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THE SYSTEM OF LOCAL COMPETENCES IN THE ROMANIAN PUBLIC ADMINISTRATION

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Abstract

The extension of administrative tasks, originally endowed with powers of supervision and maintain a social balance, it gradually became an engine that determines changes, a new level of transformation. Given the current status of local collectivities, through this research we intend to argue their tendency to become leading actors in the landscape of administrative, political, economic and social.

Our study will consider the effects of the successive transfer of powers upon local collectivities and its implications for the organization, mission and cooperation. These circumstances arise many challenges for state and local collectivity: changing relations between the institutions generated by the transfer of competences, redefining the maner of intervention and coordination, taking into account the economic imperative and upgrading administrative capacity at local level.

To understand the local collectivity administration system, we leave the general considerations about the new trends of public administration, and we will analyze the legal status of local competences set in terms of three dimensions: how they are defined, the extent of competences and how to modify the powers.

Keywords: local collectivity, competences, state, public service

Introduction

The theoretical construction of the notion of competence is differently analyzed by doctrine; from this perspective we notice the existence of a multitude of definitions, doctrinary debates and nuanced conclusions regarding this concept.

The Romanian administrative doctrine¹ has defined the notion of competence starting from the correlation competence - capacity, on the one hand and the concept of attributions on the other hand. It is estimated that the first two concepts are notions studied by the administrative law, while the concept of attributions of the administration is of interest for the science of administration.

The attributions of the public administration represent the objectives that the state authorities must undertake within the executive activity that they carry out². These objectives are based on state interests or on interests of the local communities, according to real social needs. In order to perform its activity, the local community has legal powers, namely the complex of rights and attributions or the authority that it has been invested with, for such purpose.

The doctrine considers that there is a close connection between task and attribution,

¹ Dana Apostol Tofan, *Instituții administrative europene*, C. H. Beck Publishing House. Bucharest. 2006, p.94.

² I. Vătu, M. Lepădătescu, I. Merlescu, M. Anghene, *Sfaturile populare, organe locale ale puterii de stat în R.S.R.*, Academiei Publishing House, Bucharest, 1964, p.91, apud. Ioan Santai, *op.cit*, p. 89.

showing that the latter represents the investiture conferred for achieving the first³.

The attributions of the administrative authorities are defined⁴ as being the entirety of social needs, determined objectively, assessed politically and enshrined through juridical norms; needs that represent the very reason of being of these authorities. They represent both the object as well as the finality of fulfilling the attributions.

Romulus Ionescu used to define the competence of state authorities as being: “the right and also the obligation stated by law and other normative documents to carry out a certain activity”, understanding from this that by having a special determined competence, the authorities of state administration have the capacity of being subjects in juridical relations⁵.

According to professor Ilie Iovănaș, “capacity does not identify itself with the competence of administrative authorities, although practically, we can realize if a certain collective formation has or does not have the quality of subject of administrative law, only by researching its legal competence, established in the Organic Law”; “hence the capacity of administration designates the possibility of participating as an independent subject in relations of administrative law, while competence designates the entirety of attributions of some administrative authorities, departments or persons and the limits of their performance. Attribution is legal vesting with certain attributions.” The above mentioned author, after analyzing the differences between competence and capacity distinguishes the following aspects:

- Capacity is proper to administrative authorities, while their organizational and functional structures also have competence;
- Capacity assumes the possibility to act on own behalf, while competence does not assume such independence;
- Capacity can not be transmitted to another subject of law, unlike the entirety of attributions that make up the content of the category of competence that can be delegated or assigned to other authorities or persons.

Another opinion⁶ supports that “competence determines the entirety of attributions of the authorities of public administration, of some departments within their structure or persons and the limits of their performance, stating that each authority of the public administration carries a certain competence, determined by its incumbent attributions and the purpose for which it has been established through juridical norms in accordance with constitutional principles. Competence must be determined and exercised specifically, in accordance to the legal dispositions by which it was established.

Regardless of the differences of opinion expressed in connection with the notion of competence, the doctrine⁷ has identified unanimously a series of characters of competence:

- the legal character evokes the fact that each authority of the public administration has a competence determined by law;
- the compulsory character, meaning that a failure to exercise the competence that it was endowed with attracts the responsibility of the authority of public administration;
- the autonomous character consists in the right of the authorities of public administration to accomplish their attributions and accordingly the obligation of other authorities to assure the necessary independence;
- the permanent character, meaning that it is performed continuously, repeatedly and unconditionally by the authorities of public administration.

³ Ioan Santai, *Drept administrativ și Știința Administrației*. vol. I, ALMA MATER Publishing House. Sibiu, 2011, p. 56.

⁴ Antonie Iorgovan, *Tratat de drept administrativ*, vol. I, IV-th edition, All Beck Publishing House, Bucharest, 2005, p.271.

⁵ Romulus Ionescu, *Drept administrativ*. Didactical and Pedagogical Publishing House, Bucharest, 1970, p.110.

⁶ Rodica Narcisă Petrescu, *Drept administrativ*, Hamangiu Publishing House, Bucharest, 2009, p. 35.

⁷ Ibidem.

The examination⁸ of the competence of the authorities of public administration is carried out taking into consideration various criteria:

- depending on the nature of social relations entered within the activity field of an authority, we identify a material competence (*ratione materiae*), which after its degree of spreading can be general or special, as the respective authority may decide about all essential problems of the executive activity (for example the local council or the county council) or strictly about certain problems that are reglemented rigorously.

- related to the spatial or geographical boundaries in which the material competence of a certain authority is manifested, we distinguish territorial competence that after its degree of stretching can be central or national territorial competence (in case of the government or ministeries) or a local territorial competence (the local council or the mayor);

- in relation with the quality of the person depending on which it is triggered the incidence of the action of norm and authority, we identify the personal competence of the subject of law;

- in relation with the time limits between which an authority exercises its attributions, we identify the temporal competence.

Usually this competence is unlimited, yet beside the fact that most of the authorities of public administration have elective bodies, the time limitation occurs in accordance to the mandate with which they were vested. The temporary character of an authority does not prevent the issuing of a document of a permanent nature (as an example we mention the local Commission for establishing the right of private ownership over agricultural lands and forests, founded for the application of dispositions of Law no. 18/1991, which in the exercise of its attributions issues titles of property, which order the restoration of property rights in favour of the persons entitled), as it is also possible that a temporary document is issued by a permanent authority (the mayor's institution issues building permits, which by their nature are documents of authority with a validity determined in time).

Depending on the extent of attributions established by the law maker in favour of local authorities, the law maker⁹ distinguishes three categories of competences:

Delegated competences – competences assigned by law to the authorities of local public administration, together with adequate financial resources, by the central public authorities, in order to exercise them on behalf of and within the limits established by them;

Exclusive competences – competences assigned by law to the authorities of local public administration for whose accomplishment they are responsible. The authorities of local public administration have the right to decide and also have the resources and means needed for the fulfilment of competences, with the observance of norms, criteria and standards established by law;

Shared competences – the competences exercised by the authorities of local public administration, along with other levels of public administration (county or central), with a clear separation of funding and power of decision for each responsible party.

In order to establish the juridical configuration of the statute of local competences we will examine the normative documents in which they are regulated, the extent or limitations of competences assigned to local authorities and the means for their alteration.

Regulation of competences

The constituent legislator consecrates in article 3, paragraph 3, the principles on which it is established the local public administration, without mentioning expressly the exercise of certain competences attributed for the settlement of local public issues.

⁸ Ioan Santai, *op.cit.*, p. 95 and the following

⁹ According to the provisions of article 2, paragraph 1, letters d), e) and f) from the Framework Law of decentralization no. 195/2006, published in the Official Gazzetee of Romania, Part I, no. 453 from the 25th of May 2006.

Therefore, the basis for the regulation of the competences of local authorities is represented by Law no. 215/2001, concerning the local public administration. Under the dispositions of article 3 from the above named normative document, the deliberative authority is vested *to solve and manage on behalf and in the interest of local communities that it represents, the local public issues*¹⁰.

In order to confer efficiency to constitutionally consecrated principles, the organic law maker has regulated¹¹ a general clause of competence in favour of the *local council that has initiative and acts, within the conditions of the law, in all issues of local interest, except for those granted by law to the competence of other authorities of the local or central public administration*.

The general clause of competence is defined generically by the concept of *public issues*, which must be solved by the local deliberative authority by exercising the attributions it has been vested with.

It has been born a controversy in doctrine¹², concerning the existence of the general clause of competence in favour of local communities. There is a trend that argues that communities have only those competences which have been conferred to them by Constitution or laws and that by introducing the principle of subsidiarity in the administrative organization this issue is not regulated and on the contrary the debate remains open, motivated as well by aspects connected to faulty drafting – for example the significance of the notion of *vocation* is insufficiently explained – of this principle that functions as a regulator of competence.

We notice that the law maker establishes certain categories of attributions in favour of local authorities through the regulations stated in the organic law, which are filled in by using norms of reference¹³, which leads us to the conclusion that the defining of attributions is disseminated in several texts of legislation, so that we do not have a complete picture of the attributions.

In this context the question arises whether local administrative documents can represent a source for the regulation of the attributions of local authorities. French literature shows that through administrative documents (unilateral or administrative contracts) concerning the establishment of local public institutions (public services/intercommunity associations), certain competences are statutory delegated in favour of these entities for performing the attributions with which they were endowed. In this circumstance the question arises whether the local administrative documents for the establishment of public institutions can be classified in the category of sources for the regulation of attributes or not.

The extent and nature of competences of local communities constitute a complex debate in doctrine, since their boundaries can not be identified precisely.

It is considered that on the ground of decentralization, local communities benefit of a general clause of competence, according to which the local authorities solve the local public issues.

In another view it is appreciated that given the inability to define precisely the concept of local public issues, local communities do not have the competence to manage local public issues, unless these are defined expressly and limitatively through law. This position is based on the idea that the attributions of local authorities are regulated in a disparate manner and that constantly the law maker transfers competences from the state in favour of local communities.

¹⁰According to the provisions of article 3 from Law no. 215/2001.

¹¹ According to the provisions of article 36, paragraph 1 from Law no. 215/2001.

¹² Didier Truchet, *Droit administratif*, PUF, Paris, 2010, p.95.

¹³ As an example we quote the provisions of article 36, paragraph 9 from Law no. 215/2001 that state: “The local council performs any other attributions prescribed by law”.

In the French doctrine¹⁴, we find the following statements concerning the definition of competences of local communities: it is distinguished the object (as it is defined by the territorial element), the sphere of activities of local communities and their competence, namely the type of act it can perform as concerns solving a certain local problem.

Depending on the object of competences we distinguish two categories of attributions: some of them defined expressly and limitatively by law and a category of attributions by which it is granted to local authorities a certain liberty of appreciation in the administrative action; in this sense we mention: the possibility to defend in justice the local public interest, the possibility to establish public services of local interest, the possibility to set certain taxes, etc.

The importance of classification lies in that the legal definition of attributions is likely to eliminate the risk of *excessive power of local public authorities*¹⁵, *endowed with a general material competence*.

Another debate refers to the resolution of problems that appear from the *distribution of competences between state and local communities and between local communities themselves*.

A first solution is to be found in the constitutional norms¹⁶ that state the basic principles of local public administration, respectively local autonomy, devolution of public services, decentralization and prohibition of subordination between local communities, them being *autonomous administrative authorities*.

Delimitation of competences by listing the attributions is likely to limit the local normative power to certain hypotheses regulated by the law maker, being a transfer of competences in favour of local communities yet pretty rigid¹⁷ within the present social and economical context. We appreciate that decentralization and division of competences between state and local communities constitutes a classical planning within our legislation, taking into account the tendency from the European space where we find a decentralization that allows *the construction of a less uniform local system by integrating a new concept, namely the right to experiment in favour of local communities*¹⁸.

However, this division of competences between state and local communities it is not settled and the tipping from side to side is frequent; the groping of the law maker being discovered with the overlapping of competences or the contest of competences.

This is the hypothesis in which there are exercised both national and/or county competences as well as local competence concerning the regulation of a certain situation. *An example would be the management of primary and secondary education that belongs to local communities, under the considerable reserve that the state is responsible for teaching and human resources. That being, one gets to the situation in which local community has the competence to decide the building of a new educational institution, yet it is conditioned by the power of state to allocate human resources. Examples may continue especially because recently there have been registered worse situations, in which the local community has spent*

¹⁴Jean-Bernard Auby, Jean-François Auby, Rozen Noguellou, *Droit des collectivités locales*, 5-a edition mise à jour, PUF, Paris, 2009, p. 217.

¹⁵ Dana Apostol Tofan, *Puterea discreționară și excesul de putere al autorităților publice*, All Beck Publishing House, Bucharest, 1999, p. 328.

¹⁶We appreciate that another incidental principle in this circumstance is *the principle of subsidiarity*, although as concerns us this is established only in doctrine; the importance lies in the fact that in some member states of the E.U. we find it regulated in the very constitutional norms.

¹⁷Local communities have discretionary powers and a margin of appreciation; in this sense please consult Dana Apostol Tofan, *Puterea discreționară și excesul de putere al autorităților publice*, All Beck Publishing House, Bucharest, 1999, p.327-342.

¹⁸In France the concept of experimentation has been introduced during the revision of Constitution in 2003. The Law concerning the development of local liberties and responsibilities from the 13th of August 2004 has organized a new transfer of competences in favour of local communities.

important amounts of money for the rehabilitation of educational or medical institutions, while the state ordered the restructuring of these units by closing them and dismissing teachers or medical staff.

We notice as well a category of *competences whose membership varies*. An example in this sense is represented by competences as concerns planning (building permits, landscaping plans, etc.) that are assigned either to the state, either to local communities (county council or local council), *depending on how it operates the incidence of legislation in matter of historical monuments or depending on the existence or non-existence of local planning*.

In doctrine¹⁹ it is appreciated that there are no local competences through their nature. As a consequence, the competences are exclusively legal, the determination of their content, sphere of intervention or margin of appreciation of the local authorities are very well delineated by juridical norms.

The examination of general limitations of the competences of local communities²⁰ is performed through the prism of two criteria:

The areas of intervention that the law maker granted exclusively to the competence of state. In principle, in case of diplomacy and international relations only the state intervenes, yet we notice a certain capacity of action granted to local communities²¹ by the regulation of the attributions *referring to internal and external interinstitutional cooperation*;

Definition of local public interest. The concept is difficult to define as it is subjective and susceptible to variations depending on the local context. Jurisprudence asks itself if a certain initiative of the local community complies or not with the local public interest. In this case, the debate has in view the situation in which local public services are being established that are capable of competing private initiative. It is estimated that such action can only intervene to the extent if the importance of local needs and the lack of private initiative make it correspond to a local public interest.

The transfer of competences

Through decentralization it is realized the transfer of administrative and financial competence from the level of central public administration to the level of local public administration or the private sector. The rules of the process of decentralization respect the principle of subsidiarity, economies of scale and geographical area of beneficiaries.

The transfer of competences takes place in stages, so that the government, ministries and other specialized authorities of the central public administration observe the following procedures:

- Develop the strategies concerning the transfer of competences to the authorities of local public administration and the projects of normative documents for their implementation;
- Identify necessary resources and the integral costs related to the competences that are being transferred and also the budgetary sources based on which they are financed. The resources identified as such are transferred to the authorities of local public administration, under the law;

¹⁹Jean-Bernard Auby, Jean-François Auby, Rozen Noguellou, *Droit des collectivités locales*, 5-a edition mise à jour, PUF, Paris, 2009, p. 220.

²⁰ Ibidem, p. 222.

²¹ The provisions of art. 36, paragraph 7 from law no. 215/2001 state: "In exercise of the attributions referred to in paragraph (2), letter e), the local council: a) decides under the law, the cooperation or association with Romanian or foreign juridical persons, in order to commonly finance and perform actions, works, services or projects of local public interest; b) decides under the law, the twinning of the commune, city or municipality with administrative-territorial units from other countries; c) decides under the law, the cooperation or association with other administrative-territorial units in the country or from abroad and also the adherence to national and international associations of the authorities of local public administration, in order to promote some common interests." We find similar dispositions in article 91, paragraph 6 from Law no. 215/2001.

- Ensure in collaboration with the associative structures of the authorities of the local public administration, the correlation on the long-term between the transferred responsibilities and the related resources, in order to cover the variations of cost in the provision of public services and decentralized services of public utility.

Referring the issue of transfer, in doctrine it is discussed whether there is or there is not a threshold that must be taken into account, namely if the competences considered as “royal” can be transferred to local communities.

The traditional vision of constitutional law converges to the *indivisibility of sovereignty*. This internal sovereignty consists of those *royal competences* which are according to tradition, reserved only for the state. In the context of recent developments in the structure of state and emphasizing the role of local communities and implicitly the transfers of competences to these communities, we can ask ourselves which are those royal competences reserved to the state that ensure the exclusivity of internal sovereignty.

One of the principles coordinating this system of distribution of competences is the *principle of subsidiarity*. It allows at first to justify those competences granted to public communities, other than the state. Secondly, this principle justifies the separation of competences between state and local communities and also the significant number of competences conferred to those communities. This principle however does not allow us to determine in an exact manner which are the competences²² to be withdrawn from the state in order to be given to local communities.

The consolidated version of the Treaty on the European Union, under article 5, paragraphs 1 and 2 provides that: “*The delimitation of the competences of the Union is governed by the principle of assignment. The exercise of these competences is regulated by the principles of subsidiarity and proportionality. (2) Under the principle of assignment, the Union acts only within the limits of competences that have been attributed to it by the member states through treaties in order to attain the objectives set out therein. Any competence that it is not assigned to the Union in the treaties remains to the member states.*”

From the analysis of the texts mentioned above, it results that the transfer of competences is performed at several levels:

1. The assignment of competences to the Union for achieving the objectives specified in treaties;
2. The transfer of competences to local communities for achieving local autonomy.

In essence, through this method of transferring or assigning competences, it is desired the implication or association of local communities for the elaboration and implementation of EU policies.

The principles that structure this fundamentally political concept, *multilevel governance*, seek to ensure the participation of local communities to the functioning of the Union. In order to achieve this objective, *three cumulative conditions must be met: partnership, participation and effectiveness. In the White Chart on multilevel governance it is provided that: good European governance involves cooperation for accomplishing the common welfare between the elected authorities and the actors of civil society. Regional and local authorities are invested with an indisputable democratic legitimacy. Being directly accountable to the citizens, they represent a major part of democratic legitimacy in the European Union and exercise an important part of political power.*

Legitimacy, effectiveness and visibility of the functioning of the Community are guaranteed by the contribution of all actors. They are assured if regional and local authorities are genuine partners and not mere intermediaries. Partnership means more than participation and consultation.

