EMC for self-defense;

d). To the Member State in whose territory successor assets are located, but only for those goods, if the residence of the deceased is outside the United States, none of the other conditions of the preceding point are met;

e). Exceptionally, the Member State which has sufficient connection with the succession the situation in which the succession procedure cannot be initiated and can be carried out reasonably or is impossible in the third state which has a close connection with the succession. Here the Member State acts as a forum of necessity.

The public authority of the international competent state to issue the Certificate may be the competent court (within the extended meaning of the term in Article 3 of the regulation) or another authority which, according to the national law, is competent in the matter of succession. Corroborating this norm with the provisions of art. 94 lit. j Code of civil procedure and of art. 12 letter c of the Law on public notaries no. 36/1995, we conclude that the Romanian authorities competent to issue a European certificate in situations where Romania has international jurisdiction over the succession are the court, the court (only for challenging the certificates issued by the judges, as will be (see below) and notaries public.

The rules of internal territorial jurisdiction will determine exactly which court (or court) and which public notaries are territorially competent to issue the Certificate. For the

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[6] Cosmin Dariescu, European Conflict Norms on European Heritage and Certificate of Inheritance, article available at ,https://www.academia.edu/16703430/NORMELE_CONFLICTUALE_EUROPENE_PRIVIND_MO%C8%98TENIREA_%C8%98I_CERTIFICATUL_EUROPEAN_DE_MO%C8%98TENITOR;

[7] Alexandra Irina Danila, Andrada Raluca Tanse, Decision of the Court of Justice of the European Union in case c-20/17 and its impact on the issuance by the notaries of the internal certificates of heir, based on the law no. 36/1995 of the notaries public and of the notarial activity, available at https://buletinulnotarilor.ro/decizia-curtii-de-justitie-a-uniunii-europene-in-cauza-c-20-17-si-impactul-acesteia -asupra-release-of-the-notaries-to-internal certificates-of-heir-in-law-based no-36-1995-a-notary-public/;

exact finding of the Romanian public annotator competent to issue the Certificate, the articles 15 and 101 of Law no. 36/1995, the form republished in 2014. The rules in art. 101 of the Law no.36 / 1995 distributing the successive causes (including those with an element of foreignness) in the territory between the notaries public in Romania are mixed in nature. They are both norms of internal territorial competence but also norms of international competence. Moreover, the doctrine accepts the use of the territorial jurisdiction rules for finding the competence in private international law in those systems of law that do not have special regulations regarding the competence of international law (the case of Romania for the international competence of notaries public[8].

This analysis also takes into account recital 20 of the Regulation, according to which *„This Regulation should respect the different systems for dealing with matters of succession applied in the Member States. For the purposes of this Regulation, the term 'court' should therefore be given a broad meaning so as to cover not only courts in the true sense of the word, exercising judicial functions, but also the notaries or registry offices in some Member States who or which, in certain matters of succession, exercise judicial functions like courts, and the notaries and legal professionals who, in some Member States, exercise judicial functions in a given succession by delegation of power by a court. All courts as defined in this Regulation should be bound by the rules of jurisdiction set out in this Regulation. Conversely, the term 'court' should not cover non-judicial authorities of a Member State empowered under national law to deal with matters of succession, such as the notaries in most Member States where, as is usually the case, they are not exercising judicial functions*."

However, these rules apply only to the courts and other authorities and legal professionals with jurisdiction over inheritance matters, who exercise judicial powers or act on the basis of the delegation of powers by a judicial authority or act under the control of a judicial authority (3). The rules of jurisdiction do not apply, from our point of view, to the Romanian public notaries who issue the certificate of heir of national law under Law no. 36/1995 of the notaries public and of the notarial activity, republished, since they do not fit in any of the above mentioned hypotheses.

This opinion starts from the provisions contained in the Regulation, which states that the notion of "court" must be viewed in a broad sense, not only referring to the courts themselves, but also to notaries from some states that in the field of succession exercise judicial attributions such as the courts, as well as notaries who in other states exercised these powers by delegating the date of the courts, but not notaries who within the meaning of our national legislation, who do not exercise their activity under the control and based on the delegation of the court.

Of course, we were wondering where the Romanian notaries are positioned? They do not, within the meaning of the Regulation, exercise judicial powers. Thus, they are exempted from the rules of competence of the Regulation (art. 4 et seq.). Although they are exempted from the rules of competence of the regulation, they are governed by the rules regarding the locality of the successions, by the rules regarding the determination of the law applicable to the successions (art. 21 et seq.).

As a result, the Romanian public notary notified of a succession with an element of foreignness, in which the successor only requests the issuance of the inheritance certificate of national law under Law no. 36/1995 of the notaries public and of the notarial activity is not

[8] Ion P. Filipescu, *Private International Law,* Vol. II, Actami Publishing House, Bucharest, 1995, p.209;

kept by the rules of competence stipulated in art. 4, 7, 10 and 11 of the Regulation. In order to debate the succession and issue of the inheritance certificate of national law, the notary public will verify his competence on the basis of art. 954 of the Civil Code and art. 15 lit. a) and b) and art. 103 of Law no. 36/1995 and will be able to issue the certificate of national law, for example, even in the situation where the deceased had his last domicile and habitual residence in another Member State, if he left goods in Romania.

In order to ensure a uniform application of the provisions of the Regulation in the Member States, from the beginning of the application of the Regulation and until now, certain provisions of it have been subject to interpretation by the Court of Justice of the European Union (CJEU).

By a recent decision of 21 June 2018 in Case C-20/17*Oberle*[9], The CJEU ruled that a court in a Member State to the Regulation is governed by the rules of jurisdiction provided for by the Regulation not only when issuing the European Certificate of Succession or when giving a judgment in the matter of succession, but also when, following a non-contentious procedures, issue a certificate of heir of national law (8).

The question arose whether this decision of the Court should be interpreted in the sense that notaries who are not assimilated to the courts, under the conditions of art. 3 paragraph (2) of the Regulation, could no longer issue the national certificates of heir in succession with foreign element, if the deceased had his habitual residence in the territory of another Member State.

As I have shown above, I have considered in the sense that the Romanian public notary, not being kept by the rules of competence of the Regulation no. 650/2012, could issue an internal certificate of heir, even when the competence of issuing the European heir certificate would belong to the authorities of another Member State applying the Regulation.

This opinion also results from the interpretation of the aforementioned decision considerations, whereby the Court responded to the parties' conclusions. Thus, paragraph 48 of the judgment (14), for example, viewed independently, could lead to the interpretation that the national certificate of heir must be issued in compliance with the rules of competence provided by the Regulation. In fact, this point contains the Court's answer to one of the claims made by the referring court, Germany and France, according to which it can be deduced from the inclusion in the Regulation of Article 64 that Article 4 does not determine the competence regarding the procedures for issuing national certificates of Crown (15). Of course, it is about the certificates of heir issued by the courts, and not the certificates issued by the extrajudicial authorities, which, in our opinion, were not considered by the Court.

The judgment of the CJEU establishes that courts or authorities assimilated to the courts will not be able to issue national certificates of heir, in non-litigation procedures, when another court in a Member State could attract general jurisdiction, based on art. 4 et seq. of the Regulation. This was also the interpretation adopted by other Member States. For example, in Hungary, the specific nature of the notarial procedure made the notaries to be assimilated to the courts, under the conditions of art. 3 paragraph (2) of the Regulation, being notified to the Commission and included in the list provided in art. 79. As such, although the notarial succession procedure that ends with the issuance of the national certificate is non-contentious, the Hungarian notaries receive the succession and issue the act of finalizing the

[9] http://curia.europa.eu/juris/document/document.jsf?text=&docid=203223&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=7092511

succession procedure only in compliance with the rules of competence from art. 4, 7, 10 and 11 of the Regulation (16).

Prior to the CJEU judgment in the Oberle case, the doctrine offered two divergent solutions on how to determine jurisdiction in the issue of national certificates of heir. On the one hand, it was considered that the judicial authorities of the Member States are still competent to issue national certificates of inheritance under national law, even if they are not competent with regard to the succession as a whole. On the other hand, the issuance of a national certificate of heir was included in the scope of art. 4 of Regulation (EU) 650/2012.

Considering in particular the need to ensure coherence between the provisions on jurisdiction and those relating to the law applicable in this matter, as well as the principle of unity of succession, which implies the harmonization of the rules on the international jurisdiction of the courts of the Member States both in the litigation procedures and in the in the case of non-litigants, the Court of Justice of the European Union, in accordance with the conclusions of the Advocate General, interpreted art. 4 of Regulation (EU) 650/2012 in the sense that it also determines the jurisdiction of the courts in the matter of the procedures for issuing national certificates of heir.

The ECJ also emphasized that this interpretation *"aims, in the interests of good administration of justice within the Union, to achieve this objective by limiting the risk of parallel proceedings before the courts of different Member States and any contradictions that may result from these ",* such as the situation where the national certificate of heir would be issued by two judicial authorities from two different Member States.