²² Didier Truchet, *Le droit public*, PUF, Paris, 2010, p. 15, shows that royal functions designate the prerogatives of sovereignty. An exhaustive list including such rights is: printing currency, the right to justice, enactment, amnesty, etc.

Conclusions

1. The very place that local communities occupy within the system of public administration is determined by the means of establishment, organization and operation, as well as by the incumbent competences for the performance of specific attributions, in comparison to other powers or systems of authorities of the public administration. It is considered that on the ground of decentralization, local communities benefit of a general clause of competence, according to which the local authorities solve the local public issues.

2. *Our study reveal that given the inability to define precisely the concept of local public issues, local communities do not have the competence to manage local public issues, unless these are defined expressly and limitatively through law. This position is based on the idea that the attributions of local authorities are regulated in a disparate manner and that constantly the law maker transfers competences from the state in favour of local communities.*

3. Therefore the examination of general limitations of the competences of local communities was performed through the prism of two criteria: the areas of intervention that the law maker granted the competence of state and the definition of local public interest.

4. We apreciet that through decentralization it is realized the transfer of administrative and financial competence from the level of central public administration to the level of local public administration or the private sector. The rules of the process of decentralization must respect the principle of subsidiarity, economies of scale and geographical area of beneficiaries.

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THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN KUWAIT
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Abstract

This article is an analysis of the enforcement of foreign arbitral awards in Kuwait, an Islamic nation governed by Sharia law. The need for this analysis stems from the potential conflict between the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the ‘New York Convention’)(which came into effect in Kuwait on 27 July 1978)and Sharia law and the need to merge the two into a cohesive legal system.The Gulf Cooperation Council (GCC) has a representative office in Kuwait that facilitates the applicable provisions contained therein.

Keywords: The Enforcement of Foreign Arbitral Awards

Introduction

Arbitration, under international law, is referred to as a formal dispute settlement mechanism¹ similar to a common judicial procedure.² Arbitration is a binding determination of a dispute by a third party who is sufficiently competent and knowledgeable to resolve a dispute in accordance with a set of legal principles.³ Flexibility is offered to the disputing parties, with an arbitration tribunal being set up, both on an ad hoc or permanent basis, such as the Permanent Court of Arbitration.⁴

Arbitral awards, according to Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’), are defined as including ‘not only awards made by the arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted’.⁵ This definition encompasses all kinds of arbitral awards to which the parties signatory to the Convention are party. According to the Convention, an arbitral award includes the ‘agreement in writing’⁶that is an arbitration agreement signed by the parties or an arbitration clause contained in an exchange of letters.⁷

Article I(2) of the New York Convention has sought to⁸ define an arbitral award to mean that it will not be limited to awards that are made by the arbitrators appointed in each

¹ W. Ragib, ‘Hal Altahkeem Nao’min Alqada?’ (‘Is Arbitration a type of Litigation?’),*University of Kuwait Law Journal* 17(1) (1993): 131-172.

²See D. Rothwell, S. Kaye, A. Akhatkavari &R. Davis, *International law: Cases and Materials with Australian Perspectives*(Melbourne: Cambridge University Press,2011).

³*Ibid.*, p. 673.

⁴ 1907 Convention for the Pacific Settlement of International Disputes (Hague I) [1997] ATS 6.

⁵Article II of the New York Convention.

⁶Article II(2) of the New York Convention.

⁷P. Nacimiento, *New law on civil and commercial arbitration*, *International Commercial Litigation*, 46 (1996):5-10.

⁸ Article I(2) of the New York Convention.

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case but shall also include those that are made by permanent arbitral bodies to which the parties have submitted.⁹

The Judicial Arbitration Law No. 11 of 1995, for its part, does not provide a precise definition of foreign arbitration awards. It does, however, set out the procedure whereby a panel of arbitrators can be formed in the Court of Appeal comprised of at least three judicial officers and two arbitrators to be chosen in each dispute for each party.¹⁰

Kuwait currently follows the procedures of the New York Convention, under the principle of reciprocity with public policy, as the main ground disqualifying enforcement of foreign arbitral awards in Kuwait. This is outlined in Kuwait's Code of Civil and Commercial Procedure. Additionally, legislation and practices that guide the enforcement and recognition of foreign arbitral awards include the UNCITRAL Model Law and domestic laws, as well as the various reservation clauses and reciprocity aspects. This article seeks to explore the concept of arbitration law and practice and arbitral awards in the context of Sharia law, and current arbitration laws in Kuwait as well as demonstrating how foreign arbitral awards are enforced in Kuwait and the grounds of non-enforcement of foreign arbitral awards, which include procedural and substantive technicalities arising from non-adherence to the law, arbitrator competency, legality of arbitral awards, and other provisions in the Code of Civil and Commercial Procedure.

Arbitration in Sharia-based Countries

The concept of arbitration is discussed in the Koran and therefore deep-rooted within the Arab countries long before integration with Western countries. Arbitration is part of Islamic principles as the Koran depicts the arbitrator as a respected member of society. For example, it gives a religious individual the authority to deliver judgments based on any commercial or property disputes.¹¹

Arbitration awards in countries whose law is based on the Sharia (the code of law adopted from the teaching and guidelines of the Koran) must contain a description of the dispute, the facts as determined under the Sharia, the rationale behind the award with reference to the Sharia, and the decision. The major difficulty is that in such countries it is compulsory for arbitration awards to be reviewed and approved by the courts.¹² This difficulty has been resolved in several Muslim countries, to some extent, by the ratification of the New York Convention. The latter has limited the grounds on which domestic courts can reject a foreign commercial arbitral award. Nevertheless, the New York Convention permits the rejection of such awards if the enforcement of such award is against that country's public policy.

Arbitration Law in Kuwait

Arbitration, and particularly the ability to refer to arbitration when international commercial disputes arose, became of great importance in Kuwait during the 1940s with the growth of the travel industry within the region. It is noteworthy that the Pleadings Law¹³ (governing arbitration and the way in which commercial parties undertake negotiations) changes with the underlying economic conditions. The growth of the oil industry within Kuwait made it necessary to consider how Kuwait should deal with international challenges. The drive to become more economically efficient and the recognition that international

⁹ Article I(2) of the New York Convention.

¹⁰ Enforcement of Foreign Judgments, Abdullah KH AL-Ayoub & Associates, Kuwait

¹¹ K. Thomas, 'Arbitrating Disputes with Middle Eastern Entities', *International Law News* 39(2) (2010), 8 –11.

¹² Weinberg Wheeler Hudgins Gunn & Dial, 'Recent Developments in Arbitration Law in the UAE, *International Arbitration* (2010):1-20.

¹³ S. Herbert, *Country Factsheet* (2nd edition, Dlais Lutz and Stibbe, 2009), 3.

operations were a fundamental part of the economic development of the region led to arbitration being formally recognised by the State of Kuwait.

A key part of this analysis of how arbitration is enforced within the State of Kuwait is to identify how Kuwait deals with traditional arbitration. First, the perceived advantages associated with arbitration will offer an explanation, by way of background, as to why certain judicial decisions are enforced in Kuwait and the difficulties that arise in attempting to enforce arbitral judgments within Kuwait for Kuwaiti nationals.

Arbitration broadly falls into one of four categories. First, there is optional arbitration, where the parties may include clauses in their contracts in accordance with which they will submit to arbitration in the event of a dispute. Second, there is institutional arbitration whereby certain business, such as the stock market, must be submitted to an institutional arbitration in which the capital markets authority is chiefly responsible and there is no option to opt out. In fact, Kuwaiti arbitration law demands that any arbitration law must be in harmony with public order. In Article 73¹⁴ of the Kuwait legislation, there is provision that conflicting laws (specifically, foreign laws) must not be applied where they violate order or ethics in Kuwait. Third, there is international arbitration. While there is no fundamental distinction between national and international arbitration, international arbitration in Kuwait is generally referred to as any arbitration that falls outside of Kuwait and where Kuwait has agreed to recognise foreign arbitral awards, to a certain extent, thus bringing international arbitral awards within the ambit of Kuwaiti law. Finally, there is judicial arbitration which is undertaken by the Ministry of Justice. This has recently been amended and therefore, as one of the more recent developments in the recognition of arbitral awards in Kuwait, is fundamental to this analysis.

The Enforcement of Foreign Arbitral Awards in Kuwait

In general, the enforcement of foreign arbitral awards in Kuwait is similar to the enforcement of foreign judgments. The enforcement of a foreign arbitral award in Kuwait requires the satisfaction of the five conditions.¹⁵ First, reciprocity reservation must be considered before any foreign arbitral award is enforced in Kuwait, because some member states only choose to enforce awards from other states that enforce awards formulated in their civil law. Second, due process of service must have been followed to make the arbitral award enforceable. Third, the foreign arbitral award must be the final judgment pronounced by a competent arbitral tribunal in that particular state. Fourth, neither public policy nor morality should be violated by the declaration made in the arbitral award. Finally, the case determined in the award should be capable of being subjected to arbitration, as provided for in the domestic law, that is, Kuwaiti civil law and traditional Sharia law.¹⁶ There are general guidelines that facilitate the arbitration process in Kuwait. As stipulated in the Pleading Laws, the parties involved in arbitration proceedings are guided by a procedure of either an *ad hoc* or institutional arbitration rule.

Essentially, Kuwait enforces arbitral awards subject to reciprocity. The arbitration laws in Kuwait are not based on a comprehensive and specific regulation, but rather on the Civil and Commercial Procedure Law. Moreover, it is not dependent on the UNCITRAL Model Law;¹⁷ thus the definition of an arbitral award would depend on the choice of law.

In February 1995, Kuwait set up its first arbitration tribunal for civil and commercial issues. This tribunal has been granted exclusive jurisdiction over disputes between private

¹⁴Court of Cassation Appeal No 39/87 Civil, Hearing 22.

¹⁵Court of Cassation Appeal No 39/87 Civil, Hearing 22

¹⁶*Ibid.*

¹⁷S. Herbert, *Country Factsheet* (2nd edition, Dlais Lutz and Stibbe, 2009), 3.

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corporate bodies, public authorities, government ministers, and State-owned corporations.¹⁸ The law states that a foreign arbitral award also follows the same system as a domestic arbitral award.

Kuwait enacted the Code of Civil and Commercial Procedure that came into effect in 1980¹⁹ and amendments to other legislations that are crucial for the enforcement of awards. Moreover, being a GCC country, Kuwait has incorporated Sharia law to effect enforcement of foreign arbitral awards.

However, the most significant instrument for Kuwait has been the New York Convention. The New York Convention applies in principle to each and every arbitral award, although certain reservations are permitted to the signatories under Article X. Thus, a Contracting State has the option of recognising and enforcing an arbitral award only if it has been made in another Contracting State. This is the basis of reciprocity. In addition, a Contracting State may declare that it will restrict the application of the Convention to disputes arising from legal relationships that are deemed to be commercial under the laws of the country making such declaration.²⁰

Consequently, two important reservations have emerged: the reciprocity reservation, which permits a Contracting State to refuse recognition and enforcement of arbitral awards unless and until the awards have been pronounced in a Contracting State and which were adopted in Kuwait's reservation clause; and the commercial reservations, which allow a Contracting State to restrict the application of the Convention to commercial disputes, as determined by its domestic laws.²¹ These reservations are crucial to Kuwait, as they ensure that it is only obliged to recognise arbitral awards made by Contracting States that recognise arbitral awards from Kuwait.

Grounds for the Refusal of Enforcement of Foreign Arbitral Awards in Kuwait

The place of countries that declare arbitral awards against Kuwait and do not consider themselves under an obligation to enforce Kuwaiti foreign arbitral awards is not well determined, and parties to such awards may fail to have the awards enforced. There are several grounds that need to be proved by an opposing party in Kuwait. The first is capacity. The incapacity of a party to an arbitration proceeding or an arbitration agreement must be determined by a competent arbitral tribunal. Second, the principles of natural justice must have been upheld, or this can be a ground for not enforcing the arbitral award. Third, there must have been a fair hearing and a lack thereof is a ground for refusal of recognition as a principle of natural justice because it prejudices the interests of the parties to the arbitration agreement. Fourth, where the arbitrator exceeded his powers in making the arbitration award or the arbitration tribunal had no jurisdiction to determine the dispute, then the Kuwait court cannot enforce such an agreement. Last, adverse procedural irregularities may make the arbitral award wholly unenforceable by any court of competent jurisdiction.²²

There are additional grounds capable of giving rise to refusal of recognition and enforcement of a foreign arbitral award: where any issue or subject matter submitted to arbitration was not capable of being subjected to arbitration; where the subject matter of the dispute was incapable of being resolved by arbitration, as per the law of that country; and where the public policy of that country would be violated if the foreign arbitral award was granted recognition and enforcement.²³ Disputing countries have, on several occasions, chosen

¹⁸P. Nacimiento, *New law on civil and commercial arbitration*, International Commercial Litigation, 46 (1996):5-10.

¹⁹ Law No. 38/1980 (4 January 1980).

²⁰*Ibid.*, 616.

²¹ Law No. 38/1980 (4 January 1980).

²²*Ibid.*

²³*Ibid.*

to use arbitration as the best way to solve their dispute, based on the fact that it is consensual, private, and reasonably effective compared to a court process. The place of arbitration is left to the parties to elect²⁴ and this, in some jurisdictions, can be a ground for setting aside an arbitral award.²⁵ The place of arbitration must be in a neutral location and should, as far as possible, be unconnected to either of the disputing countries. In addition, the place of arbitration should be equally convenient in terms of access for such countries. Moreover, the place of arbitration should provide the necessary facilities for hearings and meetings required in a dispute between countries.²⁶

Conclusion

The main focus of this article was on the extent to which foreign arbitral awards are enforced in Kuwait with various notable exemptions in terms of recognition and enforceability. As an Islamic nation, the legislation of Kuwait is still subject to Islamic laws. Whereas Kuwait has developed legislation to a considerable extent, its Code of Civil and Commercial Procedure is nevertheless based on the Islamic Sharia law. Consequently, the Sharia will have an influence even on international arbitration. This is potentially disadvantageous to businesses from non-Islamic nations.

Nevertheless, Kuwait has consistently honoured its international treaty commitments. To this end, it has emphasised its intention to attach greater importance to such commitments than to its domestic laws. Notwithstanding such intention, when it comes to enforcing foreign arbitral awards, Kuwait can and does protect domestic interests, when such protection favours public policy,²⁷ by virtue of the Kuwaiti Code of Civil and Commercial Procedure.

There are several international laws that govern arbitration in Kuwait, the main one being the New York Convention, which came into effect in Kuwait on 27 July 1978²⁸ and has been incorporated into domestic law. Additionally, a basis for the recognition and enforcement of arbitral awards is set out in the Code of Civil and Commercial Procedure and other laws, relevant in providing the procedural law as well as the substantive laws that govern the recognition and enforcement of foreign arbitral awards in Kuwait.²⁹ International law principles and treaties are therefore instrumental in the way in which Kuwait arbitration awards are enforced and recognised.

However, the Convention provisions were not adopted wholly; Kuwait held a reservation under Article I(3) of the New York Convention, with no reservation under those that govern arbitration agreements that involves commercial transactions.³⁰ Of relevance in the recognition and enforcement of foreign arbitral awards in Kuwait are the grounds permitting the denial of recognition and enforcement. The main ground is that of public policy—that is, if the arbitral award fails to meet the threshold set out in the New York Convention or in the Sharia laws, then it cannot be recognised.³¹ Other grounds include the arbitrability of the arbitration dispute. The foreign arbitration proceedings should have been commenced at the earliest time³² and in the relevant court. As such, Kuwait recognises and enforces foreign

²⁴ P. Geoffrey, 'Settlement of International Disputes: The "Rainbow Warrior" Affair', *Commonwealth Law Bulletin* (1989): 586-596.

²⁵ J. Collier & V. Lowe, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press, Cambridge, 2005), 565-569.

²⁶ *Ibid.*, p. 156.

²⁷ *Ibid.*

²⁸ Decree No. 10 of 1978.

²⁹ J. El-Ahdab, *Arbitration with the Arab Countries* (3rd edition, Arbitration Center): Kluwer Law International, 2011) 60-74.

³⁰ P. Fouchard, E. Gaillard, B. Goldman & J. Savage, *Goldman on international commercial arbitration* (Kluwer Law International, 1999), 150.

³¹ H. Kronke, P. Nacimiento & D. Otto, *Recognition and enforcement of foreign arbitral awards: A global commentary on the New York Convention* (Kluwer Law International, 2009), 365.

³² Article 199 of the Kuwaiti Code of Civil and Criminal Procedure 1980.

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arbitral awards in certain circumstances. However, the Kuwaiti courts are empowered to reject a foreign arbitral award, and such refusal will be on the grounds of lack of reciprocity and public policy.

One key element in ensuring the enforcement of arbitral awards across Kuwait is Kuwait's willingness to become part of an international community in terms of trade, and this requires the Kuwait government to put in place statutory provisions to provide the certainty and finality of arbitral awards, whether they are national or international in nature. It is this continuous desire to harmonise and to become part of the international community that will ultimately lead to greater certainty in the area of the enforcement of arbitral awards.

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ASPECTS OF MEDIATION IN ROMANIA

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Abstract

An important concern for the European Council in the past 15 years was to find ways for settling some divergences appearing in European Union countries. For this purpose, a number of recommendations were adopted for their settlement by mediation. We have tried below a presentation thereof as well as of some aspects related to mediation in our country.

Keywords: *mediation, conflict, negotiation, law, crime, civil case*

Introduction

Mediation it is a very current legal instrument intended for conflict resolution, which starts from the principle of offsetting the parties' interests, based on their free will, durable and perceived as very advantageous. This is the only alternative whereby judges are benefited in the context of the globalization phenomenon, to get rid of the many cases they should settle.

Mediation can settle in a balanced and concessive manner the interests of both the citizens and the State in the same time, an activity whereby conflict situations are settled amicably, over a much shorter period of time and with greatly reduced costs.

Although it approaches issues related to relationship and communication as well, mediation as defined by Christopher Moore (1996) places the most attention on the negotiation between the parties in order to make the best decision regarding the problem they face, mutually accepted by them¹. The choice of approach to mediation supports also situations in which *negotiation* may appear at the end of a case or relationship, and not necessarily at the beginning thereof or to strengthen the relationship or to settle it favorably for the parties.

The concern for establishing criteria for balancing the gains and losses must exceed for the parties involved the barrier of their own interests, having to the fore their common interest.