In conclusion, we point out that this decision of the CJEU concerns only the national certificates of heir issued by a judicial authority, such as the courts, not those issued by the notaries public, the question of qualifying the notaries as a court being given in the judgment given in C -658/17 *WB*[10] of the CJEU, a case in which the preliminary question addressed to the Court sought to find out whether the documents issued in the succession procedure by Polish notaries, which were not assimilated to the courts, could be qualified as court decisions, with the consequence of re-framing them notaries as courts and the submission of their acts to the jurisdiction rules of art. 4, 7, 10 and 11 of the Regulation.

In resolving this case, the Court held that an inheritance certificate such as the one at issue in *the main proceedings is not issued by a court, within the meaning of Article 3 (2) of Regulation no. 650/2012, this certificate does not, in accordance with paragraph 32 of this decision, constitute a "decision" in the matter of succession within the meaning of Article 3 (1) (g) of this Regulation*.

Therefore, the notarial succession procedure completed before an extrajudicial authority is still excluded from the scope of the rules of jurisdiction of the Regulation, and the issuance of the national heir certificate can be continued even if the notary public does not meet the criteria. of art. 4, 7, 10 or 11 of the Regulation.

6. PROCEDURE FOR ISSUING THE CERTIFICATE

This involves a request, made by the person concerned (heir, legatee, executor, administrator), accompanied by documents of different nature (identity documents, birth certificates, marriage, death, marriage agreements, will, declarations of acceptance or

[10] http://curia.europa.eu/juris/document/document.jsf?text=&docid=214397&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=6760914.

renunciation in succession), in certified or original copies, containing relevant information regarding the applicant, the deceased and his family or the inheritance itself; the detailed list of the targeted information is provided in art. 65 (3) of the regulation.

It is not necessarily that they allow the international character of the succession to be established, since the certificate itself can be used later for the eventual collection of data in this regard; it is also irrelevant whether or not the succession has been definitively resolved. The issuing authority (which verifies its competence in advance, in accordance with the rules of Chapter II of the regulation) must actively examine the documents and information received, their force and probative value.

According to art. 67, once, considering the law applicable to the succession, the elements whose certification is desired have been established, the requested authority will issue the certificate without delay, using the standard form elaborated by the commission. The beneficiaries (the applicant, but also other persons interested in solving the succession) will have to be informed.

Two possible reasons for refusing to issue the certificate are expressly mentioned, but not limited by the legal text. The first concerns the existence of an appeal, formulated in a separate judicial procedure or directly in front of the requested authority, regarding the elements whose certification is desired; the refusal will not intervene automatically, the requested authority preserving the freedom, after verifying its serious character, to decide a possible release of a partial certificate, regarding only the uncontested data. The second reason for refusal, with more serious consequences, is the existence of a court decision on elements whose certification is desired, with which the certificate would not comply.

The issuing authority retains the European certificate of heir, after which it issues to the applicant and, upon request, any person having a legitimate interest, certified true copies, with a validity period of six months, which can be extended for duly justified exceptional reasons (such as the use of the copy in - a procedure that has not been completed). The issuance of new copies is possible (art. 70), unless the effects of the certificate are suspended.

The authority that issued such a certificate is exclusively competent for its rectification, modification or withdrawal (art. 71). The prompt information of all persons to whom certified copies have been issued is obligatory in any of these cases (art. 71§3) and the suspension of the effects of the European heir certificate is possible, at the request of the persons justifying a legitimate interest (art. 73§ 1.a.).

Any measure of issuance, rectification, modification, withdrawal or refusal to issue a European Certificate of Succession may be challenged before a judicial authority in the Member State in which the issuing authority is located. During these procedures, at the request of the persons contesting the decision and with the delayed information of the holders of certified copies, the judicial authority may temporarily suspend the effects of the European certificate of heir (art. 73§1.b).

CONCLUSIONS

Finally, we consider that this instrument is a major innovation in European inheritance law and contributes to fulfilling the purpose of facilitating the debate of successions with elements of foreignness, but there are still issues to be clarified by the Court of Justice of the European Union. to ensure the uniform application and use of this legal instrument.

Therefore, in order to fulfill the assumed objective—the harmonization of substantive inheritance law in the European Union in this half of the century—research of the common

principles which may become basis for the future European regulation must be carried already today. Only the determination of all common values at the foundation of each specific standard solution may facilitate a closer look and a possible attempt to design new, uniform regulations. Nevertheless, Europe's uniform inheritance law is still in its earliest stage, and all evidence indicates that this phase will last much longer than it should

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LEGAL REGULATIONS REGARDING THE IMPACT EVALUATION METHODOLOGY OF STRUCTURAL AND COHESION FUNDS

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ABSTRACT:
Establishing a legislative framework for addressing an appropriate methodology for assessing the impact of Structural and Cohesion funds, in all 3 evaluation phases (ex-ante, intermediate and ex-post), is necessary both for users of these funds (the resort ministry, the intermediary bodies, the final beneficiaries – from an EU Member State) as well as for researchers on this topic. The stage of the knowledge in the field of the impact of these funds on each EU Member State economy narrows when the effects of the implementation of projects at regional, county and urban - rural level are discussed.

KEYWORDS: impact, evaluation, methodology, Structural, Cohesion, funds.

INTRODUCTION

The European Commission has struggled to reduce the number of exceptions to the community rules regarding the legal obligation for evaluation and impact assessment. Community funding is not making any deviation from the rule, as in the recent years, there was consolidated a thorough primary legislation[1] acknowledged by each Member State concerning the allocation and implementation of intra-community financial assistance.

However, there is a lack of impact assessments of the European funded projects across all Member States, which would serve to inform on 'who will be affected and how, ensuring economic, social and environmental impacts are considered together'[2]. Although such necessities are systematically discussed in the decisional process between the European Parliament, the Council and the European Commission, there are some procedural gaps and time laps until the Member States take over the community acquis in this concern. In the international legal literature regarding the regulations of impact evaluation, there are some external institutions which help towards a better understanding of the evolutionary perspectives which define impact assessments as an important evaluation tool in the European Union decisional process – the World Bank[3], the Organization for Economic Cooperation and Development[4], as well as private consulting networks[5] or companies[6].

[1] https://ec.europa.eu/regional_policy/ro/information/legislation/regulations/ [01.10.2019]
[2] European Commission, *Better regulation – taking stock and sustaining our commitment*, Brussels, 2019, p. 9.
[3] https://rulemaking.worldbank.org/en/ria-documents [01.10.2019]
[4] Organisation for Economic Cooperation and Development, *Building a framework for conducting Regulatory Impact Analysis: Tools for policy makers*, Paris, 2007.
[5] https://www.sgi-network.org/2019/Governance/Executive_Capacity/Evidence-based_Instruments [01.10.2019]
[6] S. Jacobs, *Current trends in Regulatory Impact Analysis: the challenges of mainstreaming RIA into policy-making*, 2006.

2. IMPACT EVALUATION IN THEORY

The European legal literature in the field of evaluation and impact of Structural and Cohesion funds is very limited. Even though, in recent years, the European Commission has gradually strengthened the digitalization of legislation, also managing a specific community law platform[7] regarding legal regulations, there is still missing the level of intermediary bodies online sources of documentation such as annual implementation reports or evaluation reports at operational and impact program level. There are no clear statistics at the level of the development regions (NUTS 2 territorial level) regarding the individualized implementation of the operational programs and their correlation with the objectives of each Member State's National Strategic Reference Framework or of the Regional Development Plans, the same situation being also reflected at the county level (NUTS 3 territorial level).

From the point of view of European Commission, not every public policy needs to be passed through an impact assessment procedure, because, on one side, it could not give any relevant conclusions, or, on the other side, it would not be possible to evaluate it. 'Between the years 2015 - 2018, 8.5 % of the Commission proposals […] were not supported by an impact assessment where one might have been expected'[8].

As a definition, impact evaluation allows to check whether funding programs function as intended, 'it identifies problems and their causes that then feed into impact assessments and eventually proposals that can deliver better results; it also provides the evidence needed to simplify and tackle unnecessary costs without undermining policy objectives'[9]. But it is also true that there is a need to improve the quality of evaluations (in particular the design, objectivity and timing of an impact assessment method)[10].

Despite the fact that the European Parliament, the Council and the Commission have adopted the Interinstitutional Agreement on Better Law-Making[11], in some cases, the Commission does not have adequate information about how Union legislation works in the Member States because 'the legislation as adopted by the co-legislators does not maintain the measures proposed to allow the collection of the data necessary to permit a good evaluation'[12] in the field of impact assessment. In other cases, the co-legislators add 'requirements for a range of different reviews or impose deadlines for evaluating legislation, which fall before there has been enough practical experience of applying the rules'[13].