The Council of Europe has adopted several Recommendations relating to mediation, establishing principles and directions for action addressed to the Member States, namely Recommendation no. 98 (1) on family mediation, Recommendation no. 99 (19) concerning mediation in penal matters, Recommendation no. 2001 (9) on the alternatives to litigation between administrative authorities and private persons and Recommendation no. 2002 (10) with regard to mediation in civil matters. Furthermore, in 2007, the Council of Europe has adopted three guidelines in criminal, civil and administrative matters, and later, in 2002, the

European Commission has adopted the Green Paper, which stipulates alternatives to settle disputes in civil and commercial matters.

The emergence of these European imperatives meant to settle the many conflicts by means of mediation led to the adoption in our country of the Law no. 192/2006 on mediation and organization of the mediator profession.

The European Union has adopted one more directive with direct effect on mediation and implicitly on the regulatory documents related to this area, namely Directive no. 2008/52/EC of the European Parliament on aspects of mediation in civil and commercial matters, which allowed European States to apply it also in their internal procedures.

1. Mediation in criminal cases

Mediation as an alternative method of dispute settlement offers the possibility of placing a third party in the conflict between the parties, which is neutral and unbiased and which presents the legal means by which one can identify a solution beneficial to all parties involved, all the more so in criminal conflict mediation. The mediator's role is to bring in the center of the negotiations the parties' demands and claims, to encourage the outlining of an agreement between those involved.

The legal framework is provided by the Law no. 192/2006 on mediation and organization of the mediator profession and by the Law no. 202/2010 modifying the **Criminal Procedure Code**, which, in art. 10 paragraph 1 letter (h) has the following wording: "*prior complaint was withdrawn or parties reconciled or an agreement for mediation according to the law was entered into, in the case of offences for which the withdrawal of a complaint or reconciliation of parties precludes criminal liability*".

This provision prevents the implementation of criminal action or the exercise of criminal action or, if they have been made after the agreement, they shall cease. The conclusion of a mediation agreement can be done only for the crimes for which the withdrawal of the complaint or the reconciliation of the parties precludes criminal liability, crimes investigated at the prior complaint of the injured party. In practice, the most common mediation cases are found in the crimes of violence, art. 180 of the Criminal Code, personal injury, art. 181 of the Criminal Code, personal injuries through negligence article 184 of the Criminal Code, rape, article 197 of the Criminal Code, destruction, art. 217 of the Criminal Code and family abandonment referred to in art. 305 of the Criminal Code.

2. The conclusion of the mediation agreement

According to Law no. 202/2010, art. 56 paragraph (1), mediation procedure ends "by the conclusion of an agreement between the parties as a result of conflict settlement". It is worth mentioning that art. 56 paragraph (1) of Law no. 192/2006 shows that when the parties are in conflict and reach an understanding, one can draw up a written agreement containing all the terms undertaken, which has the value of a private deed. This agreement is drawn up by the mediator, except for the situations when the parties and the mediator agree on its drawing up.²

The conclusion of the mediation agreement is performed following a mediation procedure that goes through several stages. In accordance with Law no. 192/2006, these stages are: the procedure prior to the conclusion of the mediation agreement, mediation performance and the termination of the mediation procedure, which is made "*by the conclusion of an agreement between the parties, following conflict resolution*" [art. 56 paragraph (1) letter (b)], "*by the finding by the mediator of mediation failure*" [art. 56 paragraph (1) letter (b-)], "*by submitting the mediation agreement by one of the parties*"

² Dumitru-Virgil Diaconu , Mediation in criminal causes, Ed. C.H. Beck, Bucharest 2012, pag. 5

[art. 56 paragraph (1) letter (c)] or “the unilateral termination of the mediation agreement [art. 60 paragraph (1) and (2)].³

3. Mediation concerning the civil side of the case

Mediation on the civil side of the case is regulated by the Criminal Procedure Code, as amended by Law no. 202/2002, art. 16 being entitled “*Transaction, mediation and recognition of civil claims*”.

Thus, paragraph (1) states that “*the defendant, during the entire criminal trial, both the civil party and the party liable in civil terms, may conclude a transaction or an agreement for mediation, according to the law*”. In paragraph (2) “*the defendant, with the consent of the party liable in civil terms, may recognize, in whole or in part, the claims of the civil party*”.

By Law no. 202/2010, the legislator introduced the procedural institution of mediation, not only on the criminal side, but also on the civil side. With regard to mediation, three ways of settling the civil side in a criminal case were introduced, i.e. mediation, transaction and the total or partial recognition of civil claims.

The new institutions of mediation, transaction and recognition introduced by Law no. 202/2010 in the current Criminal Procedure Code are applicable to the civil side in criminal proceedings, which is completed with rules relating to mediation in the event of a civil dispute pending before the courts.

It should be also stated that mediation, transaction and total or partial recognition in connection with the defendant as covered by the provisions of art. 16 of the Criminal Procedure Code are part of Section II entitled Civil Action, governed by the rules of civil procedure.⁴

4. Mediation from the perspective of the New Criminal Procedure Code

To determine the parties or participants to resort to mediation, the New Criminal Procedure Code stipulates the rights of the injured party (art. 81), of the defendant (art. 83), of the civil party [art. 85 paragraph (1)] and of the party liable in civil terms [art. 81 paragraph (1)] to turn to a mediator.

There is a new regulation designed to ensure the complete procedural framework for the compulsory recommendation of mediation not to be only formal, but also effective. That is why the New Criminal Procedure Code provides for the suspension of the criminal case for mediation, both at the stage of proceedings or prosecution, correlating the text of the special law no. 192/2006 with the provisions of the New Criminal Procedure Code.

Regarding the settlement of the civil side of the case, it takes place with the settlement of the criminal side of the case, the Court ruling in the same judgment upon the civil action as well (art. 397), comprising the content of the operative part and the decision made with respect to the settlement of the civil action, which can also be settled by mediation.

5. Mediation of cross-border conflicts

Since the 1980s, the continental approach to ADR methods has increased in intensity – from Recommendations of the Committee of Ministers concerning the access to justice (1981) or decreasing the burden on the courts (1986), at the level of the Council of Europe – to the most important document of the European Union concerning the mediation: Directive 2008/52/EC. It is noteworthy that the trend goes from simple recommendations to unification at European level, through Directives that, according to their programmatic value, set the

³ M. Udriou, *Procedura penală, Part generală, Part speciala*, Ed. C.H. Beck, Bucharest, 2010, p. 38

⁴ Dumitru-Virgil Diaconu, *Mediation in criminal causes*, Ed. C.H. Beck, Bucharest 2012, pag. 8.

goals to be achieved by the Member States, leaving the choice of means to the discretion of national authorities.

In Romania, the mediation and the mediator profession were regulated by the adoption of Law no. 192/2006, presuming that the mediation constitutes one of the major themes of the justice reform strategy and is a priority in the Plan of action for the implementation of the Strategy for the reform of the judiciary 2005-2007, aiming to reduce the activity volume of the courts through the adoption of the law.

Mediation is regarded as an elaborated process in which the parties in conflict have the opportunity to express their wishes, needs, aspirations, expectations and interests, while helping the individual and group reflection, in order to make the most satisfactory decision for themselves.

Directive 2008/52/EC identifies the mediation in cross-border disputes as a distinct field of mediation application. In this respect, the directive brings to the fore the need for differentiation between the general aspects that govern the work of mediators in any event subject to mediation, and the aspects specific to mediation in cross-border litigation. Every situation subject to mediation is different, has its own peculiarities and, as such, requires a permanent adaptation of the mediator, who must demonstrate great flexibility and constant adaptability.

Mediation used in relation to judicial proceedings is primarily oriented towards the mutually agreed formulation by the parties in the conflict of an agreement on the issues that are the subject of the dispute, thus providing an out-of-court alternative, faster and less expensive for them. Statistics at European level in commercial matters indicates that at the level of the 26 Member States the Directive no. 2008/52/EC is applicable to, the duration of a trial is, on average, of 505 calendar days (Belgium), with a maximum of 1,290 calendar days (Slovenia). The statistical costs associated with these trials represent 16.6% (Belgium), on average, at European level, going up to 33.0% (Czech Republic) of the amount to be recovered in court. Estimated costs include legal costs (legal fees, experts, etc.), costs for attorneys' fees and expenses incurred for the enforcement of the judgment.

For example, in Belgium the average duration of a trial in court is 505 calendar days and legal costs amount on average to 16.6% of the amount to be recovered that is the subject of the trial, while in Italy the average duration of a trial is 1,210 calendar days, and legal costs amount on average to 29.9% of the amount to be recovered in court. Using mediation, parties need on average 45 days in Belgium and 47 days in Italy in order to settle the dispute, and the costs incurred as a result of mediation in these countries amount only to 43.75% of the costs of a trial in Belgium and only 27.78% of the costs of a trial in Italy.

Conclusions

It is obvious that mediation in the field of cross-border disputes pose a high element of complexity due to different laws incidental in the case and due to different national jurisdictions, requiring specialized mediators and a clear framework legislation in cross-border mediation at European level.

It is obvious that the concept of cross-border mediation does not refer exclusively to the disputes mediated in the Member States of the European Union; cross-border mediation refers to the conflicts subject to this ADR method where the parties come from different States, without territorial restriction. Thus, we believe that cross-border mediation in the meaning of the European regulations (in particular, Directive 2008/52/EC of the European Parliament and of the Council of May 21st, 2008 on certain aspects of mediation in civil and commercial matters) must not be confused with cross-border mediation defined in universal acceptance. We start from the premise that the directive on mediation in civil and commercial matters is just a first step in cross-border mediation and by no means a finalized framework legislation that can no longer be improved.

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CONSIDERATIONS REGARDING THE FIRST PRELIMINARY RULING OF THE HIGH COURT OF CASSATION AND JUSTICE

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Abstract

Our intention is to observe the way activity was organized for the solution of legal matters by means of the preliminary ruling of the High Court of Cassation and Justice, to analyze the first notification and the first decision of the special panel in civil matters, and subsequently lay down proposals for the accountability of those involved in the new procedural "mechanism", already in use.

Key words: preliminary ruling, first decision, civil matters, High Court of Cassation and Justice, indicator for the evaluation of judges' professional performance

Introduction

The homepage of the High Court of Cassation and Justice (HCCJ) introduced the Panel for the solution of legal matters and its interface contains information about jurisdiction, a guide and forms, in civil and criminal matters, in a synthetic and enlightening wording. As a work tool, an array of notifications by years was drawn up, with information regarding the case files and hearing sessions and the full text of the notification ruling as well as of the decision given by the Panel for the solution of legal matters, which, for reasons of brevity, we will call the Panel for preliminary ruling.

The first notification regards the matter of immovable forced execution, it dates from the 5th of June 2013, belongs to a panel of the Court of Appeal of Brașov and tends to solve the manner of interpreting and enforcing the provisions of Art. 650 and 651 in relation to Art. 818 and 819 of the New Civil Procedure Code (NCPC), respectively to determine the executing court having the territorial jurisdiction to judge the request for approval of the immovable forced execution when the immovable property pursued is located within the jurisdiction of a law court and the office of the legal executor notified in order to conduct the forced execution is within the jurisdiction of another law court, but both courts are within the jurisdiction of the same court of appeal.

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The first hearing date was set on the 18th of November 2013 when Decision no. 1/2013¹ on the solution of matters of law that are the object of Case File no. 1/1/2013/HP was pronounced. Surprisingly enough, the solution found by the 13 judges, five from each civil division, as well as the HCCJ Vice-President, the President of the First Civil Division and the Delegate President of the Second Civil Division, was to reject as inadmissible the notification made by the Court of Appeal of Braşov.

The ruling of the Court of Appeal of Braşov for the notification of the HCCJ, in the account of the lawsuit, presents the request of a legal executor's office headquartered in Braşov, for the approval of forced execution of an immovable property located in the municipality of Sf. Gheorghe, registered at the Law Court of Sf. Gheorghe. The court declined jurisdiction to resolve the request for approval of the immovable forced execution in favour of the Law Court of Braşov, within the jurisdiction of which the office of the requesting legal executor is located. The latter, given that the immovable property which is the object of the forced execution is located in the municipality of Sf. Gheorghe, declined jurisdiction to resolve the case in favour of the court that was first notified and noting the negative conflict of jurisdiction arising between the two courts, sent the case file to the Court of Appeal of Braşov, *for it to decide on the competent court*.

*The viewpoint of the panel of judges*², after presenting the rules of law contained in the NCPC (New Civil Procedure Code), applicable with regard to the executing court and the legal executor competent, namely Art. 650, 651 and Art. 818, 819 regarding the request for forced execution and its registering³, the Braşov Court of Appeal and the national relevant,

¹ Published in the Official Journal, Part I, no. 43 of 20st January 2014

² The panel of judges acts on behalf of the court it belongs to, see Ion Deleanu, *Tratat de procedură civilă (Treatise of Civil Procedure)*, Volume I, Editura Universul Juridic (Publishing House), Bucharest, 2013, p. 594.

³ Art. 650 *The executing court*

(1) The executing court is the law court in whose jurisdiction the office of the legal executor who conducts the execution is located, unless the law provides otherwise.

(2) The executing court resolves the requests for approval of the forced execution, the appeals against the execution, as well as any other incidents occurring during the forced execution, except those reserved by law to the competence of other courts or bodies.

(3) The judgments pronounced by the executing court are binding and may only be challenged through appeal, within 10 days of communication, unless the law provides otherwise.

Art. 651 The legal executor

(1) Unless the law provides otherwise, judgments and other writs of execution are executed by the legal executor within the jurisdiction of the court of appeal, as follows:

a) in the case of the legal seizure of immovable property, legal seizure of fruits attached to roots and of direct forced execution of immovable property, the legal executor within the jurisdiction of the court of appeal where the immovable property is located;

b) in the case of the legal seizure of movable property and direct forced execution of movable property, the legal executor within the jurisdiction of the court of appeal where the residence or, where appropriate, the headquarters of the debtor is located;

c) in the case of forced execution of obligations to do and obligations not to do, the legal executor within the jurisdiction of the court of appeal where the execution is to be carried out.

(2) If the movable or immovable property to be seized is within the jurisdiction of several courts of appeal, any of the legal executors attached to one of these courts has the competence to carry out the execution, including with regard to the seizable property that is within the jurisdiction of the other courts of appeal.

(3) If the movable property subject to legal seizure or direct forced execution was moved during the execution procedure, the territorial competence belongs to the legal executor who began the execution procedure.

(4) Failure to comply with the provisions of this article triggers unconditional nullity of the procedural acts executed.

Art. 818 The forced execution request

(1) The forced execution request, accompanied by the writ of execution and the proof of payment of the stamp duties, will be directed at the legal executor in the jurisdiction of the court of appeal in whose territorial range is the immovable property belonging to the pursued debtor or to another person, if a mortgaged immovable property is pursued.

but non-unitary, jurisprudence, was that “the executing court competent to resolve the request for approval of immovable forced execution is the court (trial court) in whose jurisdiction is located the immovable property subject to legal seizure, even if the office of the legal executor notified to carry out the execution is within range of another court (trial court)”.

The first reasoning in determining the executing court is based on the criterion introduced by Art. 650 *the location of the office of the legal executor* performing the execution and by Art. 651 which establishes a “*functional competence of any executor within the jurisdiction of the court of appeal*”, thus resulting the three hypotheses of Art. 651 para. 1, depending on the nature of the forced execution.

Continuing with the second reasoning, the panel of judges⁴ held that, in the matter of legal seizure of immovable property, the provisions of Art. 651 para. 1 letter a) are to be correlated with those of Art. 818 and 819, thus resulting that the executing court is the one in whose jurisdiction the pursued immovable property is located and that the special rule establishes “an absolute territorial jurisdiction in the case of legal seizure of immovable property”.

By applying the syllogism to the specific case, for the immovable property subject to forced execution located in Sf. Gheorghe municipality, it was concluded that any legal executor within the jurisdiction of the Court of Appeal of Braşov may conduct the forced execution, therefore the notified legal executor operating in Braşov as well, and the executing court for immovable property is the one in whose area the immovable property is located, the trial court of Sf. Gheorghe.

Here is the theorized conclusion of the Court of Appeal of Braşov⁵ which is worth rendering here, for its clarity and brevity: “The fact that the provisions of Art. 818 para. 2 NCPC allow the creditor to choose the legal executor operating within range of the law courts that are in the jurisdiction of the entire court of appeal on whose territory the immovable property is located does not mean that the legal executor may, in turn, choose the executing court, the provisions of Art. 819 being imperative and absolute, for reasons related to the necessity to perform the execution acts at the place of the immovable property for a better turning to account of the latter”.

The admissibility grounds retained by the holder of the notification were judiciously reproduced in the preliminary ruling, from the notification ruling: >> a) on clarifying the manner of interpretation of the provisions of Art. 650 and Art. 651 in relation to Art. 818 and 819 of the Civil Procedure Code adopted through Law no. 134/2010, respectively on determining the executing court having the competence to judge the request for approval of the immovable forced execution, depends the legality of the execution acts given that, according to Art. 651 para. (4) of the Civil Procedure Code adopted through Law no. 134/2010, the sanction for failure to comply with the rules regarding the territorial competence of the legal executor is “unconditional nullity of the procedural acts executed”;

(2) However, if an immovable property spanning over multiple jurisdictions, the request may be addressed to any legal executors having the competence to carry out the forced execution, at the creditor’s choice.

(3) The forced execution request will contain the particulars provided for in Art. 663.

Art. 819 Registering of the forced execution request

After the registering of the request, the legal executor will immediately request the executing court in whose jurisdiction the immovable property is located to approve its legal seizure, the provisions of Art. 664 and 665 being enforced accordingly.

⁴ This panel of judges enjoys a legally-assigned competence to notify the HCCJ and to present their own point of view, Ion Deleanu, *op. cit.*, p. 595.

⁵ Conflicts of jurisdiction are resolved within the law courts through their judicial activity, which is an intrinsic component of justice, Ion Deleanu, *op. cit.*, p. 617.

b) the stated legal matter is a new one, because by looking through the jurisprudence, it was found that the High Court of Cassation and Justice had not issued a ruling on this matter⁶;

c) the legal matter is not subject to a pending appeal on points of law, according to the records of the High Court of Cassation and Justice consulted on the 30th of May 2013. <<

The report on the legal matter concluded that “the legal institution’s conditions of admissibility regarding the pronouncement of a preliminary ruling for the solution of certain legal matters are not met”.

Not surprisingly, the report added a “subsidiary, in case of an opinion about the notification meeting the conditions of admissibility”, the opinion of the panel sending the notification was shared, which is “that the interpretation of the provisions of Art. 650 and Art. 651 in relation to Art. 818 and 819 of the Civil Procedure Code adopted through Law no. 134/2010 is in the sense that the executing court having the territorial competence to judge the request for approval of the immovable forced execution when the mortgaged immovable property subject to seizure is located within range of a court (trial court), and the office of the legal executor notified in order to carry out the execution is within range of another court (trial court), but both courts are within range of the same court of appeal, is the court (trial court) in the jurisdiction of which the mortgaged immovable property subject to seizure is located”.

The High Court, examining the notification in view of issuing a preliminary ruling, as well as the report, and might we say, without analyzing the legal matter for which a solution is requested, wrongly established, “that the conditions of admissibility of the notification are not met, in view of issuing a preliminary ruling, as required by Art. 519 of the Civil Procedure Code...”.

According to the notification, it was for the High Court to determine the court having the territorial competence to judge the request for approval of the immovable forced execution for an immovable property subject to legal seizure located within range of the Trial Court of Sf. Gheorghe, whereas the office of the legal executor notified in order to carry out the execution is within range of another court, the Trial Court of Braşov, both courts being located within range of the same Court of Appeal, that of Braşov.

The Panel for preliminary ruling retained that the conditions imposed by Art. 519 New Civil Procedure Code are partially met, as there is a case pending before the Court of Appeal of Braşov, the object of which is to resolve the regulator of competence as court of last instance, so that “there are no issues of inadmissibility regarding the existence of a dispute and the quality of the notifying court, in which case it is as necessary to analyze the admissibility of the request in relation to the conditions regarding the legal matter whose clarification is sought”.

Therefore, “the dependency relation between the legal matter that is the object of the notification and the settlement of the case on the merits” was analyzed, being noted that the lawmaker imposes as a necessity the close connection between the legal matter that is the object of the notification of the High Court and the object of the civil action, “because only by analyzing the actual claim brought before the courts, may they carry out a trial of the case on the merits”.

Therefore, what the HCCJ retains is that the content of the ruling issued as part of the regulator of competence for negative conflict of competence, “does not settle the merits of the case, but only a procedural incident, determining which of the two courts should judge...” the request for approval of the immovable forced execution and that “it turns out that the

⁶ With regard to the “novelty” of this legal issue, see Viorel Mihai Ciobanu and Marian Nicolae, *Noul Cod de procedură civilă comentat și adnotat (New Civil Procedure Code, commented and annotated)*, Editura Universul Juridic (Publishing House), Bucharest, 2013, p. 1214.

determination of competence is not a matter on which the settlement on the merits might depend”.

And it concludes, in principle, that “it is admissible for the problems of procedural law too⁷ to be subject to notification in view of issuing a preliminary ruling, when the solution in principle given by the supreme court determines the settlement of the case on the merits”, but “the legal matter brought into attention does not fall into the category of those on the clarification of which depends the settlement of the merits of the case”, therefore the inadmissibility of the notification with regard to issuing a preliminary ruling was substantiated, which prevails and the other elements for the admissibility of the notification were not further scrutinized.

A few terminological considerations, preceding our critical analysis, are needed. Contentious procedure states, in its first article, that the civil lawsuit begins by filing the summons, at the court⁸.

In the regulation of contentious procedure and not only⁹, the lawmaker uses for lawsuit¹⁰ (trial) the synonyms: case¹¹, litigation (dispute)¹², cause¹³.

But, in order to avoid annoying repetition, they are used together in the very same article – case and lawsuit¹⁴.

The two Articles 519 and 520¹⁵ dedicated by the New Civil Procedure Code to preliminary ruling prefer the name *case*, but it is used with multiple meanings.

⁷ To contradict this opinion, see Gabriel Boroï and collaborators, *Noul Cod de procedură civilă comentariu pe articole (New Civil Procedure Code Commentary by Articles)*, volume I, Editura Hamangiu (Publishing House), Bucharest, 2013, p.1008.

⁸ Art. 192 **The right to notify the court**

(1) To protect their rights and legitimate interests, any person may address justice by notifying the competent law court through summons. In cases specifically provided by law, court referral (notification) may be carried out by other persons or bodies, as well.

(2) The lawsuit begins with the filing of the petition at the court, according to the law.

⁹ Art. 532-533 of the non-contentious procedure uses the synonym case.

¹⁰ See, in the New Civil Procedure Code, Art. 194, 202, 211, 224, 231, 237, 240, 241, 244, 247, 249, 254, 307, 343, 363, 389, 395, 398, 414, 430, 451, 458, 478, 480, 498, 502.

¹¹ See, in the New Civil Procedure Code, Art. 200, 220, 223, 230, 385, 386, 392, 397, 400, 412, 415, 424, 452, 479.

¹² See, in the New Civil Procedure Code, Art. 227, 462.

¹³ See, in the New Civil Procedure Code, Art. 399, 525.

¹⁴ We have in view Art. 201, 236, 242, 243, 390, 498, 522, 524 of the New Civil Procedure Code.

¹⁵ Art. 519 The object of the notification

If, during the trial, a panel of judges of the High Court of Cassation and Justice, the Court of Appeal or the County Court, vested with hearing the case in last instance, finding that a legal matter, on the clarification of which depends the settlement of the merits of the case, is new and the High Court of Cassation and Justice has not issued a ruling concerning it, nor is it subject to a pending appeal on points of law, it may request the High Court of Cassation and Justice to give a ruling solving in principle the legal matter about which it was notified.

Art. 520 The trial procedure

(1) The notification of the High Court of Cassation and Justice is done by the panel of judges after adversarial proceedings, if the conditions laid down in Art. 519 were met, through a ruling which is not subject to any means of appeal. If through the ruling notification is ordered, the latter shall include the reasons supporting the admissibility of the notification according to Art. 519, the viewpoint of the panel of judges and of the parties.

(2) Through the ruling provided for in para. (1), the case shall be suspended until the pronouncement of the preliminary ruling for the solution of the legal matter.

(3) After registering the case at the High Court of Cassation and Justice, the notification ruling is published on the website of that court.

(4) Similar cases pending before the courts may be suspended until the resolution of the notification.

(5) The assignment of the notification is done by the President or, in his absence, by one of the vice-presidents of the High Court of Cassation and Justice or by the person appointed by them.

(6) The notification is heard by a panel comprising the president of the appropriate division of the High Court of Cassation and Justice or a judge appointed by him and 12 judges of the respective division. The president of

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The first meaning: - if, during the trial, a panel of judges of the High Court of Cassation and Justice, the Court of Appeal or the County Court, *vested with hearing the case in last instance...*, meaning a trial (lawsuit) which is tried in the county court or the Court of Appeal or the HCCJ, without the prospect of another trial, in another court.

In the specific case analyzed, as the HCCJ itself establishes, “it is found that there is a case on trial, and the Court of Appeal of Braşov, vested with solving the regulator of competence, judged (the correct word is “is judging” or “will judge”, our underlining) in last instance, according to the law”.

- a legal matter, *on the clarification of which depends the settlement of the merits of the case...*, here, too, the meaning is that of a trial (lawsuit) which is to be resolved *in last instance* at the county court or court of appeal or the HCCJ, without the prospect of another trial, in another court. We emphasize that the law has in view the same case, from the previous presentation, specifying it’s *the respective* case, not another.

That is, in this specific case, the litigation whose object is the regulator of competence, by which the Braşov Court of Appeal has the obligation to determine whether the executing court is the Trial Court of Sf. Gheorghe or the Trial Court of Braşov and which gave rise to the necessity of clarifying the legal matter, that makes up the object of the notification.

- *the case will be suspended until the pronouncement of the preliminary ruling for the solution of the legal matter.* Of course, the lawmaker is considering the entire lawsuit (trial) pending in last instance before the county court, the court of appeal or the HCCJ, without the prospect of another trial, in another court, where the legal matter requiring a solution arose, and in the specific case, the regulator of competence which is to be decided by the Court of Appeal of Braşov, after the issue of the ruling by the HCCJ.

The second meaning: - *after registering the case at the High Court of Cassation and Justice*, here, the term signifies “notification” (referral), in the specific case forming the object of case file no. 1/1/2013/HP of the HCCJ.

the division or, if unable, the judge appointed by him is the president of the panel and shall take the necessary steps for the random appointment of the judges.

(7) After the formation of the panel according to para. (6), its president shall appoint a judge to draw up a report on the legal matter that was subject to trial. The judge appointed as rapporteur does not become incompatible.

(8) When the legal matter concerns the activity of several divisions of the High Court of Cassation and Justice, the president or, in his absence, one of the vice-presidents of the High Court of Cassation and Justice shall forward the notification to the presidents of the divisions concerned with the resolution of the legal matter. In this case, the panel will be made up of the president or, in his absence, the vice-president of the High Court of Cassation and Justice, who will chair the panel, the presidents of the divisions concerned with the resolution of the legal matter, as well as 5 judges of the respective divisions randomly appointed by the president of the panel. After the formation of the panel, the president of the panel shall appoint one judge from each division for the drawing up of the report. The rapporteurs are not incompatible.

(9) If at the High Court of Cassation and Justice, there is no division corresponding to the level at which it was found that the legal matter was not uniformly solved in the practice of the courts, the provisions of para. (8) shall apply accordingly.

(10) The report shall be communicated to the parties, which, within 15 days from the communication, may submit, in writing, through a lawyer or, where appropriate, a legal counselor, their views on the legal matter that is subject to judgment.

(11) The provisions of Art. 516 para. (6) - (9) shall apply accordingly.

(12) The notification shall be judged without summoning the parties, within 3 months from the date of vesting, and the solution shall be adopted by at least two thirds of the judges in the panel. Abstentions from voting are not allowed.

(13) The procedure provided in this chapter is exempt from judicial stamp duty and judicial stamp.

The third meaning: - *similar cases pending before the courts*, the reference is to similar lawsuits (trials), litigations of the same nature, pending before any law courts, having no connection to the procedure unfolding for the pronouncement of the preliminary ruling.

It is necessary to mention a fourth meaning, as well, which is not highlighted by the two articles originating the preliminary ruling and it concerns the initial litigation, the lawsuit understood as a request registered at a court of justice, even a trial court, which by means of appeal or by procedural incident, is before one of the three courts, for settlement, in the last phase of the procedure, *either as the proper lawsuit (trial) or another one, derivative* from a procedural incident.

In the present case, the *proper lawsuit* is the legal executor's request for approval of the immovable forced execution, addressed to the Trial Court of Sf. Gheorghe, registered at this court, which desisted from it through civil sentence no. 25/C/06th April 2013, the court declining competence in favour of the Trial Court of Braşov.

Through the negative conflict of competence, the proper lawsuit gave rise to a derivative lawsuit, i.e. the one pending before the Court of Appeal of Braşov in order to decide the regulator of competence.

Each case may result in a *settlement on the merits*, but both as different ones, depending on the different object of the proper lawsuit or the derivative one.

The error of the supreme court has to do entirely with shifting the analysis of the cumulative legal requirements that Art. 519 imposes *only for the case pending in last instance* before the county court, the court of appeal or the HCCJ..., respectively from the litigation of the Court of Appeal of Braşov having as an object the regulator of competence, to the lawsuit brought before the Trial Court of Sf. Gheorghe, regarding the approval of the immovable forced execution.

This led to a string of erroneous reasonings caused by a lack of elementary logic.

Thus, although it is correctly retained that “the present notification requests the pronouncement of a preliminary ruling for the solution of the manner of interpreting and enforcing the provisions of Art. 650 and Art. 651 in relation to Art. 818 and 819 of the Civil Procedure Code..., respectively the establishment of the executing court having the territorial jurisdiction to judge the request for approval of the immovable forced execution when the immovable property pursued is located within the jurisdiction of a law court (trial court), and the office of the legal executor notified in order to conduct the forced execution is within the jurisdiction of another law court (trial court), but both courts are within the jurisdiction of the same court of appeal”, the examination is artificially shifted, outside any of the provisions of Art. 519, to the “object of the civil action, *because only by analyzing the actual claim brought before the courts, may they carry out a trial of the case on the merits*” (the underlining belongs to the HCCJ decision), hence to the lawsuit for the approval of the forced execution registered at the Trial Court of Sf. Gheorghe.

A correct analysis should have further pursued *the case brought in last instance...*, i.e. the one that caused the notification of the HCCJ for the solution of the new legal matter aimed at establishing the executing court “on the clarification of which depends the settlement of the merits of the case”, which is the one brought before the Braşov Court of Appeal.

In a different order of ideas, if the HCCJ admitted that the approval of the forced execution is the “*actual claim brought before the court*” and involves “*a trial of the case on the merits*”, it must also accept the fact that the litigation pending before the Court of Appeal of Braşov, derived from the first one as a result of procedural incident, aiming to designate the competent court, has the same legal status as the “*actual claim brought before the court*” and awaits “*a trial of the case on the merits*”, case to which the High Court of Cassation was notified to contribute by a preliminary ruling.

Our opinion is that the notification of the Court of Appeal of Braşov is admissible and that the decision of the High Court of Cassation and Justice was wrong.

Conclusions

The use of the institution of preliminary ruling, with three notifications in civil matter having been issued to this date, demonstrates that regulation is necessary, and by implementing the formal tools available on the website of the High Court of Cassation and Justice, it becomes also easy to do.

But the institution, being at the beginning of its existence, must be defended against unprofessional approaches, both of the judges who send notifications and the judges of the High Court of Cassation and Justice who are called to solve them.

We think that a useful tool may be the introduction of an indicator for the evaluation of judges' professional performance in the Regulation concerning the evaluation of professional activity of judges and prosecutors¹⁶, which aims to set a level of professional competence of the judges and to improve their professional performance, to increase the efficiency of the activity of courts and public prosecutors' departments and public confidence in the authority of the judiciary, to maintain and enhance the quality of the judicial system.

Thus, in Art. 5 of the Regulation, section "Quality of Activity", in addition to the two indicators, quality of drafting judgments and conduct during the hearing session, a third one might be introduced, *the notification (referral) of the High Court of Cassation and Justice in view of pronouncing a preliminary ruling for the solution of certain legal matters, respectively the participation in the pronouncement of such a ruling*, and, as sub-indicators, the identification of new legal matters with major impact on the settlement of cases resolved in a non-unitary manner and the persuasive, concise and clear nature of the notification, respectively the settlement of the notification within its deadline, and a logical and convincing reasoning thereof.

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¹⁶ Approved by Decision no. 676/2007, published in the Official Journal no. 814/29th November 2007, amended.

**HACKING AND COMPUTER CRIMES
COMPUTER FRAUD – A COMPARATIVE LOOK
AT THE NEW CRIMINAL CODE AND THE CRIMINAL CODE OF
THE REPUBLIC OF MOLDOVA**

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Abstract

Hacking involves the attempt to compromise the security of a computer system in order to gain unauthorized access. In the course of time it has turned out that the Internet is a vulnerable system, and this has generated a framework for criminal activities, resulting in the emergence of new crimes, among which computer fraud.

Keywords: *computer system hacking, computer fraud*

Introduction:

Cyber criminals elude the physical limitations that govern real-world crimes. The classic police model based on the principle that law enforcement bodies must react effectively and promptly to a crime, is less efficient against online crimes, because, in these cases, the police response usually begins long after the cyber crime was successfully carried out.

Hacking

Hacking is a complex task that requires a high level of technical knowledge. Usually it does not pay for a hacker to make the effort of penetrating a private home computer. Real hacking is typically done on computers that are likely to include the personal data of a lot of people, such as those of banks, databases of corporations, hospitals, schools, etc.

The term “hacking” is used very frequently, in fact, it is overused. Many individuals call themselves hackers even if they are not. In the world of hacking, the word “hacker” only refers to those who try to find vulnerabilities in different systems for research purposes. “Cracker” is the person trying to exploit the vulnerable parts of a system for malicious purposes. However, for the general public, as well as for most officials, the distinction has been lost¹.

Many in the hacking community object to the use of the term “hacker” in the media in order to denote illegal computer intrusions. In the hacking community a hacker is the one doing experiments on an information system in order to learn more about it.

Hackers are classified in a variety of groups, of which we will mention only a few.

The white hat hacker does not carry on illegal activities, he only learns about various information systems and seeks their vulnerabilities in order to subsequently provide security programs that protect the systems from illegal penetration.

The black hat hacker carries on illegal activities; these are the people who are usually associated with computer crimes. This term is synonymous with the word “cracker”. Usually when the media talk about hacking, the reference is actually to black hat hackers.

¹ Chuck Easttom and Det. Jeff Taylor, *Computer Crime, Investigation and the Law*, Course Technology, a part of Cengage Learning PTR, Boston, 2011, p. 10

The grey hat hacker is a combination of the white hat hacker and the black hat hacker. The best way to describe this class of hackers is by calling them opportunistic. If a grey hat hacker searches a target on the Internet and manages to gain access to a computer, he will notify the system owner².

There are numerous ways in which hackers manage to compromise an information system, including by finding a vulnerability in the operating system which can be exploited, denial-of-service attacks, or the so-called DOS, spamming, etc.

However, one must understand that hacking is not an easy task. Although many films have made it look like a hacker can gain access to highly reliable information systems within minutes, this is simply not true. Hacking is very similar to burglary: the safer the target, the more skill and time it will require for infiltration. A clever hacker will need a complete understanding of operating systems, information networks and security countermeasures.

Computer fraud in the new Criminal Code and in the Criminal Code of the Republic of Moldova

Legal content

As regards *computer fraud*, this criminal offence is provided for in Art. 249 of the new Criminal Code. This offence is reproduced without any significant changes from Law No. 161/2003 – only the penalty change, being diminished. In its turn, this special law merely reproduced the text of Art. 8 of the European Convention on Cyber Crime. Thus, according to Art. 8 of the Convention, regarding computer fraud, each Party should adopt legislative measures and other measures that are necessary to criminalize as an offence, under their domestic law, the act of intentionally and unlawfully causing a patrimonial damage to another person:

- a) by any input, alteration, deletion or suppression of computer data;
- b) in any form that affects the operation of an information system, with a fraudulent or wrongful intent to obtain without right an economic benefit for themselves or for another person.

With a view to noticing the similarities, according to the provisions of the new Code, a computer fraud consists in “the input, modification or deletion of computer data, restriction of access to such data or the hindrance in any way of the operation of a computer system in order to obtain a material benefit for oneself or for another, if damage was caused to a person”.

In other words, computer fraud involves the input, alteration, deletion or superimposition of data or computer data or any other intrusion that might result in an influence on the outcome, thereby causing an intentional material or economic loss, the perpetrator seeking a patrimonial advantage for themselves or for another³.

As regards the Republic of Moldova, computer fraud is regulated in Art. 260 Criminal Code. This article states that computer fraud means “the input, modification or deletion of computer data, restriction of access to such data or the hindrance in any way of the operation of a computer system in order to obtain a material benefit for oneself or for another, if these actions caused large-scale damages”.