Another minus is that 'the European Commission impact assessments make better use of evaluations as a basis for problem definition, but the European Parliament and the Council do not generally consider evaluations in their work'[14]. Evaluations and impact assessments should be linked better so that findings from one are used more effectively by the other.

'By the end of 2018, the Commission had produced 259 evaluations. About three quarters of impact assessments supporting legislative revisions are now accompanied by an evaluation'[15]. The most popular were the counterfactual methods of impact assessment ('with funding scenario' versus 'without funding scenario'), which had the expected effect at the

[7] https://webgate.ec.europa.eu/esiflegislation/display/ESIFLEG/ESIF+Legislation+Home [01.10.2019]
[8] European Commission, *Better regulation – taking stock and sustaining our commitment*, Brussels, 2019, p. 10.
[9] *Ibidem.*
[10] Organisation for Economic Cooperation and Development, *Better regulation practices across the European Union*, 2019.
[11] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016Q0512%2801%29 [01.10.2019]
[12] European Commission, *Better regulation – taking stock and sustaining our commitment*, Brussels, 2019, p. 10.
[13] *Ibidem.*
[14] *Ibidem.*
[15] *Ibidem.*

macroeconomic level, when the behavior of counties or regions has been investigated overall. Another area applicable to this type of evaluation is the educational infrastructure, respectively the business environment. However, when it comes to social infrastructure and tourism, it is difficult to quantify the impact of the investments made.

3. IMPACT EVALUATION IN PRACTICE

If it were necessary to establish the impact of Structural and Cohesion funds scientifically, the first question would be: how did they contribute to economic development? Due to the co-financing mechanisms, they rather stimulate public investments - in transport infrastructure, environmental protection, renovation of historical heritage, urbanization through water and sewerage systems, waste management, etc. On the other hand, these investments also focus on human development, unemployment reduction and the creation of non-governmental organizations. The investments were also set on the development of information systems in the public administrations and re-technologies in the private sectors.

Both of the community financial assistance towards a Member State, the Pre-Accession funds and the Structural and Cohesion funds, do not seek to replace the national financing measures but, on the contrary, they come to complement them. It can be specified that, in each Member State, the European Union made its presence felt in the relevant institutional environment and in the specialized economic language from the pre-accession period to the post-accession period, when each Member State had its debut in using these funds, as the national legislation in the field was, in most of the cases, rigid and incomplete, the legal and institutional bases being deepened only after a period of accommodation. From that moment, the concepts in the field of Structural and Cohesion funds began to become more visible, with research concerns beginning to be spotted in this field, because since from the pre-accession years to the post-accession period, it was not known the impact that these funds will generate, there were not identified in realistic terms the potential beneficiaries, the target groups and the economic effects that such projects can generate to the national economy of each Member State, both in macroeconomic and microeconomic perspective.

In the case of Structural and Cohesion funds, the European Commission approaches the impact assessment only at Member State level and uses macroeconomic models, but the results are often questionable (for example, '1 Euro invested in Member States between 2007 and 2013 is equivalent to 0.78 Euro in their GDP in the year 2015, respectively 2.74 Euro in the year 2023'[16]). Member States use various econometric analyzes, input-output models, counterfactual methods, SWOT analysis, etc., but also in their case, the results can be called into question. The territorial administrative units, through the representative public institutions, do not approach the evaluation methodologies.

There is a vast and quite clear legislation[17] in each Member State regarding the management of the non-refundable community assistance, the general financial framework for the management of the non-refundable community assistance allocated to each Member State, the control and recovery of the community funds, the public finances with specific provisions of the external non-refundable funds, the procurement and communication regarding the structural instruments, legislation largely derived from the Union law in this case.

[16] F.A. Popescu, M. Berinde, Analysis regarding the instruments for impact evaluation across practitioners, *Annals of the University of Oradea – Economic Sciences*, TOM XXVI, Issue 1, 2017.
[17] e.g. http://mfe.gov.ro/consolidarea-reglementarii-cadrului-de-evaluare-a-impactului-in-romania/ [01.10.2019]

But there is no concrete legislation on choosing an appropriate methodology for assessing the impact of these funds at the macroeconomic level. Indeed, at the microeconomic level, the evaluator of such a project has at its disposal the cost-benefit analysis, the economic and financial analysis, for approving or rejecting the project, instruments derived from the European Union procedures.

It is very difficult, in fact, to assess the economic impact of Cohesion policy, firstly because the data obtained cannot provide clear information on the net effects, at most they can illustrate the result (output) of the funded interventions, and secondly, analytical tools are required, which use technical language and are not accessible to the general public. So far, there is no adaptation in the legal literature of the methodology of impact assessment of Structural and Cohesion on the economy of a region (NUTS 2 territorial level), respectively a county (NUTS 3 territorial level) in any Member State.

CONCLUSIONS

There is a paradox[18] specific to the field: although the projects financed through Structural and Cohesion funds generate, in the evaluation phase through the cost-benefit analysis, a clearly identified impact at the target group level, community, actions and benefits taken, the impact assessments fail to capture these elements.

The author estimates that a total contribution to any national economy (e.g. Romanian economy - 53.87 billion Euro[19]) through the Cohesion policy has generated significant expenses with bank loans, with the purchase of materials, services and with the staffing necessary for the projects carried out, but it did not have a major impact in the growth of the national GDP, for the following reasons[20]:

- infrastructure projects, social projects, services and / or equipment endowments do not bring a consistent financial contribution to the state economy;

- the projects which involved the procurement of materials and services, through specific public procurement procedures, shifted the national trade balance towards imports;

- projects on agriculture or zootechnics generate the sale of raw materials or finished products on a market dominated by the presence of imported products;

- investments in industrial parks do not generate a trend of increasing wages.

In order to be able to issue a law establishing the most appropriate methodology for impact assessment at different stages and at subsidiary macroeconomic levels, it is necessary that public institutions who manage Structural and Cohesion funds overcome the passive reporting tendency of the monitored indicators and to adopt an active reporting tendency.

As a critical point of view, the author appreciates that, following the detailed inspection of the lists of projects implemented in some of the Central and South-Eastern Member States, a large part of this funding does not bring a sustainable economic development to the national economies, in the sense that, in the public sector, the vast majority of the portfolio of infrastructure projects consists of objectives delayed by about 5 - 10 years[21], in other words, they were not implemented at the right time, and the rehabilitation of roads, buildings or public utility networks would have represented anyway the legal

[18] F.A. Popescu, M. Berinde, Theoretical aspects regarding Structural and Cohesion funds impact evaluation methodology, *Annals of the University of Oradea – Economic Sciences*, TOM XXV, Issue 2, 2016.
[19] http://mfe.gov.ro/ [01.10.2019]
[20] F.A. Popescu, *Impactul fondurilor structurale și de coeziune asupra economiei județului Bihor în perioada 2007-2013*, Aureo Publishing House, Oradea, 2019, p. 87.
[21] *Ibidem.*, p. 143.

obligations of city halls or county councils in each Member State. The race over time is lost also in the industry sector, because the settlement of industrial parks, mostly specific for the South-Eastern Member States, is being related more to the decision of the big producing companies to find places with cheap labor force, rather than generating an economic rebirth of some of the lost industrial areas of the country.

In any case, it is worth noting that a possible misalignment of the national strategic objectives of each Member State (as they were transposed in the national operational programs) to the reality of evaluating the projects on the ground, does not necessarily mean that there is a negative side: this denotes that these strategic objectives must keep pace with the dynamics of each Member State's economic development in relation to accelerating the increase in the absorption of Structural and Cohesion funds and, impetuously, they need to be updated in shorter periods of time, and in this regard, impact assessments would help clarifying the overall image.

The author's conclusions are directed towards understanding the antagonism between the negative opinions of worldwide academics and the positive opinions of the public authorities or private consultancy companies, generated by the gradual appearance of the impact assessments. In both cases, however, it is widely accepted that the effect of propagation throughout the community is too widespread and in reality, it is not yet known.

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THE MEANS OF PUBLIC INSTITUTIONS TO PROTECT THE SUBJECTS OF LAW AGAINST CRIME

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ABSTRACT

The article covers the means by which public instiutions protect the rights and freedoms of its citizens from the crime phenomenon. The main focus of the paperwork is represented by the analysis over three major sections: the fundamental law of Romania, the Criminal Code of Romania and the legal norms present at the level of the European Union. Subsequently, conclusions will be provided at the end in order to draw out the essence of the research.

KEY WORDS: Phenomenom, analysis, norms, institutions, crime

INTRODUCTION

The human being is a sociable form of existence, therefore it cannot live on its own, requiring the assistance of others in order to develop properly and to know true happiness. Since the early days of our species, we came in contact with each other and formed communities. The purpose of these social structures was to ensure the satisfaction of basic needs such as security, food and reproduction. Given their nature, humans have the tendency to evolve beyond the conditions of a certain moment. In the same manner, the group will follow in the footsteps of the members, becoming more complex with every new level reached. Throughout time tribes expanded into kingdoms,empires and states at the current stage.

States are an assembly of institutions meant to defend the citizens from exterior and interior threats through the mechanisms at their disposal.

THE MOST IMPORTANT METHOD OF PROTECTION

In any action taken with the objective to create a new domain or to lay the foundation of a structure, a central pillar is required in order to guide the next steps. This rule applies the same in the event that a new form of government is established. Such was the case in December 1989 when Romania, as a result of the Revolution, became a Semi-Prezidential Republic. In other words, our country transitioned from a totalitarian form of state to a democratic one.

The first and most important brick placed on the path to an authentic republic was at that time the Constitution of Romania adopted in 1991.

From a legal perspective, the Constitution of Romania represents the main law by which society is governed. The constitutional stipulations possess the highest law force, all the other legal norms accepted and put into practice must follow their guidelines. The supremacy of the constitutional norms is assured by the constitutional control[1].

[1] Ș.Deaconu, *Drept Constituțional,* "C.H. Beck" Publishing House, Bucharest, 2011, p. 16.

The fundamental law contains the basic reglementations of the social reports which take place in our country and with other states or internationally recognized institutions. In this manner, the Constitution names the three powers of the state (The Executive Power, The Legislative Power and The Judicial Power) alongside their duties, the freedoms and obligations of the citizens, the procedures by which new laws are adopted and the position of the country on the international level.

Due to the importance of the constitutional regulations and the supreme authority they hold, we can say that, by admitting the rights and freedoms of the individuals in this context, the first layout of protection againts criminality is set in place.

To be in the presence of a crime event two conditions must be met, as per the legal interpretation:

Firstly, a legally protected and recognized social norm must be affected. This is a general requirement applicable to various cases.The difference comes from the second component which is that the illegal activity presents danger to the right to live or the physical integrity of the victim.

The possibility to live and have a functional body and/or mind are the main roots by which a person can exercise their other freedoms. Knowing this infomation, it is only natural and logic that the Constitution would include these basic rights in its texts, therefore the basic law dictates that „the right to live as well as the right to physical and mental integrity are guaranteed”[2].

It is also assured that living is done in proper conditions with no negative impact from any external factors designed to affect in a bad manner the organism or menthal health of a citizen, such would be the case with torture and inhuman treatment, both being banned[3].

Some countries have the legal option to condemn their criminals to death, for example in the United States of America. However, in Romania the capital punishment is prohibited on a constitutional level[4]. This can serve as proof that the legislator looked for an extra way to assure the right to exist even to convicts. Given time and proper assistance, any indiviual can repent for their actions and practice their rights without having to damage the liberty of others. Also, the structures assigned to judge and provide solutions to criminal cases are stoped from committing a crime in the event that someone would be convicted to death based on insufficient or false proof.

CRIMINAL LAW AND THE COERCIVE FORCE OF THE STATE

As shown in the previous chapter, the Constitution represents the central point from which all the other laws are derived. The most important type of regulations detailed and expanded in accordance with the primary norms for this article are the ones available in the Criminal Law area.

In order to understand the important role that these type of stipulations have in the process of protection againts criminality, we require a minimum imformation about public institutions, criminal law and the coercive force of the state.

The Executive Power is held by the Government, this structure is divided into several ministries such as the Ministry of Foreign Affairs, Ministry of National Defence, Ministry of National Education, Ministry of Tourism, Ministry of Internal Affairs, Ministry of Justice, Public Ministry and so on. These are central public authorities with different public institutions subordinated. Based on the data shared, we can define a public institution as a

[2] *Constituția României. Convenția Europeană a Drepturilor Omului. Carta Drepturilor Fundamentale ale Uniunii Europene, ”*ROSETTI INTERNATIONAL” Publishing House, Bucharest, 2018, p. 18, Title II, Chapter II, Art. 22, alin (1).
[3] *Ibidem*, alin. (2).
[4] *Ibidem*, alin. (3).

subsidiary structure of a central or local public authority, with its costs covered from public funds[5].

The Criminal Law is composed of the totality of legal norms ment to protect the values of a society by setting several activities as crimes and sanctions for commiting them. The main two goals of this branch of law is to either prevent incriminated behaviours or to punish those already consumed[6].

Regulations of the criminal law reside in the Criminal Code of Romania and other special laws. The public institutions which ensure that these reglementations are followed and applied if necessary are the Police (part of the Ministry of Internal Affairs), the courts (part of the Ministry of Justice) and the Prosecutor`s Offices attached to them (part of the Public Ministry).

It is relevant to mention that the Police and the Prosecutor`s Offices are components of the Executive Power, they represent the state in criminal cases as accusers, seeking to prove to the judges that an illegal deed has been completed. On the other hand, as mentioned in the current legislation, the courts constitute the Judicial Power[7], making sure that justice is served if someone is found guilty. Even if they are affiliated with the Ministry of Justice, the courts are independent and make decisions in accordance to the evidence provided and with no external interferences.

As for the coercive force of the state it can be explained as that authority granted by a law to a public organism, such as the police or the judicial bodies, to uphold a subject of the law for his illegal behaviour by restricting some of his rights, questioning him in order to find evidence to support the accusations or to make him execute the sentence as a result of a definitive and irrevocable decision offered by the court.

Three principal means serve as preservation againts crime, reassuring the right to live and the menthal and psysical integrity of the persons, within the sphere of the Criminal Law. These are the activity of the police, the prosecution procedures and the cases presented to judges.

First of all, the police, as determined by the current law based on which their atributes are listed, have the responsibility of protecting the lives alongside the integrities of the members from the community[8].

With this objective in mind, they are permitted to take all the necessary measures for maitaining the order and the public safety. Also, the representatives of the law can put into motion any legal act for the prevention and fighting againts the crime phenomenon and terorism[9].

The police officers patrol the streets of a location day and night, they identify individuals who manifest suspicious conducts and question them. Also, they are called in when incriminated events are in place and help sustain the safety of everyone.

Secondly, prosecutors are the magistrates which act on behalf of the state as the accusing part and as investigators when a scene of a crime is reported. With reference to the Criminal Code, the prosecutor is the one in charge of coordinating the prosecution act, procedure which involves the gathering of evidence related to a criminal affair, the

[5] Dana Apostol Tofan, *Drept Administrativ. Volumul I*, ”All Beck” Publishing House, Bucharest, 2003, p.6.
[6] C. Mitrache, Cr. Mitrache, *Drept penal român. Partea Generală*, ”Universul Juridic” Publishing House, Bucharest, 2014, p. 22.
[7] *Legea nr. 304 din 28 iunie 2004 privind organizația judiciară, publicată în M.Of. nr. 576/29 iun. 2004, repulicată în M.Of. nr. 827/13 sep. 2005,cu modificările și completările ulterioare*, Title I, Chapter I, Art.1, alin. (1).
[8] *Legea nr. 218 din 23 aprilie 2002 privind organizarea și funcționarea Poliției Române, publicată M.Of. nr. 305/9 mai. 2002, repulicată în M.Of. nr. 307/25 apr. 2014 cu modificările și completările ulterioare*, Chapter III, Art. 26, alin. (1).
[9] *Ibidem*, alin. (2).

identification of the authors and the determination of ones criminal liability (necessary to know if the case will be sent in court or not)[10].

The law states that a prosecutor can start the prosecution either based on a criminal complain or by ex officio notification[11].

Thirdly, when a criminal categorized act is consumed and the prosecutor has collected enough data to demonstrate the accusation, the case is debated in court where a decision will be made by the judges if the potential criminal is found guilty or not.

Due to the significance of their assignment, the judges must make sure that they have a clear representation of the events that took place. They will listen to both parties (accusation and defense) and they will also have to analyze and decide which proof is genue, relevant and can be taken into consideration. Also, the magistrates require to maintain the order in the court as well as an objective approach towards the case, personal feelings being left out of the decision. After a conclusion is drawn, the accused can be held responsible for the events or recognized as innocent.

In the event someone is presented as guilty, the judge will dictate a punishment to be applied in accordance with the law and through a definitive and irrevocable decision. The coercive force of the state will force the criminal to attend a correctional institution to repent for his actions (jail, prison) with a timeframe from several months to years, proportional with the form of the criminal act done. In this way, a toxic element is isolated from the other members of society so that their freedoms and rights are reassured and the social values are once more protected.

COLLABORATION AGAINTS CRIME IN THE EUROPEAN UNION

The European Union can be defined as a confederation of the states in Europe, its founding being based on several treaties, with the purpose to reach a superior level of coexistence between different populations, through collaboration an assistance in several domains such as security, economy, investments, trade, resources and law.

In the earliest days, the predecessors of the current EU were The European Community for Coal and Steel, The European Economic Community and The European Community for Atomic Energy.

Slowly but surely their ideas and actions expanded throughout the last century, gaining more members. Today the EU has a total of 28 states as members[12].

Romania became a member of the European Union on the 1st of January 2007 assuming all the necessary obligations and benefiting from all the rights which come with this status.