According to Art. 126, para. (1) of the Criminal Code of the Republic of Moldova, “extremely large-scale and large-scale damages are the value of goods that have been stolen,

² Robert Moore, *Investigating high-technology computer crime, second edition*, Elsevier, 2010, p. 25

³ Alexandru Boroi, *Drept penal. Parte specială, Conform noului Cod penal*, Ed. C.H.Beck, București, 2011, p. 230 (*Criminal Law. Special Part, According to the New Criminal Code*, C.H.Beck Publishing House, Bucharest, 2011, p. 230)

acquired, received, manufactured, destroyed, used, transported, stored, sold, passed across the customs border, the value of the damage caused by a person or a group of persons which, at the time of committing the criminal offence exceeds 5000, respectively 2500 conventional units of fine”.

According to the legislation of the neighbouring country a fine is “a pecuniary penalty applied in the cases and within the limits provided by this Code. The fine is set in conventional units. The conventional unit for the fine is equal to 20 Lei”.

So, in the case of computer fraud, the Criminal Code of the Republic of Moldova requires that at the time of committing the criminal offence the damage value should exceed 50,000 MDL (Lei of the Republic of Moldova), i.e. 14,000 RON (Romanian Lei).

We can see that unlike our criminal code, wherein the value of the damage does not matter, all that is needed is to prove that the patrimony of the aggrieved person has suffered a decrease as a result of the offence committed by the offender, the criminal code of the Republic of Moldova requires that the damage caused should be on a large scale.

Pre-existing conditions

A. Object of the criminal offence

a) The special juridical object is represented by the social relations that protect the security and reliability of assets represented or managed through information systems (electronic funds, deposits, electronic home banking, computerized control of stocks, accounts, automated desks that can be manipulated) or other instruments which may have consequences on property legal relations and on those relating to confidence in the security and reliability of the transfers performed⁴.

b) The material object is the material entity (hard disk drive, CD, DVD, memory stick, etc.) on which the computer data are stored. In a broader sense, the material object is the entire information system⁵.

According to Art. (1) of the Council of Europe’s Convention on Cybercrime, a computer system means any device or group of interconnected or related devices, one or more of which, pursuant to a program, perform automatic processing of data. Such a system may include data inputs, outputs or storage capabilities, may work alone or be connected to a network or other similar devices.

The convention also defines computer data as any representation of facts, information or concepts in a form suitable for processing in a computer system including a program that may cause a computer system to perform a function.

B. Subjects of the criminal offence

a) The active subject of this crime may be any natural or legal person, but in practice, manipulations are most often found to be committed by employees or officials or people with advanced knowledge in the field of computers⁶. The active subject might be even one of the

⁴ Alexei Barbăneagră, Gheorghe Alecu, Viorel Berliba, Vitalie Budeci, Trofim Carpov, Valeriu Cușnir, Radion Cojocaru, Alexandru Mariț, Tudor Popovici, Gheorghe Ulianovschi, Xenofon Ulianovschi, Nicolae Ursu, Victor Volcinschi, *Codul penal al Republicii Moldova: Comentariu*, Tipografia Reclama, Chișinău, 2009, p. 576 (*Criminal Code of the Republic of Moldova: Commentary*, Reclama Printing House, Chisinau, 2009, p. 576)

⁵ Vasile Dobrinoiu, Mihai Adrian, Mirela Gorunescu, Maxim Dobrinoiu, Ilie Pascu, Ioan Chiș, *Noul Cod penal comentat*, Volumul II-Partea specială, Ed. Universul Juridic, București, 2012, p. 330 (*The New Criminal Code Commented*, Volume II – The Special Part, Universul Juridic Publishing House, Bucharest, 2012, p. 330)

⁶ Ioana VasIU, Lucian VasIU, *Informatică juridică și drept informatic*, Ed. Albastră, Cluj, 2009, p.144 (*Legal Information Technology and Information Technology Law*, Publishing House: Ed. Albastră, Cluj, 2009, p.144)

employees of a trading company who should oversee the smooth running of the computerized management systems, in which case his discovery becomes a lot more difficult. Criminal participation is possible in all its forms (as an accomplice, co-perpetrator, instigator).

Under the Criminal Code of the Republic of Moldova the active subject of the criminal offence may be any natural person who has reached the age of 16 years.

b) The passive subject of the crime is the natural or legal (public or private) person whose patrimony was affected by the committing of the computer fraud.

The constitutive content of the criminal offence

A. The objective content

Information and communication technologies offer a lot of possibilities to commit computer frauds; they also facilitate the committing of these offences by the possibility to act from a great distance or the misuse of authorizations granted, by the low cost of committing these crimes and the low risk to which the perpetrators are exposed⁷.

The material element consists in the action of inputting, modifying or deleting computer data, by restricting access to computer data, or by hindering in any way the operation of a computer system.

Data input refers to the introduction of inaccurate data or the introduction without an authorization of computer data, with reference to data that did not previously exist in the respective system.

Data modification includes the alteration, variations or partial changes of computer data, resulting in the emergence of new computer data that are different from the original ones and inconsistent with reality.

For example, such a mode of action is data manipulation. Data manipulation refers to the process by which a person changes the data in a computer as a means to cause damages to the owner of that computer – damages that are not physical in nature, but which almost always have financial consequences.

A possible situation for this type of action could be that of former employees who use the security codes to gain access to bank records and then transfer the money into a bank account where the money cannot be detected. The rounding-down or salami technique (as it is sometimes referred to, given its “slicing” effect) is an example of data manipulation involving financial information. Instructions regarding the software program are secretly inserted in the network or the computer and when there are changes in the bank accounts, the program will round down the deposits and transfer the excess funds to a separate account. Once the account has reached a certain level, the money will be transferred into a separate account⁸.

Data deletion refers to the erasure of data from physical devices, which are no longer available for licit electronic transactions, or may also be equivalent to the destruction of the data carrier.

Access restriction includes withholding, hiding, encrypting or changing the authorizations of legitimate users.

The changing of the authorizations of legitimate users, for example, can be achieved by learning their passwords and changing them by using a keylogger. The keylogging process takes place by means of software programs that can be installed on the user's computer without their knowledge, but also through hardware means, i.e. physical equipment, which are

⁷ George Antoniu, Constantin Duvac, Daniela Iuliana Lămășanu, Ilie Pascu, Constantin Sima, Tudorel Toader, Ioana Vasiu, *Explicațiile preliminare ale noului Cod penal, Vol. III (Articolele 188-256)-Partea specială*, Ed. Universul Juridic, București, 2013, p. 601 (*Preliminary Explanations of the New Criminal Code, Vol. III (Articles 188-256) - The Special Part*, Universul Juridic Publishing House, Bucharest, 2013, p. 601)

⁸ R. Moore, op.cit., p.37

not only impossible to detect by the antivirus software, but for the average user it is very difficult even to visually spot them.

Once installed, the keylogger will automatically start recording every pressing of the button on the keyboard, so with the help of it one can find out what was said when using Messenger, what websites were visited, but also the user's passwords.

The hindrance of the operation of a computer system includes physical attacks (such as wire-cutting or power supply interruption) and logical attacks, which prevent the computer's normal startup of (for example, by changing the initial settings), denial-of-service attacks (which aim at blocking access to a system or service offered by the computer through depletion of a resource allocated to the respective system or service – for example, the bandwidth or the number of simultaneous clients that can be answered), as well as system crash, by resorting to computer viruses.

Computer viruses are actually programs that infect a computer's executable files. Any program that replicates without the user's consent is a virus. Once the virus has infected a computer its first task is to multiply itself by spreading to other computer systems.

The damage caused by a virus is called payload (viral load). The trigger for viral action is the condition or the event that activates the virus, which can be a calendar date, the running of a program or sometimes even the connection to the Internet.

Another way of hindering the operation of the computer system is by using Trojan horses. A Trojan horse is a program that performs an apparently useful action, while in fact carrying out destructive actions that remain unknown to the user⁹.

This program uses a method of instruction insertion into a program so that the program will perform an unauthorized function while executing a seemingly ordinary one¹⁰.

The immediate consequence of these actions is that they produce a result, consisting in material prejudice for the aggrieved party, whereas the Criminal Code of the Republic of Moldova requires that at the time of committing the offence the damage value should exceed the equivalent of 50,000 MDL.

B. The subjective content

With this offence, guilt is only present as direct intention qualified by purpose. Thus, the perpetrator's action is carried out in order to obtain a material benefit for oneself or another. It is not necessary to actually achieve that benefit, the pursuit of it suffices¹¹.

Forms. Punishment

Preparatory acts, although possible and sometimes necessary are not criminalized, therefore are not punishable.

Attempt is possible and is punished (according to Art. 252 of the new Criminal Code).

The criminal offence is considered as completed when the perpetrator has introduced, modified or deleted in any way the data in a computer system or has restricted access to the respective data or has hindered in any way the operation of a computer system, thus causing a patrimonial loss to a person.

The offence can also be present in a serial form. It ends when the last act criminalized by the lawmaker has been achieved.

Penalties

⁹ Debra Littlejohn Shinde, *Scene of the Cybercrime. Computer Forensics Handbook*, Syngress Publishing, Rockland Massachusetts, 2002, p.326

¹⁰ Adrian Cristian Moise, *Metodologia investigării criminalistice a infracțiunilor informatice*, Ed. Universul Juridic, București, 2011, p. 145 (*Methodology of Cybercrime Forensic Investigation*, Universul Juridic Publishing House, Bucharest, 2011, p. 145)

¹¹ V. Dobrinouiu and collaborators, op. cit., p.334

In the new Criminal Code, the act of computer fraud is punishable with imprisonment from 2 to 7 years, a penalty which is lower than that provided by the old regulation, namely in Art. 49 of Law no. 161/2003, which was imprisonment from 3 to 12 years.

Under the Criminal Code of the Republic of Moldova computer fraud is punishable by a fine of 1,000 to 1,500 conventional units or by unpaid community work from 150 to 200 hours or by imprisonment from 2 to 5 years.

If the offence is committed by an organized criminal group or a criminal organization and it causes large-scale damages, the punishment will be imprisonment from 4 to 9 years.

Conclusions

Cyber criminals elude the physical limitations that govern real-world crimes, because the physical proximity of the perpetrator and the victim is not necessary. All that a cybercriminal needs is a computer connected to the Internet.

The apparent anonymity that users are enjoying when browsing the Internet leaves place for vulnerability to improper, immoral and illegal usage.

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HUMAN SECURITY AND THE “RIGHTFUL STATE” C. Leucea

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Abstract

The article is based on the idea that human security concept should be understood as an open one, accepted in its broad definition and definitely not in its narrow terms because the variety and multilevel forms of threats to human security can manifest in manners hard to anticipate. The main challenge in promoting human security concept internationally lies in its power to deconstruct the principle of state sovereignty which is the key-stone of the contemporary international system and of international law and that's the reluctance to accepting it. But if there weren't bad states, the human security concept wouldn't have emerged. The point we intend to advance is that defining human security restrictively might imply legitimating sovereignty for “bad” countries in which corruption is endemic and where groups of people who achieved power by “negative selection mechanisms” perpetrates human insecurity rather than security.

Keywords: *human security, sovereignty, state system, non-intervention*

Introduction

Supporters of human security concept have not excluded the importance of state as a provider of safety and public goods for the population, yet in many countries human security is threatened by the actions of its own government. In many cases the state had become a source of threat for its own people. From this point of view, when the state is the perpetrator of violence, understood as well as structural violence, human security is hard to be promoted as long as the state remains the main and legitimate sovereign actor in international relations.¹

The international law is based on the concept of state. The state has its fundament in its sovereignty which involves the supremacy of governmental institutions in domestic sphere and in juridical relations with other international actors. Yet, there are situations in which, for some historical reasons, there have been developed during time negative mechanisms selection of political elite that succeeded to have power to legitimately oppress the population. The principal argument they posses to remain in power and to claim international reconnaissance of state sovereignty is appealing the “rightful state” concept in order to deter foreign intervention.

Still, humanitarian intervention is placed under the question mark regarding its compatibility with predominant norms in international society, sovereignty, territorial integrity and non-interference in domestic state-affairs. Up to now humanitarian intervention was justified in cases of direct and violent conflicts and the narrow definitions of human security was related to conflict management necessity.

¹ KERR, Pauline, ‘Human Security’, in COLLINS, Alan, *Contemporary Security Studies*, Oxford University Press, 2007.

Human Development Report (1994) sought to broaden the traditional notion of security focused on military balances and capabilities to a concept that included 'safety from such chronic threats as hunger, disease, and repression' as well as 'protection from sudden and hurtful disruptions in the patterns of daily life.' Human security thus implied economic security, food security, health security, environmental security, personal security, community security, and political security.²

From another point of view, related to historical context, some authors have remarked that the human security concept evolved at a time of great international shifts when the disintegration of the Soviet Union ended the Cold War, when the shadow of bipolar politics that clouded relations between countries had been lifted and the political context gave way to the recognition of new threats and conflicts in addition to the many unresolved ones.³

In our view defining human security in a narrow manner is like bringing an obstacle on a road map of solving problems but having in mind the sovereignty concept to be protected. We agree with many analysts who consider sovereignty to be an outdated principle and an obstacle in promoting human security in different parts of the world.

Yet, "some analysts have argued that sovereignty is being eroded by one aspect of the contemporary international system, globalization, and others that it is being sustained, even in states whose governments have only the most limited resources, by another aspect of the system, the mutual recognition and shared expectations generated by international society. Some have pointed out that the scope of state authority has increased over time, and others that the ability of the state to exercise effective control is eroding. Some have suggested that new norms, such as universal human rights, represent a fundamental break with the past, while others see these values as merely a manifestation of the preferences of the powerful. Some students of international politics take sovereignty as an analytic assumption, others as a description of the practice of actors, and still others as a generative grammar".⁴

The analysis of human security needs anyway a perspective which allows the reinterpretation of sovereignty and to posit the state and the international system in a mutual constitutive relation. The states are partially constituted by an internal dynamic and partially are constituted by international actors, by norms, by inter-subjective meanings. A state is a state as long as other actors recognize it as being a state and possess sovereignty as long as people involved recognize and behave accordingly.

United Nations have been involved in many intrastate conflicts and the intervention has been motivated by humanitarian reasons and peacekeeping missions. Yet many of these operations had been based by chapter VI of UN Charter and depended on the agreement of the parties involved in the conflict, therefore can not be named humanitarian interventions per se.

The challenge for promoting the concept of human security in many cases relies in legitimating the "intervention". There has to be overcome a juridical void as the humanitarian reason is opposable to state reason but up to now the right to interfere in a "rightful" state is considered an offence.⁵

Although different authors, e.g. Stephen Krasner, have remarked, that the principle of sovereignty consolidates "the organized hypocrisy" at the international level, the fact that the term "sovereignty" has been used in different ways reveals "the failure to recognize that the norms and rules of any international institutional system, including the sovereign state system, will have limited influence and always be subject to challenge because of logical

² TADJBAKSH, Shahrbanou, and Anuradha M. CHENOY, *Human Security. Concepts and Implications*, New York and London, Routledge, 2007, p. 1.

³ *Ibidem*, p. 1.

⁴ KRASNER, Stephen, *Sovereignty: Organized Hypocrisy*, Princeton University Press, 1999, p. 3.

⁵ RUSSBACH, Oliver, *ONU contra ONU*, Editura CNI „Coresi", București, 1999, pp. 20-22;

contradictions (nonintervention versus promoting democracy, for instance), the absence of any institutional arrangement for authoritatively resolving conflicts (the definition of an international system), power asymmetries among principal actors, notably states, and the differing incentives confronting individual rulers. In the international environment actions will not tightly conform with any given set of norms regardless of which set is chosen. The justification for challenging specific norms may change over time but the challenge will be persistent.”⁶

As Stephen Krasner shows, the term sovereignty has been used in four different ways - international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty:

- international legal sovereignty refers to the practices associated with mutual recognition, usually between territorial entities that have formal juridical independence;
- Westphalian sovereignty refers to political organization based on the exclusion of external actors from authority structures within a given territory;
- domestic sovereignty refers to the formal organization of political authority within the state and the ability of public authorities to exercise effective control within the borders of their own polity;
- interdependence sovereignty refers to the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state.⁷

There are many situations in which sovereignty exists *de jure* and not *de facto*, or vice versa. A state can have international legal sovereignty, be recognized by other states, but have only the most limited domestic sovereignty either in the sense of an established structure of authority or the ability of its rulers to exercise control over what is going on within their own territory.

From the human security perspective, the domestic sovereignty might be understood as absent in case the state has no capacity to provide safety and other public goods identified as security problems by UNDP, such as economic security, food security, health security, environmental security, personal security, community security, and political security. In the 1990s some failed states in Africa, such as Somalia, served as unfortunate examples. A state can have international legal, Westphalian, and established domestic authority structures and still have very limited ability to provide human security conditions.

There are many challenges involved by promoting human security internationally and we may add that conceiving human security concept in its broad meaning it has revolutionary potential as it is seen as restructuring the international order although everybody knows that on the global arena power speaks security and law.

As it was explained in the book entitled *Constructivism and human security*⁸, the state system can be seen as a constitutive factor of human insecurity and the principles of sovereignty and independence as ideas that prevent legitimate intervention of international community in countries where there are many evidences that people do confront situations of human insecurity generated by corrupt regimes. Blaming the communist regimes and in the same time recognizing and cooperating economically with them implies at least the concept of organized hypocrisy or the double standard behavior, a disjunction between discourse and action.

⁶ KRASNER, Stephen, *Op. Cit.* p. 3.

⁷ KRASNER, Stephen, *Op. Cit.* pp. 3-4.

⁸ LEUCEA, Ioana, *Constructivism și securitate umană*, Editura Institutul European, Iași, 2012.

The community of democratic states who share the values of democracy and human rights should make a choice and assume a single position. Universality of human rights implies renouncing to the idea of “private zones of security” and replacing it with the idea of multilateral cooperation. The principle of sovereignty should be reinterpreted (maybe) in terms of suzerainty or limited sovereignty. The responsibility must be shared by international democratic community of states in cases when we speak of failed states, endemic corruption, structural violence, bad governance or abuses of the rule of law.

A good example for what may be named constitutive causes for human insecurity or structural violence would be the “attack” of the persons composing the Romanian Parliament by voting a set of laws that would enable more corruption and eluding the rule of law. What was named in Romania “Black Tuesday” can be seen as an example of threat to human security generated by the “dead-point” from a legal system. As Immanuel Kant wrote, the monarch has no juridical duty as being the source of law. Yet, in cases of democratic regimes the idea is not applicable as it involves the prevalence and hierarchy between the principles of democracy and the rule of law. Iulia Motoc has approached the subject in her study dedicated to the issues of democracy, the rule of law and development, the case of Romania.⁹

What the Romanian members of the Parliament tried to do on Black Tuesday was to use the legislative sovereignty of the Parliament in order to protect some group interests by using the dead-point from a juridical system where the state can no be forced to subsume to its own regulations.¹⁰ Victor Duculescu noticed the dead-point of law-generation and proposed a parliamentary code of behavior as the political contest can not be restrained not to play even in the arena of the Parliament.