By coming into this block, our country gained extra means of protection for its people versus crime, as an example we can provide the procedure of the european arrest warrant.

As stipulated by the current law, the european arrest warrant can be categorized as a decision made by a recognized judicial authority of a member state to have a certain individual arrested and brought back in his country by the other members, with the goal to start a prosecution procedure or either to send the case in court, as well as to execute a sentence[13].

It is well known that millions of romanian citizens work in other countries in the EU, therefore someone who comitted a crime and had decided to run in another state represents a danger to our countrymen abroad. With this line of thinking, the law system of Romania with

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[10] *Noul Cod Penal. Noul Cod de Procedură Penală,* "Hamangiu" Publishing House, Bucharest, 2014 p.385, Title I, Chapter I, Art. 285 and 286, alin. (1).

[11] *Ibidem*, Art 288, alin. (1).

[12] A. Fuerea, *Manualul Uniunii Europene. Ediția a V-a revăzută și adăugită după Tratatul de la Lisabona (2007/2009)*, "Universul Juridic" Publishing House, Bucharest, 2011, pp. 14-31.

[13] *Legea nr. 302 din 28 iunie 2004 privind cooperarea judiciară în materie penală publicată în M.Of. nr. 594/1 iul. 2004, reuplicată în M.Of. nr. 377/31 mai. 2011, M.Of. nr. 411/27 mai. 2019 cu modificările și completările ulterioare*, Title III, Chapter I, Art. 84, alin. (1).

the support from other nations can ensure that the problem is dealt with. Since we are part of a bigger community, this is also to protect the social values of the other members.

CONCLUSIONS

Based on the information given we can deduce that the most important and primary method by which the criminal current is minimized is to have the basic standards of a society recognized and guaranteed at its most important levels. This means that the Constitution is an undisputable statement, a core and the root for all the laws and procedures. It can be classified as a primary wall of defense.

The Criminal Law has a significant role to play in order to uphold the constitutional regulations with the work done by the police officers, prosecutors and judges.

In the era of globalization, fast processess and evolving technology, criminal cases tend also to improve, thus one state cannot fight this battle alone. The European Union ensures that international cooperation in the judicial matter is covered and that states are willing to share, assist and support each other.

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20 YEARS OF EUROPEAN FUNDS' MANAGEMENT – WHAT WE HAVE LEARNED AND WHAT IS TO DO NEXT? A PRACTITIONER'S PERSPECTIVE

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ABSTRACT:

The management of European funds was part of the public agenda, in a consistent manner, for the past 15 to 20 years. Although visible progress has been made since the moment Romania started to access pre-accession funds (Phare, ISPA, SAPARD), to date, with direct effects on the economic growth, the efficiency in implementing it suffered a lot due to the political spectrum intervention, the human resource involved, the volatile administrative framework or even due to the influence, sometimes unwelcomed, of the private sector. The present material tries to unveil some of the causes that affected the implementation of European projects, and also to offer a range of solutions for a better management of it, taking into consideration the fact that the new programming period, 2021-2027, is at our doorstep.

KEY WORDS: European funds; management; political spectrum; human resource; absorption.

INTRODUCTION

Although Romania officially joined the European Union on the 1st of January 2007, the European path of the country started much earlier, the most important moment from the perspective of European funds management taking place in February 2000: during the EU Council for General Affairs meeting, for the launching of the Intergovernmental Conference, the official accession negotiations are opened, which meant that from that moment on, Romania had the opportunity to access European funding, through pre-accession programmes[1].

Hereinafter, we will make a short presentation of Romania's situation at that moment: a disastrous economic situation, marked by dubious privatizations, political and institutional instability, a never-ending provisional state (the so called "transitional period"), of general uncertainty at all levels of society. The Progress Reports issued by the European Commission mentioned, in not so optimistic terms, the stage of implementation of the necessary measures to be taken in order to join the EU, the administrative framework being one of the main issues to be tackled at that moment, as it is stated into the 2003 Report: *"Although Romania*

[1] For more details, please consult https://europa.eu/rapid/press-release_PRES-00-32_en.htm, accessed on 12.09.2019.

continues to make progress in what concerns the adoption and implementation of the <acquis (communautaire)>, there is still a great distance between the commitments made during the negotiations for accession and Romania's administrative capacity to fulfill it. Also, in the case of many priorities set into the revised Accession Partnership, the legislative alignment must continue"[2]. That was the framework in which Romania had to create the institutional structures, had to train its human resource etc, in order to manage to implement the pre-accession projects (on Phare, ISPA and SAPARD financing Programmes). With a lot of help from many technical assistance projects, Romania managed to create, in a quite reasonable timeframe, the institutional framework for managing European funds, at least from a formal point of view. From a broader perspective, though, the image didn't look as good, many shades appearing on that apparently clear picture…

And these shades were quite a few. Maybe the most important aspect is that, at that moment, Romania had a public administration centered on a communist model of managing the community problems, an administration trapped in a certain way of thinking and applying the concepts, completely hanged to the political spectrum, which tried to define itself in the new geo-political context, a context that required adaptations in order to join the EU and NATO. And many adjustments were needed in this respect. As a young (and probably naïve) master student, taking an MBA in Public Sector Management at Birmingham University (United Kingdom), I decided to tackle in my final paper the applicability of the "New Public Management" model in that day Romania. This management system, at that moment completely adopted only in some of the Anglo-Saxon administrative systems, promised a lot: a flexible administration, with less strict hierarchical leyers, with a more degree of implication of the private sector into the community problems, which was seen as a partner in tackling it, with clear and well-defined performance indicators of the public sector etc. It represented everything that we didn't have and we wanted to have, at least from a lip service. From the start of the documenting process for the paper till the end of it, my enthusiasm was gradually tempered, the final conclusion being that, for the moment, Romania was not ready to implement the New Public Management, due to the cultural conflict between the existing administration and the new practice models, so generous at least theoretically. Less than two years later, I was working in the Romanian central public administration, managing pre-accession European funds (Phare), confronting the realities of the public administration, which looked very similar with what I have found, from a theoretical perspective, during the documentation of my final paper: an administration less opened to new models, hanged to the political spectrum, bearing a low flexibility and trapped in pre-defined patterns.

A PATH PAVED WITH OBSTACLES. WHAT WE HAVE LEARNED?

Although, changes were made, and not just a few, affecting the system in a positive way, starting with that period of time. Around the moment when Romania has joined the EU, a group of well- trained professionals existed in the area of management of European funds (especially trained through technical assistance projects), in the central and also the local administration. That personnel had a good understanding of project management, both in theory and practice (for many people, this could sound elementary, but at that moment, it was a huge step forward, compared to the previous period of time, when the annual planning prevailed over the multiannual strategic planning); it was predominantly young, more prone to adopt a new way of thinking (we could say that around the year when Romania has joined the EU and in the following years, more than 75% of the human resource consisted of youngsters up to 35 years old, proficient in English or other foreign language, having completed long-term specialization courses or even long-term studies abroad); it was enthusiastic, feeling that the things started to move, after very hard times in terms of economy

[2] European Commission - *2003. Raport periodic privind progresele inregistrate de Romania pe calea aderarii*, p. 137, http://www.anr.gov.ro/docs/rapoarte/Raport_periodic_privind_progresele_Romaniei_pe_calea_aderarii_183.pdf, accessed on 16.09.2019.

and social issues and the European funds are part of the solution for developing the country and we can all contribute to that goal.

At the same time with the institutional establishment of the stakeholders, with the personnel training, with a better understanding of project management came also situations that will at the end limit the progresses made in that area, with effects that are still valid to this day: the political spectrum interference in the management of European funds or the siphoning of the European funds by bogus private consultancy companies and other beneficiaries of the European funding.

Some additions are necessary in this respect, mainly regarding the involvement of politics and politicians in the area of European funded projects. First of all, we must say that the influence of politics within the management of projects, irrespective of the source of financing, is, to a point, normal and necessary. After all, the politicians define the development strategy on sectoral areas, including that of an administrative unit, the politicians have the power to decide, they can assure the financing for any course of action, they set the priorities. The problem appears when the priorities, for example, are set based on private interests, personal or of a group of interests, rather than the general wellbeing of the community, for economic reasons or when it interferes with the human resource directly involved in the management of projects. Too often, some initiatives are financed due to the personal interests of the political leadership and less based on the real needs of the community. Also, in many cases, the influence of the political spectrum is used in order to press and coerce the human resource involved in the management of European funds, with direct effects on the efficiency of the administrative capacity: with every political change, almost automatically the high level of the administration is changed (general directors, directors, etc), and also the medium level is affected (head of office for example), a fact that is seriously affecting the continuity and, thus, the effectiveness of the administrative actions. Unfortunately, this way of involvement into the inner life of the administration continues to this day, with destructive effects over the administrative capacity.

The same as in the case of the political involvement, the influence of the consultancy companies has both positive and negative effects on the management of European funded projects. Although it is absolutely clear that they are useful and, if they act in a correct and efficient manner, constitute an undeniable help for the administration and the private sector, in the same time they can represent a disruptive factor if using their knowledge in other ways that they should do. Many cases had come to the public attention, especially through media, presenting politicians that went hand in hand with bogus consultancy companies or even cases when politicians acted both as administrators of private companies and of the public goods…As we have said above, unfortunately, these situations are as real today as they were 10 years ago, affecting on long term the implementation of European funded projects, affecting the absorption rate and maintaining a way of thinking which collides with the idea of proper and sound management.

What is even more disturbing from the perspective of administrative efficiency is the fact that all these deficiencies were known and accepted by the stakeholders involved, and not only those presented above, but many more, as the conclusions of the performance audit report of the Court of Accounts of Romania for the period 2007-2012 was presenting. Thus, the report reveals a: *„Low interest of the majority of public institutions in accesing European funds, in the audited period (2007 – 2012)", "defective budgetary programming of public funds neccesary for implementing the projects of the credit principals acting as beneficiaries", "no control or analysis was made over the budget execution regarding the use of funds awarded from the public budget for accessing non-reimbursable European funds at the credit principals, at local or central level, by the structures having atributions in this regard within the Ministry of Finance", "the lack of qualified personnel, having experience in*

the area of European funds, staff turnover, lack of vision in some situations in efficiently achieving the objectives of the program".[3]

But, after all, to get back to the title of this article, what we have achieved in the past 20 years of managing European funds? A lot, quite a lot. Although it sounds to be basic and self-evident, we could say that first of all, we learned how to manage European funded projects. Also, we learned that is better to develop useful projects, with an impact over the society or community, not just projects that are designed especially for some persons or entities in order to gain some financial advantages. It became clear over time that a project which is made considering the last aspect is hard to implement, leading to financial corrections on it, to the extent that the financial benefit of the financing is nullified (this aspect was learned by many, but this practice still exists today, in order to favor some public or private actors). We learned that the management of projects is not a game, that fraud and the conflict of interest are serious matters, being punished by law at the end, as criminal offences. Maybe that's the most important aspect that we have assimilated, since it defines a change in our mindset: if after the Romanian Revolution of 1989 it became quite common to think that everything is permitted, including "stealing" in different ways (and the ones who were not letting you do so were labeled as communists), now, with the help of European funded projects, the concepts of accountability and responsibility are valued again.

WHAT IS TO DO NEXT? A SET OF PROPOSALS

At this moment, we could say that we reached "adulthood" (or at least an end of childhood) in what concerns this area of expertise. But there are still a lot of things to do, at all levels (in some cases though it is better for some things not to be done in fact…)

First of all, the influence of the politics into the project management should be limited to some extent, by eliminating the possibility of replacing/firing the personnel involved in the management of European funded projects at every political change, at central or local level. (the new Administrative Code, adopted through Emergency Government Decision no. 57/2019, has already missed the opportunity to do something in this respect, the perspectives regarding it being dissuasive considering this); also, by limiting the possibility to interfere with the implementation of some strategic documents (as an example, see the so-called Masterplan for Transport, a document that was designed to be a long-term planning strategic sheet, but in fact it is changed by every transport minister, and they were quite a few in the past 8-9 years, due to local and electoral considerations)[4]; and maybe most of all, by limiting the use of European funds as an electoral tool, used just for marketing and ignored in the rest of the occasions, as a mean of community development.

Secondly, the legislative changes in this particular area should be restricted to applying the European Regulations and Directives, without producing continuous malfunctions into the system. This aspect is mainly related to the permanent changes that affect the financial management of the project, where the numerous adjustments of the Law no 227/2015 adopting Fiscal Code transform the implementation of European funded projects into a never-ending saga, but one which never ends well for the beneficiaries. This predictability is requested by everybody, but especially by the private sector, but the future is uncertain the same as in the rest of the presented cases.

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[3] Curtea de Conturi a Romaniei - RAPORT DE AUDIT *"AUDITUL PERFORMANȚEI UTILIZĂRII FONDURILOR ALOCATE DE LA BUGETUL DE STAT PENTRU DERULAREA PROGRAMELOR SAU PROIECTELOR FINANȚATE PRIN FONDURILE EXTERNE NERAMBURSABILE pentru perioada intermediară 2007-2012"*, Bucuresti, 2013, pp. 16-25, http://www.curteadeconturi.ro/Publicatii/Raport_audit_performanta_FEN_2007-2012.pdf, accessed on 18.09.2019.

[4] Curs de Guvernare – editie online, https://cursdeguvernare.ro/politizarea-infrastructurii-distruge-si-noul-master-plan-pe-transporturi.html, accessed on 12.09.2019.

Even more, a strict control of the activity of consultancy companies acting in this field of expertise should be exerted, by using a system of credentials and thus of supervision, so the cases in which a company with 2-3 employees manages projects of billions of Euros will not exist anymore. Without affecting the free market and the competition, this system will contain the activity of the bogus companies that are siphoning the public money for more than 20 years.

We should not forget the importance of creating, maintaining and developing a human resource that is capable, involved, determined and conscious of the important mission that it has. The involvement of politics to a large extend in the change of personnel creates not just malfunctions of the administrative system, but also a deception of the human resource, which is feeling constantly under pressure. The continuous training of staff, assuring the stability of the job, the involvement of all layers of decision into the strategic planning should be priorities not only for the future, but starting now.

Moreover, we should take into consideration the fact that these projects, although referred in the day-to-day speech as being "financed through European funds", are in fact co-financed from the EU budget. Based on the development region, the Operational Programme, the type of beneficiary, the contracting conditions etc, this co-financing varies from 98% to 30-40%, the rest being in the responsibility of the state or of the direct beneficiary of the financing. Thus, conditions should be created for the beneficiary, either a public or private entity, in order to be able to ensure this complementary financing. Although some measures were taken in this respect, from the central level, like the establishment of the National Fund for Guaranteeing the Credit for SMEs since 2001, these were able to solve the problem of financing for the beneficiaries only to a certain degree, by reducing the bank risk and thus lowering the bank fee[5]. The financial difficulties that the small, rural, local administrations[6] or the NGOs are facing cannot be solved through last-minute or discretionary measures, like allocation of funds from the Government's Reserve Fund, based on who-knows criteria[7], or through the allocations, the same as shady and politically biased, of the County Councils to city halls (the examples in this respect are so many, unfortunately, but we decided to choose only one not to overcrowd this material)[8]. Also, the actions taken regarding the indebtedness rate of the city halls to the State Treasury, approved through Government Decision no 8/2018, as a last resort measure, gave just a breath of air to the public administrations suffocated by expenses[9]. It is necessary to create a uniform, coherent, correct and based on clear criteria system of supporting the public administrations in need which require support for implementing major projects, that can prove useful for the community.

For sure, there are many other things to be done, but since the management and control system reached a certain maturity, with all the shortcomings, maybe is not a good idea

[5] Eugen Staicu, *Fondul Național de Garantare a Creditelor pentru IMM-uri: o soluție?*, in *Legestart*, online edition, 27th of February 2017, https://legestart.ro/fondul-national-de-garantare-creditelor-pentru-imm-uri-o-solutie/, accessed on 25.09.2019.

[6] In the context of the approval of Emergency Government Decision no 46/2013, regarding the financial crisis and insolvency of public administration units, more than 2000 city halls cannot pay their current expenses from their own budget.

[7] Anca Simina, *Ultima împărţire pe şest a milioanelor din Fondul de Rezervă al lui Ponta spre primării şi biserici. Cum a cheltuit Guvernul în 2013 „bugetul paralel"*, in *Gandul*, online edition, 12th of December 2013, https://www.gandul.info/politica/ultima-impartire-pe-sest-a-milioanelor-din-fondul-de-rezerva-al-lui-ponta-spre-primarii-si-biserici-cum-a-cheltuit-guvernul-in-2013-bugetul-paralel-11756982, accessed on 25.09.2019.

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[9] Ovidiu Barbulescu, *Guvernul majorează limita de îndatorare a primăriilor și permite împrumuturi de la Trezorerie, în plafonul de 800 milioane lei, pentru proiecte din fonduri europene,* www.profit.ro, 23rd of August 2018, https://www.profit.ro/insider/banci-asigurari/guvernul-majoreaza-limita-de-indatorare-a-primariilor-si-permite-imprumuturi-de-la-trezorerie-in-plafonul-de-800-milioane-lei-pentru-proiecte-din-fonduri-europene-18363474, accessed on 24.09.2019.

to start everything from scratch and make radical transformations of the system. In this way, the implementation tools that the personnel involved in the managing of European funds used in the past, which become common knowledge over time, will be better used also in the future, due to the routine of applying it. Anyhow, the new programming period 2021-2027 will bring many changes to the current situation, as the drafts of the European Regulations regarding European funds look at this moment[10], fact that will again disrupt the management system of project's implementation.