This type of mechanisms of governing that allow a minority to promote laws for specific group interests presupposes the relation between democracy and the rule of law. That’s why the criteria proposed by Arend Lijphart¹¹ are of great necessity for consociate democracy to function.

Some theories of international relation assume that as long as there is no international state, there will be an essential difference between internal and external politics.¹² In our opinion the assumption is no longer valid as the anarchy and the principle of non-intervention can no longer justify any type of political conduct and the principles of human rights and democracy adopted by some actors within the international community determine them, as a consequence, to intervene in cases and in states where the human security is threatened.

One relevant speech delivered by the of Romanian President of the Chamber of Deputies, Valeriu Zgonea, when trying to defend the illegitimate vote given by the majority of parliamentary in December 2013, on Black Tuesday, when officials from other countries had taken the position of condemning the vote, had made reference to legality and sovereignty of the Romania Parliament to decide what laws to promote. The argument would be accepted as valid in other historical context, probably during the Cold War period, but nowadays invoking sovereignty and legality without questioning the constitutional norms and social mechanism that might afford a small group of people coming to power and persecute the rest of the population or inhibit the democratic development of the society would involve ignoring the international context that generated heated discussions on the issue of human security. The concept of human security wouldn’t have been developed if the tension between the government apparatus of a state and its population would have existed.

In conclusion, if there weren’t bad states, the human security concept wouldn’t have emerged. Defining human security restrictively might imply legitimating sovereignty for

⁹MOTOC, Iulia, “Democrație, stat de drept, dezvoltare: Cazul României” la <http://193.226.121.81/publications/buletin/10/motoc.pdf>, 02.02.2014, 20:48.

¹⁰ DEL VECCHIO, Giorgio, *Lecții de filosofie juridică*, Editura Europa Nova, 1998, p. 196 – 203;

¹¹ LIJPHART, Arend, *Modele ale democrației*, Editura Polirom, Iași, 2006.

¹² GUZZINI, Stefano, *Realism și relații internaționale*, Editura Institutul European, Iași, 2000, p.32.

“bad” countries in which corruption is endemic and where groups of people who achieved power by “negative selection mechanisms” perpetrate human insecurity rather than security. In this respect the democratic international community must have a word and find ways to reduce the importance of the principle of sovereignty at the global level.

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DUTIES OF THE LOCAL POLICE REGARDING THE SECURITY OF OBJECTIVES, GOODS, VALUABLES AND THE PROTECTION OF INDIVIDUALS F. MATEAȘ¹

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Abstract

Security is that which ensures the well-being and the protection of the individual, as well as everything that is related to the human being: food, economy, education, environment, etc. Fighting crime as a way of providing the security of mankind “must take into account the respect for human rights”. All modern human communities have come to understand the need to intensify concerns in order to extinguish states of conflict since their early phase. Therefore, the attention of policy makers and analysts in each human settlement turns increasingly toward those events, processes and phenomena that can give rise to dangerous contradictions, trying to discover, examine, master them, constantly keeping them under control.

Keywords: security of objectives, protection of individuals, specific documents, security with the local police

1. Introduction

People have always tried to ensure their own protection against certain eventualities, in the beginning by satisfying their vital needs, and later on by giving rise to bodies empowered to ensure national security and/or local security.

Security went from being defined as “a state of fact” modifying its composition with the development of technique and technology in parallel with terrorist attacks and organized crime, to representing a security environment. The security issue has preoccupied human communities throughout their existence. With the social and political organization of human society, the need to ensure the security of the community has also emerged. The concept of security at the individual’s level expresses the feeling of not being in danger, of being protected, of living peacefully in an environment allowing self-affirmation on multiple levels. At the level of the community, the concept of security means a situation where a group of people, a state or groups of states, following specific measures of protection, have the certainty that their existence, integrity or fundamental interests are being protected.

2. The notions of security of objectives, goods and valuables and protection of individuals

The Romanian Police are part of the Ministry of Internal Affairs and the Local Police within the Local Administration are a specialized institution of the State, which exercises powers regarding the protection of the fundamental rights and freedoms of individuals, of

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public and private property, the prevention and detection of crimes, the respect for public order and tranquility, in compliance with the law.

The two structures complement each other in their mission of ensuring the security of objectives and the protection of individuals.

The activity of the Romanian Police is a specialized public service done in the interest of the individual, of the community and in support of the State's institutions, being solely based on and aimed at law enforcement.

In carrying out their incumbent tasks, the Romanian Police cooperate with state institutions and collaborate with non-governmental organizations and associations, as well as natural and legal persons, within the limitations of the law².

Security and protection are activities performed by specific forces and means in order to ensure the safety of objectives, goods and valuables against any unlawful action adversely affecting the right of ownership over them or their material existence, as well as to protect individuals against any hostile acts that may endanger their life, physical integrity or health.

Security and protection are achieved through military or civilian forces and means by specialized institutions of public administration authorities, or privately, by the owners or holders of the objectives, goods and valuables, as well as by specialized security and protection companies³.

Security and protection structures, in the sense of the present methodology, include:

- a) companies specialized in security and protection;
- b) specialized bodies organized by regulations approved by Government Decision
- c) security of one's own⁴.

The ministries and other bodies of central and local public administration, autonomous administrations, national corporations and national companies, national research and development institutes, trading companies, regardless of the nature of their social capital, as well as other organizations holding goods or valuables by any title, called units under the law, are required to ensure their security.

Natural persons can resort for their personal protection to the services of specialized security and protection companies under conditions provided for by the legislation in force.

Depending on the importance, characteristics and value of the goods they hold, the heads of ministries and of other specialized bodies of central and local public administration, autonomous administrations, national corporations and national companies, national research and development institutes, trading companies and other units holding goods or valuables on any basis, with specialized support from the police, for civil security systems, or of the gendarmerie, for military security systems, establish concrete ways of organizing and providing security, as the case may be, with gendarmerie forces, public guards, own security personnel or security ensured by specialized companies.

The units grouped in a particular area may organize, with police permit, joint security with public guards, security by their own personnel or by specialized security companies. The heads of these units establish the form of security, the duties and responsibilities of each beneficiary, including those regarding the drafting of the security plan.

In the case of units where it is not possible to provide an organized security system, their heads are forced to produce enclosures, railings, shutters, safe locks, security lighting,

² Law no. 218/2002 on the organization and functioning of the Romanian Police

³ Law no. 333/8 July 2003 on the security of objectives, goods, valuables and the protection of individuals, Article 1

⁴GIRP (General Inspectorate of the Romanian Police) Disposition no. 422/25 September 2006 on the regulation of the activity of the police structures in the field of security of objectives, goods, valuables and protection of individuals, Article 1, para. 2

alarm systems or other such means necessary in order to ensure the security and integrity of the goods.

The responsibility for coordinating and guiding the work carried out by the security and protection structures mentioned above, for preventing and combating crimes and other violations of the law in this field lies with the Directorate for Public Order Police within the General Inspectorate of Romanian Police and the Public Order Police Services within County Police Inspectorates, respectively the General Directorate of Bucharest Police, according to their jurisdiction.

As regards objectives or activities in the rail, water and air transport areas, the powers fall within the competence of the Transport Police Directorate, Regional Transport Police Departments, County Services and Transport Police Stations⁵.

Both the Directorate for Public Order Police and Transport Police Directorate include one service in the field, organized into compartments and lines of work. Within the Public Order Police Services of the County Police Inspectorates, a Security System Compartment operates, consisting of officers, of whom at least one is an electronics specialist, all of them being responsible for the control, support and guidance of the activity carried out by the security and protection structures, the beneficiaries of these services, as well as for monitoring the activity of subordinate police structures.

The Public Order Police Service of the General Directorate of Bucharest Police includes a Security Systems Office. Within the public order structures one or more police officers will be designated, depending on the volume of activity in the area, to be in charge of the security issue, who will be evaluated according to specific indicators.

In rural areas, activities in the security line are carried out by officers and agents within Communal Police Offices or Stations, in the assessment of whom specific indicators will be taken into account⁶.

The Security Systems Compartment ensures the fulfillment of police duties in the line of the security of objectives, goods, valuables and protection of individuals, at the level of the Public Order Departments, Offices and Formations in urban areas.

Police officers in the Security Systems Compartments perform the following preventive activities:

- a) provide support, guide and control the manner in which legal provisions regarding the security of objectives, goods, valuables and protection of individuals are respected by the holders of valuables and service providers, establishing the necessary measures to be taken;
- b) ensure knowledge of all holders of goods or valuables within their range of competence and the security measures they have taken;
- c) identify the objectives that work with few security measures and determine who should implement additional measures in order to protect the valuables;
- d) analyze the causes and circumstances of facts burglary or robbery committed on the personnel operating with the valuables of the objectives within their competence and propose measures to improve the security of all similar units in order to prevent such acts in the future.

To combat crimes aimed at the patrimony of institutions or economic units, police officers of the Security Systems Compartments gather information and carry out operational activities in order to identify those who violate legislation in the field of security and

⁵ GIRP Disposition no. 422/25 September 2006 on the regulation of the activity of the police structures in the field of security of objectives, goods, valuables and protection of individuals, Article 2

⁶ GIRP Disposition no. 422/25 September 2006 on the regulation of the activity of the police structures in the field of security of objectives, goods, valuables and protection of individuals, Article 3

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protection of objectives, goods, valuables and individuals, imposing the legal measures that are necessary⁷.

The protection of magistrates, police officers and gendarmes, as well as of the members of their families, if their lives, physical integrity or property are under threat, is ensured by the Ministry of Interior, according to the law⁸.

The responsibility for taking measures to ensure the security of goods and valuables held by any title falls upon the heads of ministries and other specialized bodies of central and local public administration, autonomous administrations, national corporations and national companies, national research and development institutes, trading companies and other units holding goods or valuables by any title.

Security is organized and carried out according to the security plan drawn up by the unit whose goods or valuables are being watched over, with a special permit from the police. This permit is required for each instance of security plan change.

For units that ensure security through gendarme forces, a police permit is not mandatory.

The security plan sets the following main issues: characteristics of the objective under watch, the number of posts and their location in the respective area, the number of security personnel required, facilities, security and alarm equipment and technical means, posts' curfew, connection and cooperation with other bodies responsible for the security of objectives, goods, valuables and people and the mode of action in various situations. Access rules should also be provided, in compliance with the orders of the unit's head, as well as the documents specific of the security service.

In the case of units that ensure security through gendarme forces, specialized security and protection companies, public guards or a combination thereof, the security plan is drawn up by the heads of the beneficiary units together with the commanders/chiefs of these forces.

The specific documents required for the performance and records of security services, except for those provided by gendarme forces, and the models for these documents are established by Government Decision⁹.

As part of the specific activities they carry out within their range of competence, the proximity police should identify the objectives that require the provision of physical guarding, mechanical and electronic protection systems or complementing and upgrading those already in place, as well as connection to local monitoring dispatch units, while notifying about this, according to a grid, the Security Systems Compartments within the municipal and town Police structures. Police officers in these compartments should check and enforce legal measures to secure the objectives indicated.

Owners Associations will be advised by the proximity police officers to implement appropriate mechanical and electronic systems at the stairway entrances of their blocks-of-flats. Also recommendations should be made, in areas where required (parking lots, isolated walkways, places where public order and tranquility are frequently violated or street gangs are active, etc.), to organize security and protection according to a patrol system provided by authorized companies¹⁰.

⁷ Annex to the GIRP Disposition no. 7/7 February 2008 on the principles of organization and action of the public order police structures, Article 21

⁸ Law no. 333/8 July 2003 on the security of objectives, goods, valuables and protection of individuals, Article 3

⁹ Law no. 333/8 July 2003 on the security of objectives, goods, valuables and protection of individuals, Article 5

¹⁰ GIRP Disposition no. 422/25 September 2006 on the regulation of the activity of the police structures in the field of security of objectives, goods, valuables and protection of individuals, Article 81

Specific documents necessary for the performance and records of the security service

These documents and records should be present in all units provided with any of the forms of security mentioned by the law as a necessary condition for security activities, because they keep track of all the activities and operations carried out by the security personnel and of the control exerted over the work thereof.

a) Post-Bulletin Register: set for objectives whose security system consists of three or more posts. In this case one or several shift heads of the service or of the objective will be appointed, by the beneficiary, in the case of self-provided security, or by the service provider, when the activity is carried out by security companies.

b) Register of Service Delivery-Receipt Reports, used at each guard post.

c) Register of Weapon Delivery-Receipt Reports, used at armed guard posts.

d) Records of People's Access.

e) Records of Vehicle Access, where appropriate.

f) Records of Factory Railway – CFU Access – where appropriate.

g) Records of the Movement of Weapons, kept at the arms' room.

h) Control Register, which records the checks performed by the representatives of the beneficiary and of the provider.

i) Unique Control Register, which records the checks performed by police officers or gendarmes, as appropriate.

j) Register of Events.

k) Special Register for keeping track of contracts.

All these documents, except the Records of Weapons and the Special Register, are numbered and registered at the secretary's office of the guarded unit, the two exceptions being registered each year at the Public Order Police Services of the General Directorate of Bucharest Police or of the County Police Inspectorates¹¹.

Duties of the Ministry of Administration in providing the security of objectives, goods and valuables

The Ministry of Administration is a specialized body of the central public administration, with legal personality and headquarters in Bucharest Municipality.

The Ministry of Administration exercises, in compliance with the Constitution and the laws of the country, its duties relating to:

a) the protection of the fundamental human rights and freedoms, of public and private property;

b) achieving the Governance Program and strategies in the field of public administration and order and monitoring, on behalf of the Government, the development and application of institutional reform programs by ministries and other central public administration authorities;

c) public function and civil servants;

d) the activity of cadastre, geodesy and cartography;

e) activity concerning disadvantaged areas and industrial parks;

f) the provision of public order;

g) the security of individuals, objectives, goods and valuables;

h) the prevention of and fight against antisocial acts;

i) compliance with the legal regime of the state border;

¹¹ Government Decision no. 1010/10 August 2004 approving the methodological norms stipulated in Article 69 of Law no. 333/2003 on the security of objectives, goods, valuables and the protection of individuals, Annex 4, Article 1

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- j) the computerized record of the person;
- k) the legal status of foreigners;
- l) applicants for refugee status and persons who were granted a form of protection in Romania;
- m) fire safety and civil protection of people and property, as well as the management and protection of the National Archive Fund.

Duties of the Romanian Police regarding the security of objectives, goods, valuables and the protection of individuals

- a) approve the security plans of units whose security is not ensured by gendarme forces and determines, where appropriate, the need to equip the personnel involved with the required weapons and ammunition, if there are documents certifying the right of ownership or, as the case may be, the right of use over the objective¹²;
- b) provide specialist support in organizing security for these units, in training the security personnel and see to the strict enforcement of the measures established through the security plan;
- c) issue operating licences for specialized security companies and deliver permits for the heads thereof, in compliance with the law;
- d) issue certificates for the employment of security personnel or withdraw the certificate granted when the legal conditions that were the basis for its issuance are no longer met;
- e) approve, as appropriate, thematic plans for the training of the security personnel and bodyguards;
- f) approve the design for technical intrusion alarm systems, proposed for installation in the units;
- g) direct and oversee, where appropriate, the carrying out of firing sessions using the supplied armament by the security personnel and bodyguards;
- h) provide assistance in the organization of the security and bodyguard activities and supply, for free, the armament necessary to equip the personnel of public institutions authorized by the law on their establishment, organization and functioning to own and use firearms and ammunition, with the exception of those in the Defence, Public Order and National Security System;
- i) provide, through rental, for a fee, within available funds, the weapons needed to equip the security personnel of other units ;
- j) control the enforcement of legal provisions on the protection of objectives, goods and valuables, as well as those on bodyguard activity and establish measures to be taken;
- k) approve the rules of organization and functioning of the dispatch units in the area and monitor alarm systems;
- l) issue operating licences to companies specialized in activities of design, manufacture, installation and maintenance of alarm systems against intrusion or their components and of monitoring the alarms in the premises or revoke their licence, under the conditions of the law;
- m) authorize the managers and technical staff of specialized companies or withdraw these permits when the conditions provided by the law are no longer met;
- n) authorize the security personnel and bodyguards to own and use firearms;
- o) control and guide the activity of specialized companies;

¹² Law no. 9/9 January 2007 amending Law no. 333/2003 on the security of objectives, goods, valuables and the protection of individuals, section 6

p) keep track of the licences, certificates and permits granted, as well as those withdrawn, and supply, on demand of the security and protection service beneficiaries, data in this regard¹³.

Duties of police officers in the Public Order structures regarding the security of objectives, goods, valuables and the protection of individuals

I. Public Order Offices and Formations, by law, carry out the following activities:

a) provide specialized assistance, upon request, to the unit heads to help them establish effective ways of organizing and carrying out security services or install mechanical and electronic security means necessary to ensure the security and protection of goods and valuables, and also control the security systems adopted;

b) notify in writing the managers/associates, heads of public and private economic agents about the obligations imposed by law with regard to the protection of patrimony;

c) verify the manner in which the managers/associates, heads of public and private agents fulfill the obligations imposed by law with regard to the protection of patrimony;

d) verify, according to their competence, the documents required for the approval of the applicants' requests to attend security guard qualifying courses;

e) verify and propose for approval security plans for objectives secured with unarmed guards;

f) carry out field verifications, following the observance of legal provisions regarding the holding, handling, storage and transportation of monetary values;

g) conduct inspections and punctual actions at the objectives within their range of competence, which they communicate to the competent county service;

h) propose the withdrawal of certificates from security personnel, in the cases prescribed by law;

i) carry out regular trainings with the security personnel upon request or when the operational situation requires it;

j) draw up reports addressed to the management of units within their range of competence where flaws were found in the security activities;

k) organize meetings with the representatives of owners of goods and valuables in order to convince them to ensure appropriate security and protection against potential risks and threats;

l) perform case analyses, aiming to establish favouring causes and circumstances, take measures to remedy deficiencies and spread information for preventive purposes, within the limitations of the law;

m) carry out, within their competences, activities of criminal case investigation concerning the offences provided by the law with regard to the security of objectives, goods, valuables and the protection of individuals;

n) carry out specific activities to identify legislation infringements in the field of the security of objectives, goods, valuables and the protection of individuals;

o) establish contraventions and offences, particularly regarding the security law;

p) communicate to the Public Order Police Service contravention sanctions imposed leading to the suspension of licenced companies or those resulting in the cancellation of security personnel qualifications¹⁴.