INSTEAD OF CONCLUSIONS

In order to conclude in a positive manner, we would like to point out an information already presented in the official statistics: Romania's GDP almost doubled since the moment it joined the EU in 2007 (see *Graphics*) and this happened also due to the use of European funds[11]. We have no reason to doubt that this growth will continue having this important financial support. Even if at this moment the absorption rate is approximately 30%[12] (out of which a good part represents direct payments to farmers, the so-called subsidies), just a little below the European average of approximately 33%, with minimal responsibility and involvement we can assure a sustainable growth of it, and the best part is that is only up to us to do so.

DISCLAIMER: *This article does not present the point of view of MRDPA, of the Managing Authority for Interreg V-A Romania-Hungary Programme or any other organization involved in the management of the Programme, expressing only personal considerations.*

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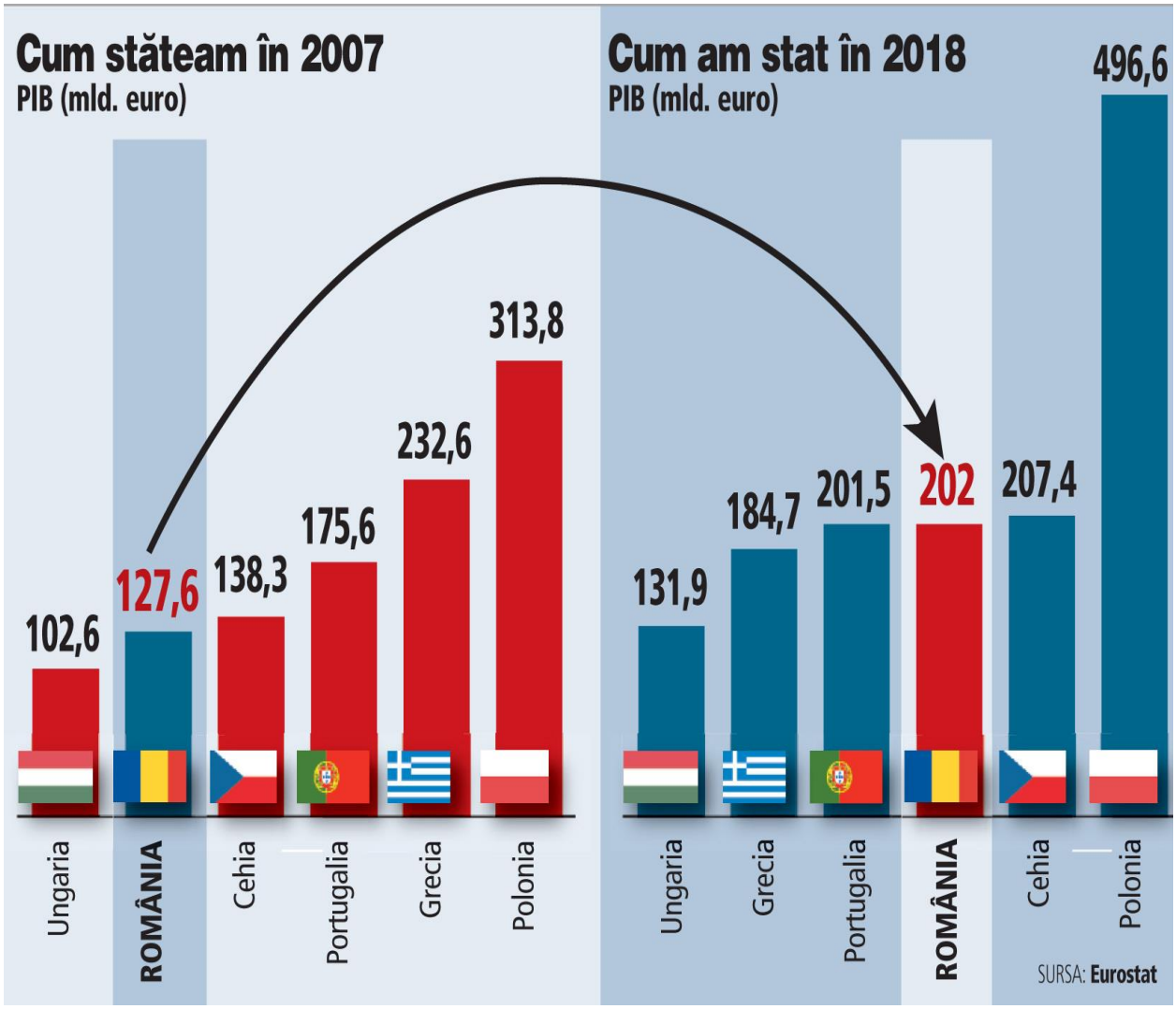
GRAPHICS: How we did in 2007 and how are we in 2018 in terms of GDP



Source: *Ziarul Financiar*, online edition, 22nd of March 2019, https://www.zf.ro/eveniment/romania-a-depasit-portugalia-la-pib-ul-nominal-17957768, accessed on 18.09.2019.

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FORMS OF SOCIAL REACTION AGAINST CRIMINALITY

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ABSTRACT:
In the first part we define some forms of social reaction against crime conceived as a mechanism of social and normative organization, perpetuating itself differently from one society to another, depending on the specifics of each one, referring to the system of ethical, normative and cultural values. Next, we identify aspects related to fight against criminality, which consider the way of establishing some forms of social control, from a social/ legislative/ institutional/ state/ contextual norms perspective, that are found in the public or private space.

KEY WORDS: social reaction, social control, criminality, prevention, punishment.

INTRODUCTION

The social reaction against criminality represents the legal disapproval and social protest materialized in preventive measures from the perspective of some forms of social control or measures to remove causes and conditions that generate or favor the adoption of criminal behavior, the treatment applied to criminals either minors, adults, women or repeat offenders. On the other hand, it is materialized in punitive measures that apply to the perpetrators who have committed an act that summarizes the conditions for committing a crime[1].

Given that the members of a society differ one another, disturbances of the equilibrium state can be created precisely through the contrast of each one's diversified concepts. That is why the forms of social reaction, together with the social control come to establish some norms (imperative or supplementary) and habits that balance the social stratification and the dissonance of ideas[2].

It is easy to understand that the social reaction against crime is also a topic of criminology, forming a branch that studies social psychology, with the particularities related to the legal-criminal field, referring to the causal and non-causal doctrinal theories. In light of this idea, we make a compact characterization to a form of preventive reaction, a

[1] Article 15 paragraph (1) of the Penal Code of Romania published in the Official Monitor no. 510/24.07.2009.
[2] C. Loghin, *Conflicte – metode alternative de administrare și soluționare*, Ed. Univ. Alexandru Ioan Cuza, Iasi, 2016, p. 43.

form of repressive reaction and a form of social control, criminological landmarks that would reduce criminality.

MODERN PREVENTIVE MODELS - PROHIBITION-TRENDS

Probation[3] in Romania appeared as an element of novelty in the field of criminal law in 1996 by implementing a pilot project within the Arad penitentiary with the creation of an experimental center[4].

Regarding the need for a project[5] that deals with the principles of probation[6], we affirm that the reduced number of non-custodial measures and penalties in the criminal field, the absence of specialized bodies to supervise the execution of non-custodial measures and sanctions needed to assist individuals in conflict with the criminal law, for their social reintegration[7], the need to find new solutions for reducing or diminishing the phenomenon of crime[8] and for reducing the costs related to deprivation of liberty[9] are defining aspects of the probation system in Romania.

The extension of the alternative range of measures to custodial sentences, the easing of access conditions to parole, a good functioning of the probation service and the continuation of the penitentiary capacity modernization projects were among the recommendations addressed to the Romanian authorities.

A memorandum, adopted on January 19, 2016, focuses on improving the applicability of the probation system principles[10] (in particular by increasing the number of probation counselors)[11], improving detention conditions and developing alternative measures. Thus, for the period 2016-2023, an investment plan with a total value of 838.45 million euros is foreseen to be distributed between the National Administration of Penitentiaries, the National Probation Directorate and the Ministry of Internal Affairs. According to the Government, by the end of 2023, 10.895 new accommodation places will be created, 1.651 places will be upgraded and 5.847 people will be recruited by the National Administration of Penitentiaries[12], also by 2018, 626 probation counselors and 171 administrative assistants will be recruited to the National Probation Directorate[13].

The National Probation Directorate has continued the steps and consultations with the Ministry of Justice management for the adoption of a draft law on the status of

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[3] Available at *www.eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32008F0947&from=EN, Framework Decision 2008/947 / JHA of the Council of 27 November 2008,* accessed on 22.11.2019.

[4] M. Sandu, *Reacția socială împotriva criminalității*, Ed. Pro Universitaria, 2017, p. 78.

[5] Available at *www.euprobationproject.eu/*, accessed on 22.11.2019.

[6] Law no. 252/2013 on the organization and functioning of the probation system, published in the Official Monitor no. 512/14.08.2013.

[7] Available at *ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation /detention-and-transfer-prisoners_en*, accessed on 22.11.2019.

[8] *European Probation Rules, European Rules on Comunity Sanctions and Measures* – Recomandation no. R(92) 16 on European rules on Community sanctions and measures, available at *rm.coe.int/rec-92-16-on-community-sanctions-and-measures/16808b60b6*, accessed on 22.11.2019.

[9] Available at *www.just.ro/directia-nationala-de-probatiune/*, accessed on 22.11.2019.

[10] Available at *www.ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=regprof&id_regprof=16890*, accessed on 22.11.2019.

[11] Available at *www.just.ro/comunicat-de-presa-referitor-la-protestul-consilierilor-de-probatiune/*, accessed on 22.11.2019.

[12] Available at *www.cdep.ro/interpel/2016/r3286B.pdf*, accessed on 22.11.2019.

[13] Available at *www.ier.gov.ro/wp-content/uploads/cedo/Rezmives-si-altii-impotriva-Romaniei.pdf*, *Rezmiveș and others against Romania*, accessed on 22.11.2019.

probation staff, this project representing a distinct measure included in the Justice Chapter from the 2018 – 2020 Government Program[14].

Regarding the main activities of the probation services, we mention that in 2018, the probation counselors prepared 9.613 evaluation reports, 100.703 files on criminally sanctioned persons, 9.159 supervised or deprived of liberty persons benefited from specialized interventions with the purpose of community reintegration[15].

For example, the European Probation Confederation which promotes the social inclusion of offenders through community sanctions and measures such as probation, community service, mediation and conciliation is committed to increase the profile of probation and to improve professionalism in this field, at national and European level[16].

MIXED MODELS OF SOCIAL REACTION[17] - GUARANTY MEASURES

This type of model comprise the prevention with repression when applying a criminal punishment, emphasizing the dual need to apply a punishment measure with the role of re-educating and preventing the relapsing of a deviant behavior and of canceling effects of a criminal offense[18]. The literature defines the guaranty measures found in the Criminal Code[19] as a mixed model, following their application society being protected against perpetrators and also the individual being protected by the occurrence of applying a penalty in what concerns him[20].

In the contemporary conception, guaranty measures are interpreted as penalties of criminal nature. The main difference between punishments and guaranty measures is that punishments can only be applied to offenders (who have committed an act that sums up the conditions of the crime translated in the penal code) while guaranty measures can be applied to those who have the quality of a perpetrator (be they minors or persons without discernment), respectively those who have committed simple unjustified acts provided by the criminal law[21].

As regards the dismissal of the danger state, the applicability of the guaranty measures proves its efficiency by its immediate application, constituing a way by which the danger state is removed and replaced with a security state necessary for the lawful order[22]. The purpose consists in that by taking a guaranty measure, it acts as a barrier to reiterating illicit behavior. Preventing a crime means, from the point of view of the specialists in criminal law, "to put an obstacle in the way of the reality from which the state of danger arises and to prevent it from leading or contributing to the commission of such acts"[23].

MEANS OF SOCIAL CONTROL - ETIOLOGICAL PERSPECTIVES

[14] Available at *www.just.ro/wp-content/uploads/2015/09/RAPORT-DE-ACTIVITATE-DNP-2018-de-publicat2.pdf*, *Sistemul de Probațiune – Raport de activitate 2018*, accessed on 22.11.2019.
[15] *Idem.*
[16] Available at *www.cep-probation.org/about-confederation-of-european-probation/*, accessed on 22.11.2019.
[17] M. Sandu, *op. cit.*, p. 39.
[18] P. H. Robbinson, *Crime, punishment, and prevention*, p. 61, available at *www.nationalaffairs.com/public_interest/detail/crime-punishment-and-prevention*, accessed on 22.11.2019.
[19] Article 107 paragraph (1) of the Penal Code.
[20] Article 5, paragraph 1, letter e) of the *European Convention on Human Rights* and article 6 of the *Charter of Fundamental Rights of the European Union*.
[21] V. Pașca, *Drept Penal – Partea generală*, Ed. Universul Juridic, Bucharest, 2014, p. 499.
[22] *Idem*, p. 500.
[23] V. Pașca, *op. cit.* p. 501, apud. V. Dongoroz and others, *op. cit.*, p. 280.

The social control aims to establish a strong connection between the society and its members, a beneficial interaction for both parties. As an expected result of social control, the individual should exhibit strong adherence to the norms and values of the community and the group to which he belongs, thus taking on identity and personality in relation to society[24].

Without assuming any form of social control, an individual can easily pass under the notion of *anomos*[25] which is defined as a *"social instability arising from the rupture between the individual and human values"*[26].

There are two forms of social control that are dissected from the point of the rules origin. Therefore, two modalities of social control exist, the formal and the informal one. Characterizing the *informal* nature of this concept, we expose the idea that the societies norms and values, as well as the adoption of a system of beliefs learned through the socialization process, represent a form of conformity and adaptation of the society's members. The initiators of this category are parents, caregivers, teachers, coaches[27]. "It represents the result of socialization within the existing social normativity and of social learning, that is, of internalizing the system of norms, behavioral patterns and attitudes typical for a society" [28.]

Formal social control is defined by the institutional norms of legislative character, evoked by the institutions of a state, the organizations or corporations regulations etc. [29].

By categorizing the notion of social control between formal and informal, we understand a different interpretation that each individual has. At the same time, these two notions are interdependent, the behavior of an individual being characterized through the prism of the set of values or original norms which are then propagated in the way of observing the institutionalized rules imposed by an organizational structure[30].

The discrepancy between the intrapersonal characteristics of the individual and the imperative norms imposed on him by a certain institutional or organizational structure can lead to his non-compliance with this type of norms.

There is the opinion that the imposed institutional norms would be conceived at a generally valid level, thus the applicability and their keeping by the members of a society can be made difficult, given that the diversity of individuals is infinite, therefore the proper observance of such a norm can be relative and interpreted through the prism of each one's cognitive-behavioral constitution[31].

Criminological aspects of social control are essential in the application, understanding and observance of certain norms. The branch of critical criminology refers to the lack of causal theories that explain the inevitable occurrence of criminality and the connection between social structure, social order, semantics of society and crime, and not least, the lack of theories and scientific explanations regarding the usefulness of norms in the criminal sphere, as a form of social control[32].

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[24] Available at *www.dreptmd..com/cursuri-universitare/sociologie-juridica/cursul-nr-10-controlul-social*, accessed on 22.11.2019.

[25] *a-nomos* – without law (*Social anomie theory* – R. K. Merton), *www.etymonline.com/word/anomyk*, accessed on 22.11.2019.

[26] Available at *www.merriam-webster.com/dictionary/anomie*, accessed on 22.11.2019.

[27] I. Meszaros, *The necesity of social Control*, Monthly Review Press, New York, 2015, p. 35.

[28] C. Zamfir, L. Vlăsceanu, *Dicţionar de sociologie*, p.139.

[29] I. Vlăduţ, *Introducere în sociologia juridică*, Ed. Lumina Lex, Bucharest, 2003, p. 155.

[30] S. Karstedt, K. – D. Bussmann, *Social Dynamics of Crime and Control – New Theories for a World in transition*, Hart Publishing, 2000, p. 249.

[31] C. I. Loghin, *op.cit*, p. 66.

[32] S. Karstedt, K. – D. Bussmann, *op. cit.*, p. 244.

Regarding the extremely heterogeneous composition of the population and the high mobility among the inhabitants of certain parts of an area, these can be regarded as causes of the lack of social cohesion and, indirectly, of the comprising of the criminality characteristics.

Concerning that ethnic segregation and poverty concentration go hand in hand with an increase in violence, violent criminality can continue to increase by establishing illegal markets and organized crime, emphasizing ethnic conflicts and resentments and also through cultural or social adaptation of behavior in a threatening environment[33].

CONCLUSIONS

Therefore, we conclude by exposing the idea that these three models, *the preventive*, *the mixed* and *the social control* one, sums up the perspectives and characteristics of a justice system that has parts of the restorative justice and are presented as beneficial methods on the way to carrying out the act of justice. By applying these models one can better take into account the needs and interests of an individual, given that understanding the original aspects of the occurrence of criminality, identifying the causes and making a criminological prognosis on the phenomenon of social deviance can prevent, but more importantly, can eliminate some generating factors of this current.

The lack of empathy related to the organizational and functional structure of a *criminal mindset* has certain causes, certain items that once identified can be transposed in the ways to combat and prevent crime, while also highlighting the *etiological*, *preventive* and *explanatory* functions and the role of criminology as a science, criminogenic factors treated by this science (economic, demographic, socio-cultural factors) and the relationship with other branches (criminal law, criminal procedural law, forensics, legal medicine, judicial psychology, legal sociology).

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