¹³ Law no. 333/8 July 2003 on the security of objectives, goods, valuables and protection of individuals, Article 55

¹⁴ GIRP Disposition no. 422/25 September 2006 on the regulation of the activity of the police structures in the field of security of objectives, goods, valuables and protection of individuals, Article 8

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Public Order Offices and Formations draw up and keep to date the following records:

- a) objectives that are not provided with security and/or electronic and mechanical means;
- b) objectives provided with unarmed security;
- c) personnel approved for enrollment in training courses;
- d) collecting tellers and other storage spaces for monetary values;
- e) currency exchange and pawn offices, jewelry stores;
- f) lotteries and sports betting agencies;
- g) wholesale trade centers;
- h) post offices;
- i) museums, churches and any other places of culture and art that do not hold patrimony assets;
- j) petrol stations and deposits;
- k) educational units and institutions.

In fulfilling its incumbent duties, the Ministry of Administration cooperates with the other ministries and other specialized bodies of the central public administration and collaborates with local public administration authorities, their associative structures, employers' associations and trade unions, associations and non-governmental organizations, other legal entities, as well as natural persons, within the limitations of the law.

The Ministry of Administration organizes, provides and conducts cooperative relations with authorities in other countries specialized in its areas of competence, and through internal affairs attachés or liaison officers ensures the representation of the institution in relation to similar authorities of the countries with which Romania has diplomatic relations or specialized international bodies and organizations¹⁵.

Security with the local police

Law no. 155/2010 on the organization and functioning of Local Police mentions in Article 1 that this institution aims to ensure public order and safety, but also to increase the efficiency of the security of objectives, goods and valuables of public and private interest. The number of posts for local police officers with security duties is determined depending on the number and importance of the objectives for which security is to be provided.

The local police are organized as follows:

- the structure for public order and tranquility and security of goods;
- the structure for traffic on public thoroughfares;
- the structure for discipline of construction works and street display;
- the structure for environmental protection;
- the structure for trading activities;
- the structure with duties in the line of population statistics.

The structure for public order and tranquility and security of goods is made up of the head of the structure who is subordinate to the local police chief and local police officers with duties in maintaining public order and tranquility and ensuring the security of goods.

The head of the structure for public order and tranquility and security of goods has the following specific tasks, depending on the responsibilities entrusted to him:

- a) organizes, plans, directs and controls the activity of the local police personnel with duties in maintaining public order and tranquility and ensuring the security of goods;
- b) draws up the security plans of the objectives within his competence;

¹⁵ Emergency Ordinance no. 63 of 28 June 2003 on the organization and functioning of the Ministry of Administration and Interior, approved by Law no. 604/2003

c) makes sure the subordinate staff know and carry out to the letter the legal provisions governing public order and tranquility enforcement, the rules of social cohabitation and the physical integrity of persons;

d) keeps track of the contravention sanctions enforced by the subordinate staff;

e) makes sure that the subordinate staff attend specialized training, according to the established schedule;

f) immediately informs the Local Police leadership about all special events in the activities of public order enforcement and keeps a record of these events;

g) gives a monthly analysis of the work of the subordinate staff;

h) takes effective measures in order for the entire staff to properly execute their incumbent duties, have a civilized behaviour, respect the disciplinary rules set, by proposing rewards and sanctions, accordingly;

i) participates, along with the Local Police leadership, to the drafting or updating of the public order and safety plan of the administrative-territorial unit/subdivision;

j) prepares a daily report on the main events and submits it to the Local Police chief;

k) provides the daily training of local police officers to raise awareness of the operational situation in their area of competence¹⁶.

The contractual personnel of the Local Police provide the security of goods, objectives and valuables as set by the Local Council or the General Council of Bucharest, through decisions.

The contractual personnel of the Local Police with duties in the field of security of goods and local interest objectives have the following specific tasks:

a) check, during the service, vulnerable places and spots, the existence and state of locks, of the technical facilities and security and alarm systems and take, if necessary, appropriate measures;

b) know the legal provisions regarding access to objectives and the rules established in the security plans;

c) make sure that the people who were allowed in the premises, on the basis of the documents set, only move to places to which they were given access;

d) do not leave the post entrusted to them except in situations and conditions provided for in the post's curfew;

e) verify the objective entrusted to them for guarding, to find any potential sources of fire, explosion, or other serious hazards. If such hazards have occurred, take the first measures to rescue people and goods, and also to limit the consequences of these events and notify the competent authorities;

f) in the case of a flagrant offence, they take measures to deliver the perpetrator to the Romanian Police structures competent by law. If the perpetrator has disappeared, they ensure the safety of goods, do not allow other people to enter the crime scene and announce the competent police unit, while also drafting a report in which they include their findings;

g) make use of the weaponry they are equipped with¹⁷ only in strict compliance with legal provisions.

¹⁶ Government Decision no. 1332/23 December 2010 on the approval of the Framework Regulation regarding the organization and functioning of the Local Police, Article 16

¹⁷ According to Government Decision no. 1332/23 December 2010 on the approval of the Framework Regulation regarding the organization and functioning of the Local Police, Article 32 provides that local police staff who have made use of a weapon are obliged to act immediately in order to provide first aid and medical assistance for the injured persons and also to immediately notify the nearest police body of the Romanian Police, regardless of whether or not there were victims or property damage, according to the provisions of Law no.

Conclusions

The Local Police can provide, under the conditions of the law, the security of transportation of goods and valuables, consisting of amounts of money, credit bonds, cheques or other securities, jewelry, precious metals and stones, belonging to the commune, town, Oradea municipality or Bucharest municipality sector¹⁸.

During service, the contractual personnel of the local police with duties in the field of security of goods and objectives of local interest are obliged to wear uniforms and exercise the duties listed in their job description. Also when the use of weapons cannot be avoided, the local police personnel may make use of the weapon supplied while exercising their duties regarding the security of goods and objectives of local interest¹⁹.

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295/2004 regarding the regime of weapons and ammunition, as subsequently amended and supplemented.

¹⁸ Government Decision no. 1332/23 December 2010 on the approval of the Framework Regulation regarding the organization and functioning of the Local Police, Article 30

¹⁹ Law no. 155/2010 on Local Police

**REFLECTIONS ON WORKING TIME - AN ESSENTIAL ELEMENT OF THE
INDIVIDUAL EMPLOYMENT CONTRACT
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Abstract

Conducting work within a specified number of hours and according to a certain program is a defining feature of the individual labour contract, one of the criteria for differentiating it from civil or commercial legal relationships with a similar object. Considering these characteristics of the employment contract, it is particularly important to analyze the legal framework to determine whether the current statutory regulation of international and European level is respected by the national law. It is equally important to identify the main lines of action, so as to create a balance between capital positions represented by the employer and labour represented by the employee, within the individual employment relationship.

Keywords: work program, legal relationship, balance, labour intensity, labour relations

Introduction

In the execution of the individual employment contract, the employee is obliged to work a number of hours, daily, weekly or monthly, according to a schedule established unilaterally by the employer or conventionally, compliance with which constitutes the core of labour discipline.

Labour legislation should reflect the need to ensure a better balance between the interests of both the employer and the employee, that is, between the aim of the first to continuously streamline operations and increase productivity and purpose of the latter to rebuild their own capacity to work and pay attention to the personal side of life, simultaneously with professional development. Based on this objective, both internationally and at European Union level and also at the level of each member state special attention shall be given to matching working time and rest time, in order to create working conditions that must provide workers genuine opportunities to achieve professional and personal development.

International regulation of working time

The International Labour Organization has paid particular attention to working time, considering it an essential element of the employment relationship, whose duration produces consequences on the personal and professional development of the individual engaged in a dependent activity. The particular importance placed on working time by the International Labour Organization is reflected in the very considerations this body's Constitution. According to them, "there are employment circumstances involving injustice, misery and hardship for a large number of people, "requiring" urgent improvement of these conditions, for example, in the regulation of working time, in setting a maximum duration of the day and

of the working week ...”¹. . The subsidiary principle is that human life is not just about work and that every human being should enjoy effective protection against excessive physical and mental fatigue and should be able to feel good and to have social and family life. Limiting working time and recognition of the right to rest appear, to the highest level, in international instruments universally valued. Thus, Article 24 of the Universal Declaration of Human Rights recognizes that all people have the right to rest and to leisure time and to a reasonable limitation of working hours and periodic paid holidays. This principle is recognized by Article 7 d) of the International Covenant on Economic, Social and Cultural rights referring to rest, to reasonable limitation of working hours and to periodic paid holidays.

The International Labour Organization adopted several legal instruments, their way being open by Convention 1/1919 on labour duration, which, on its adoption, corresponded the social and economic reality of the time.

The purpose of the international normative regulation of working hours is to ensure the effective protection of workers in the context of increased flexibility of labour relations. The international regulation of working time is a body of normative legal instruments aimed at providing the necessary framework for decent work, ensuring workers respect for their values in their family, social and spiritual life. However, the legal regulation must also respond the need for flexibility of labor relations, so employers would better organize their work and be competitive in an economy increasingly globalized.

Following the impact studies conducted by the International Labour Organization, the result was, on the one hand , the need to maintain minimum standards on working time and, on the other hand , the need to revise existing ones so that they would respond the best interests of employers and workers alike. Given these results, at the 93rd Conference of the International Labour Organization, which took place in 2005, the Report on the study of conventions relating to the regulation of working time was presented, which included recommendations on how to approach this international legal institution. The recommendation referred to the need to adopt a unique new legal instrument on working time and related issues of weekly rest and paid annual leave, which would consider the following additional items² :

- a. to provide effective protection of workers, so that working time should not affect their health and safety;
- b. to maintain a reasonable balance between work and family;
- c. to ensure that the new instrument should not lead to a reduction in the level of protection offered by existing tools;
- d to provide more flexible forms of organization of working time than those in the conventions examined. This might be done by extending the authorized daily work within the limits determined and with sufficient breaks to help raise decent working conditions;
- e. to fill an important gap of Conventions 1-30 , which do not set a precise limit of the total number of overtime hours that can be performed during a given period, within the permanent or temporary derogations provided by the Convention³.

¹Extracted from the overall study of the CEACR Convention (No. 1) reports on the duration of labor (Industry) Convention 1919 (No. 30) on the duraton of labor (trade and office) in 1930. International Labour Conference, 93 edition 2005, report III (Part 1B). Chapter X. Conclusions <http://www.untrr.ro/activitate-patronala/comentariile-biroului-international-al-muncii-privind-intrebarile-puse-de-catre-guvernul-romaniei-privind-codul-muncii.html>

²<http://www.untrr.ro/activitate-patronala/comentariile-biroului-international-al-muncii-privind-intrebarile-puse-de-catre-guvernul-romaniei-privind-codul-muncii.html>.

³Al Athanasiu, *Codul muncii Comment on articles*. Update to Vol I_II, CH Beck Publishing House, Bucharest, 2012, p. X

3. European regulation of working time⁴

At European Union level, a relevant expression of the regulation of working hours was the Community Charter of Fundamental Social Rights of Workers⁵, in particular its paragraphs 8:19 . The first paragraph, which shows that any employee of the European Community must benefit, at their workplace, from satisfactory conditions of safety and protection of health, and they are entitled to a weekly rest period whose duration Member States will gradually match according to national practices.

In the legal system of the European Union working time was not approached from a classical perspective of labor law, but from the perspective of protecting the security and health of employees. The main reason was the difficulty of regulation of this matter in the European Economic Community Treaty reformed in 1986 by the Single European Act. In this the provision of harmonizing the laws of member states regarding safety and health was first envisaged in Article 118, but was rejected by the notorious opposition of certain countries, like the United Kingdom and Northern Ireland, harmonization of European laws in all other aspects related to labor relations.

In this context, the European Economic Community Council approved the Framework Directive 89/391/EEC on safety and health and, subsequently, Directive 93/104/EC on working time⁶ planning was approved, considering that this area contained an extremely important issue affecting the health protection of employees. Currently, this directive is repealed and replaced by Directive 2003/88/EC.

The United Kingdom of Great Britain and Northern Ireland⁷ has positioned from the start against the approval of this Directive and even challenged it before the Court of Justice⁸, considering that this was a clear violation of the Treaty because it dealt with a matter which was in the classical field of labor law and there was no scientific evidence that this would affect the safety and health of employees as it concerned only the physical risks of the workplace. Court of Justice considered the Community legal norm correct, given the general extensive criteria of occupational health set by the World Health Organization.

The Community Court judgment of 12 November 1996⁹ established that there was no prohibition in art. 118 A of the Treaty of the European Economic Community which did not allow the interpretation of the concepts of work environment, safety and health in the sense that it referred to all factors, physical or otherwise, that might affect the health and safety of employees in their work and, in particular, to some aspects of the planning of the working time. Such an interpretation of the terms "security" and "health" can be based on the preamble

⁴ For details on EU working time regulation see *Relații de muncă. Modul de curs*, developed by the Labour Inspectorate, Romania, Labour Inspection and Social Security, Spain, PHARE Project RO-03/IB/SO-01, Oscar Print Publishing House, Bucharest, 2005, p.136-139

⁵ Moral-political document adopted by the European Council in Strasbourg on 9 December 1989

⁶ Directive 93/104/EC as amended by Directive 2000/34/EC, in reality, the regulatory framework working time and rest time, although the title concerned only certain aspects of the organization of working time.

⁷ See A. Popescu, *Dreptul internațional al muncii*, C.H. Beck Publishing House, Bucharest 2006, p. 358-363.

⁸ Community case is taken from *Relații de muncă. Modul de curs*, published by the Labour Inspectorate, Romania, Labour Inspection and Social Security, Spain, PHARE Project RO-03/IB/SO-01, Oscar Print, Bucharest 2005, p. 137-147.

⁹ The United Kingdom of Great Britain and Northern Ireland v Council of the European Union.

of the Constitution of the World Health Organization, body to which all Member States belong, which defines health as " a state of physical, mental and social comfort and not only a disease or condition in which pain is missing. "

On the other hand, the court held that the Community Planning working time did not appear necessarily conceived as an instrument of employment policy. Planning working time may have a favorable influence on the safety and health of employees by ordering minimum rest periods and adequate rest periods and, in addition, studies have shown that long periods of night work are detrimental to the health of employees and can endanger safety at work. Moreover, work organization in a certain pattern must take into account the general principle of suitability of the work to the person. The Community court acknowledged that the matter of working time can be considered both from a classical perspective, as an institution of labor law, and also as an institution of safety and health.

Nevertheless, further on, at the European Union level, the issue of working time is a component of health and safety at work of employees.

Regulation of working time has been an intractable problem, in view of the many specialties and exceptions to general rules for different types of activities. Community legislation has so many and such extensive exceptions that these almost allow deformation of the minimum content of the current Directive 2003/88/EC by special regulations, collective agreements and even individual agreements.

However, the content of this Directory is very important because it establishes community-based concepts on working time, rest periods, breaks, holidays, night work, time and pace of work, which are applicable to all legal systems of the Member States. Article 13 of Directive sets to the Member States the task to adopt necessary measures to ensure that employers who organize their work in a certain rhythm would consider the general principle of adequacy of labor to the party, primarily in order to alleviate monotonous work and work pace, depending on the type of activity and requirements for safety and health, especially as regards breaks during work.

It is all about the community concepts in the sense given to this phrase by the Court of Justice and, therefore, their meaning and approach present a generally binding. Interpretation of national legislation on working time depends largely on the one previously conducted by the Court of Justice of the EU and this is one of the most important values of Directive 2003/88/EC. It should be noted that consultations are taking place in the labor ministers of the governments of the European Union, aimed at improving the EU regulatory framework on labor time¹⁰, considering the current legal too rigid.

Consequently, action will be taken to harmonize laws on working time with the need for flexibility of labor relations, by introducing permissive legal instruments such as the part time work contract, work at home or work through a temporary employment agency.

National legal regulation of working time

Romania ratified Convention 1 on the working time (industry), 1919. However, it did not ratify Convention 30 on the duration of employment (trade and office), 1930 Convention no. 47 on the reduction of working time to 40 hours a week, 1935.

The Labour Code regulates working time and rest time in art. 108-153; the organization of working time, pauses, records of work done by employees are established by internal regulations. Normal duration of employment is on average 8 hours per day and 40 hours per week. However, even the Constitution provides in Article 38 para. 3 that the normal working time is on average less than 8 hours per day. According to art. 111 paragraph 1

¹⁰ I.T.Ștefănescu, *Tratat de dreptul muncii*, Wolters Kluwer Publishing House, Bucharest, 2007, p 546, footnot. 1

Labour Code, the maximum legal working time may not exceed 48 hours per week, including overtime. For employees aged under 18 years working time is 6 hours per day and 30 hours per week, according to art. 109, paragraph 2 of the Labour Code. The same law provides that the distribution of working time is usually uniform, 8 hours per day for 5 days with 2 days of rest, which means that the duration of monthly working time is 21-23 days, about 170 hours.

Any social activity is inconceivable without restoring useful physical and intellectual capacities of working which means, logically, daily, weekly and yearly rest. Rest time is necessarily associated with working time and concepts are complementary. The regulation governing working time, particularly by setting its limits, is one of the legal guarantees of the right to rest, being the expression of the objective necessity to protect labor against its unreasonable use.

Employers may establish specific forms of organization of working time, such as shift, continuous shift, operation program, unequal program activity-specific to maintenance and repair - maintenance and fractionated schedule. The employer has the opportunity to establish individualized programs of work that require flexible organization of working time, with the consent of the employee concerned. In this situation the working time is divided into two segments: a fixed period where all staff are simultaneously at work and a variable, mobile period when the employee chooses arrival and departure, respecting daily work time.

Being connected to the work performed as an essential element of the individual labor contract, the labor code defines the notion of working time as a concept which expresses the amount of labor required to perform the operations or work by a suitably qualified person who works with normal intensity in terms of determined technological and work processes (art. 126). The work time includes productive time, time for breaks imposed in the technology process, required time for breaks under the labor laws.

Employers should establish work rules under which all categories of employees operate, on union agreement, or if applicable, on employee representatives agreement¹¹.

The rest time of employees is regulated in interdependence with working time and as a result of the requirement to work the right to rest corresponds to it, in order to restore labor force, to protect the integrity and health of workers. Regulation of the right to rest is built on the fundamental idea that this right is not only answering a personal necessity, but it is also an integral part of the protection measures and of guaranteeing the right to work. Hence the severe legal sanction of absolute nullity of any agreement which waives all or part of the right to annual leave.

By rest time one should understand the time required for recovery of physical and intellectual energy spent in the labor process and for satisfying social and cultural-educational needs, the period in which the employees do not perform the work that they perform under the individual employment contract. Rest time takes the following forms: lunch break, the interval between two working days, weekends, public holidays and other days on which according to the law no work is performed and annual leave.

Conclusion:

By analyzing normative regulations at international, European and national levels on working time, it appears that it is still an essential element of the employment relationship, enjoying attention from lawmakers, but also the social partners'. Considering the large number of legal relationships in which their work has a dependent character, all institutions involved understand and act in order to ensure the necessary legal framework to protect the rights of employees, to harmonize work and family life, to create the necessary leverage for the economic and social progress of each nation .

¹¹ On this issue see Constitutional Court Decision no. 24/2003 published in „Monitorul oficial al României”, Part I, no. 72 of 5 February 2003

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THE PHYSICIANS DISCIPLINARY RESEARCH PROCEDURE IN ROMANIA

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Abstract

Like other professions in Romania the medical profession it is also regulated by special laws: Law no. 95/2006 on medical reform, the Code of Medical Ethics and The Romanian College of Physicians Status. The competent authorities to carry out to carry out disciplinary research of the facts that constitute misconduct and specific procedural rules will be briefly analyzed in this paper.

Key-words: physician, disciplinary responsibility, procedure, misconduct

Introduction

The sanitary system has suffered a series of modifications and experiments, by the adoption of multiple normative acts amended for several times within the past 10 years, until the adoption of the Law No 95/2006¹ on healthcare reform. Neither this law escaped the successive modifications of the provisions covered by it².

Title XII of the Law No 95/2006 on healthcare reform, titled "Practicing medicine. Organization and function of the Romanian College of Physicians" states provisions regarding the disciplinary liability for physicians³, as form of the judicial liability⁴ of interest for this paper.

General considerations on the disciplinary liability of physicians

It was stated that "the disciplinary liability is the most common form of judicial liability of the physician, because it organically derives from the rules of professional conduct, from how each healthcare professional performs his duties. The situations which can involve medical liability are multiple, as well as the medical specialties and means in which the physician can and must offer his services to those in need".⁵

¹ Published in the Official Gazette No 372 of 28 April 2006

² From the entrance into force until its analysis in this paper, the Law No 95/2006 has suffered 58 modifications, 4 only in 2013.

³ Section 6, Art 442-451

⁴ E. Ciongaru, *Teoria generala a dreptului*, Scrisul Romanesc Publishing House, Craiova, 2011, p.150

⁵ Doina Popescu, *Sănătatea publică- Serviciul public de interes național în dreptul românesc și comparat*, University of Bucharest, Law Faculty, Bucharest, 2005, PhD thesis, unpublished, p.185

Law No 95/2006 on healthcare reform, as framework law, is completed with the provisions stated by the Code of Medical Deontology⁶ and by the statute of the Romanian College of Physicians⁷.

Though the Law No 95/2006 does not define the disciplinary misconduct of the physicians, it does mention the sources of law stating obligations for the physicians, without being exhaustive: laws and regulations of the medical profession, the Code of Medical Deontology and the rules for a good professional practice, the Statute of the Romanian College of Physicians, mandatory decisions adopted by the organs of the College of Physicians, as well as any action regarding the profession, committed with guilt⁸ which causes a prejudice for the honor and the prestige of the profession or of the Romanian College of Physicians⁹.

Starting from the framework regulation in this area, Art 94 of the Statute of the Romanian College of Physicians defines the disciplinary misconduct¹⁰ committed by the physician, stating that it consists in the “misconduct committed with intent violating the oath taken, the laws and regulations specific for the profession of physician, the Code of Medical Deontology, the provisions of the present statute, the mandatory decisions of the Romanian College of Physicians, as well as any other action committed in relation to the profession or outside it, which prejudices the honor and prestige of the profession or of the healthcare system”. As it is noticed, the Statute offers a wider area for the sources of the obligations for the physician, enumerating besides the sources stated by the Law No 95/2006 and the oath taken. Likewise, Law No 95/2006 states as disciplinary misconducts only the actions committed in relation to the profession with the purpose of prejudicing the honor and prestige of the profession or of the Romanian College of Physicians, while the Statute expands the object of the misconduct also for the actions which have nothing to do with the profession.

Stated by Art 447 of the Law No 95/2006 on healthcare reform, the disciplinary sanctions applicable for physicians for a disciplinary misconduct committed are restated by the Statute of the Romanian College of Physicians in its Art 100.

As well as in the common law, the principle of a unique disciplinary sanction. Thus, from the provisions of Art 100 Para 1 of the Statute of the Romanian College of Physicians it is deduced that for a disciplinary misconduct can only be applied a single disciplinary sanction, one from the ones listed by the pointed article of law. The sanctions shall be applied considering the gravity of the misconduct, the circumstances, the personal circumstances of the physician and the effects produced by the misconduct.

If a physician repeats the disciplinary misconduct until the sanction is radiated, this is considered as an aggravating circumstance which can be considered in the establishment of the disciplinary sanction for the new misconduct which has been committed¹¹. In this regard, according to Art 96 of the Statute of the Romanian College of Physicians, the councils of the territorial colleges must have an evidence of the sanctions applied for their members and to communicate it to the competent institutions.

⁶ Annex 2 of the Decision No 2/2012 of the Romanian College of Physicians on the adoption of the Statute and the Code of Medical Deontology of the Romanian College of Physicians, published in the Official Gazette No 298/7 May 2012

⁷ Annex 1 of the Decision No 2/2012 of the Romanian College of Physicians on the adoption of the Statute and the Code of Medical Deontology of the Romanian College of Physicians, published in the Official Gazette No 298/7 May 2012

⁸ See E. Ciongaru, *op.cit.*, pp.152-153

⁹ According to Art 442 Para 1 of the Law No 95/2006 on healthcare reform

¹⁰ For an analysis of the concept of misconduct see Carmen Nenu, *Trăsăturile caracteristice ale contractului individual de muncă*, University of Bucharest, Law Faculty, Bucharest, 2008, PhD thesis, unpublished, p. 119

¹¹ Art 95 of the Statute of the Romanian College of Physicians

The disciplinary sanctions applicable for physicians are:

- a) Reprimand;
- b) Warning;
- c) Vote of censure;
- d) Fine between 100 lei to 1500 lei;
- e) The prohibition to practice medicine or certain medical activities for a period of one month to a year;
- f) Withdrawal of the membership of the Romanian College of Physicians.

a) The *reprimand* is the mildest sanction which can be applied for physicians, having a preponderant moral feature.

Taken from old labor legislation and kept by the latest normative acts applicable for physicians, the reprimand is a sanction by which the physician is notified that he has violated his professional obligations or prejudiced the honor or prestige of the profession, drawing his attention to the need to review its conduct in the future. This sanction is applicable for all the persons committing a disciplinary misconduct for the first time without serious effects and without intent.

b) The *warning* is also a measure with a preponderant moral feature. This is an easy sanction without direct material consequences.

The warning is not stated by any of the mentioned normative acts enumerating the disciplinary sanctions, unlike the common law, where the warning must be written.

The warning consists in the notification of the employee about the misconduct committed and is put in mind that if he shall commit new misconducts shall be sanctioned with a more serious penalty. Considering the disciplinary procedural elements, we note that the warning must be written, even if the law does not state so.

c) The *vote of censure* is a sanction by which an organized collectivity shows its disapproval regarding an unworthy action committed by one of its members or a sanction by which a collectivity, an organization (etc.) disapproves the activity of a leader or of a proxy. Thus, neither this sanction has direct material consequences for the disciplinary sanctioned physician, only representing a disapproval of the College of Physicians for the action representing a disciplinary misconduct.

d) The only sanction having a direct and prevailing material feature is the *fine between 100 lei to 1500 lei*.

Though Art 249 Para 1 of the Labor Code states the rule according to which disciplinary fines are prohibited for physicians, both the Law No 95/2006, as well as the Statute of the Romanian College of Physicians settle as sanction the disciplinary fine. Art 100 Para 1 Let d) of the Statute of the Romanian College of Physicians settles both an inferior and a superior limit of the fine. Thus, the fine cannot be less than 100 lei and cannot exceed 1500 lei.

The same legal regulation states the owner of the account where the fine is paid, namely the Romanian College of Physicians. The maximum term in which the fine can be paid is 30 days and starts from the moment when the disciplinary decision is definitive. The failure to comply with this sanction entails another sanction, namely the suspension of the right to practice until the disciplinary fine is paid. The suspension of the right to practice assumes the suspension of all rights and obligations arising from the quality as physician.

e) A more serious misconduct is the *prohibition to practice medicine or certain medical activities for a period of one month to a year*.

This sanction has two parts: the prohibition to practice medicine and the prohibition to practice certain medical activities.

These disciplinary measures can be instituted for a period of one month to a year, depending on the gravity of the disciplinary misconduct committed.

f) Withdrawal of the membership of the Romanian College of Physicians is the most serious disciplinary sanction applicable to a physician.

Considering that Art 379 Para 1 Let d) of the Law No 95/2006 states that the profession of physician is practiced in Romania by the persons who are members of the Romanian College of Physicians, the withdrawal of this quality assumes the interdiction to practice medicine. Though this sanction assumes the interdiction to practice medicine, it is not identified with the previous sanction.

The sanction regarding the interdiction to practice medicine or certain medical activities does not assume the withdrawal of the Romanian College of Physicians membership, the sanctioned person keeping his membership to the institution. In exchange, withdrawal of the Romanian College of Physicians membership automatically attracts the interdiction to practice medicine.

This sanction operates *de jure*, without being necessary a particular approach of the Romanian College of Physicians, for the time established by a definitive decision of the court regarding the interdiction to practice medicine, when the interdiction is disposed as a complementary measure, and not like a disciplinary sanction.

In the situation of applying this sanction, the sanctioned physician shall be able to submit a new request to recover his membership in the Romanian College of Physicians, with the fulfillment of the legal conditions, after the expiration of the period stated by the court's decision or after 2 years from the moment when the sanction was applied by the disciplinary commission.

The competent authorities to perform the disciplinary investigation are organized by the supreme professional organization of physicians, respectively the Romanian College of Physicians, with its territorial branches.

In the counties and in Bucharest is organized and operates a territorial college of physicians practicing in that administrative-territorial unit.

Territorially, in each college is organized a disciplinary commission which is independent from the college's management, and nationally, the in Romanian College of Physicians is organized the superior discipline commission, also independent from the management.

Disciplinary procedure

The disciplinary action can be initiated within maximum 6 months since the misconduct is committed or from the moment when prejudicial consequences are known¹².

The prescription term of 6 months can start from two different moments: from the moment in which the misconduct is committed or from the moment when the prejudicial consequences are known.

The disciplinary investigation organs have not the right to choose between these two moments, but only when the moment when the misconduct was committed is unknown, then they can use the 6 months term from the moment when the prejudicial consequences of the disciplinary misconduct are known.

Thus, if the disciplinary action has not initiated within maximum 6 months from the moment in which the misconduct is committed, though this moment is known, and however fits within the 6 months since the prejudicial consequences are known, the complaint shall be dismissed as late submitted.

Regarding the procedural rules for the performance of the disciplinary action, these are stated by Art 105-117 of the Statute of the Romanian College of Physicians, being governed by the principles stated by Art 54-59 of the Code of Medical Deontology: celerity, presumption of innocence, impartiality, written contradictions, survey.

The disciplinary investigation has three stages performed by different organs within the same territorial college: the bureau of the territorial college registers the notification and

¹² Art 102 Para 1 of the statute of the Romanian College of Physicians

verifies the form and the material and territorial competence, the professional county commission performs the disciplinary investigation and the Discipline Commission performs the disciplinary action and issues a decision for the application of a disciplinary sanction.

The intimation regarding a disciplinary misconduct can be made by a complaint or by the own initiative of the authorities.

The complaint shall be submitted to the territorial college in which the physician is a member either personally, by a proxy or by letter with confirmation of receipt. If the complaint is emailed, faxed, submitted or sent in a copy it shall not be taken into consideration.

In order for a complaint to be valid it must cumulatively include all the following elements:

- a) Name, surname, address and quality of the plaintiff;
- b) Name, surname and working place of the physician against whom is submitted;
- c) Physical and moral prejudice caused to the patient;
- d) The patient's signature.

If the complaint does not include all these validity elements or if it is not submitted or sent according to the law previously analyzed, the plaintiff shall be answered regarding this situation, and his complaint shall be taken into consideration.

The bureau of the territorial college can be notified ex officio and may initiate a disciplinary investigation if is aware of a disciplinary misconduct committed by one of its members.

As a result of the self-notification shall be issued a decision including all the elements that were the basis for the decision being attached, if necessary, all the proper evidences.

After registering the complaint, the bureau of the local college's council shall decide whether it shall or shall not initiate the disciplinary investigation.

The situations for which the disciplinary investigation shall be initiated are strictly and limitative stated by Art 106 Para 2 of the statute of the Romanian College of Physicians:

- a) Only if the complaint is not in the competence of the Romanian College of Physicians;
- b) When the complaint does not include the mandatory elements above mentioned.

If neither of the two cases is incident, the bureau of the territorial college, by a decision, shall decide the initiation of the disciplinary investigation. The decision shall be communicated to the professional jurisdiction commission from the territorial college. The professional jurisdiction commission shall verify if the notification has been submitted within the 6 months prescription term.

If the notification was made after this term has expired, the professional jurisdiction commission, by a report, shall propose the rejection of the notification as late submitted, without investigating its background. This report and the case file are sent to the disciplinary commission of the territorial college. The discipline commission shall issue a decision for the rejection of the complaint as late submitted, without ruling on the main issue of the matter.

If the complaint is submitted within the term stated by the statute, based on the decision initiating the disciplinary investigation issued by the council's bureau, the professional jurisdiction commission shall inform the aimed physician about the complaint sending him a copy of it, notifying him about the term in which he can submit his defense in written and the term when he must attend the hearing. The physician must submit his defense in written until the term stated in the notification. The disciplinary investigation is similar to the mandatory prior disciplinary investigation from the common law.

Also, for physicians operates the fundamental right to defense. Within the disciplinary investigation the physician has the right to defend himself and to provide evidence supporting it. Medical or forensic units must provide for the disciplinary commissions or the persons assigned with the disciplinary investigation the requested medical documents or any other necessary information, according to Art 102 Para 2 of the statute.

After the disciplinary investigation is concluded, the professional jurisdiction commission shall send the case file together with the proposal to sanction or to drop the disciplinary investigation to the discipline commission of the territorial college. The disciplinary commission has the ability to enforce a disciplinary sanction.

The disciplinary commission shall investigate again, the disciplinary action being supported by the professional jurisdiction commission.

The disciplinary commission shall hear the physician, respecting his right to defense, the witnesses, the plaintiff and shall request the opinion of different specialists in this area.

The solutions that the disciplinary commission may adopt are either to admit the complaint and to apply a disciplinary sanction, or to reject the complaint. The rejection of the complaint and disciplinary action may be settled for two reasons: either the misconduct is not a disciplinary one, or the plaintiff does not attend the hearing settled by the discipline commission or does not state in written his position regarding the request of the commission, or does not attend the survey ordered in the case. For the latter case, even if the misconduct is a disciplinary one, the physician shall not receive a sanction, the disciplinary action being rejected.

The solution issued by the disciplinary commission shall be included in a decision stating:

- a) The number and date of the decision;
- b) The composition of the disciplinary commission;
- c) Short description of the facts;
- d) Presentation of the means of investigation used (declarations of the parties, heard witnesses, investigated documents etc.);
- e) The disciplinary sanction applied;
- f) The legal ground of its adoption;
- g) The term for appeal and where it must be submitted;
- h) The signature of the discipline commission's president and his seal;

The decision shall be communicated to the investigated physician, the plaintiff, the executive bureau of the national council of the Romanian College of Physicians and to the professional unit where the physician is working and to the Ministry of Health, if the decision is definitive by no-appeal.

According to Art 117 of the statute if a complaint was submitted against a member of a management organ, the disciplinary investigation shall be solved by the superior discipline commission and gathered by the professional jurisdiction commission of the Romanian College of Physicians.

Appealing the decision for disciplinary sanction

The term for appeal is 15 calendar days and starts from the moment the decision for disciplinary sanction was communicated.

The owners of the right to appeal are: the sanctioned physicians, the plaintiff, the Ministry of Health, the president of the territorial college and the president of the Romanian College of Physicians. From Art 113 Para 1 of the Statute we deduce that the physician, who has not been sanctioned, regardless of the reason for which the disciplinary action has been stopped, cannot make an appeal against the decision of the disciplinary commission. We consider that if the disciplinary action was dropped based on Art 110 Let c) of the statute of the Romanian College of Physicians, the investigated physician could appeal the decision of the commission based on the fact that the disciplinary action was stopped, if he considers himself to be innocent. This is possible also in the penal law, according to Art 362 Para 2 Let b) of the Code of Criminal Procedure, the defendant being able to appeal against the decision for acquittal or termination of the criminal trial, regarding the grounds of the acquittal or termination.

The appeal is submitted to the territorial disciplinary commission, which shall send it together with the case file, within 3 working days, to the superior disciplinary commission¹³. If the appeals are submitted directly to the superior disciplinary commission these are declared void, according to Art 114 Para 3 of the statute.

The appeal must be written, a condition *ad validitatem* for it. Also, for the validity of the appeal, it must include the following elements:

- a) Name and surname of the objector;
- b) The domicile, or headquarters of the objector;
- c) The object of the appeal;
- d) The motivation of the appeal;
- e) The evidences grounding the appeal;
- f) The objector's signature.

If the professional jurisdiction commission of the Romanian College of Physicians considers that the appeal does not include all the above elements shall request the objector that, within 5 days from the notification, to complete his appeal.

If the objector does not comply with the request or if the appeal does not include his name, surname, domicile or headquarters, the appeal shall be urgently sent to the superior disciplinary commission with the proposal for rejection.

The appeal has a suspensive effect. From the moment when it was submitted it shall suspend the enforcement of the decision issued by the territorial disciplinary commission.

The appeal cannot include new aspects which have not been invoked in the complaint that led to the initiation of the disciplinary investigation.

In order to solve the appeal, the superior disciplinary commission analyzes the cause under all its aspects. The decision shall be issued after the hearing of the objector and the administration of all evidences considered important for the cause.

The decisions issued by the superior disciplinary commission can either admit or reject the appeal, thus¹⁴:

- a) It may cancel the decision issued by the territorial disciplinary commission, if it was unlawfully issued and, as a consequence, order the restoration of the territorial disciplinary investigation, according to the law;
- b) It may reject the appeal and maintain the provisions of the territorial decisions already issued;
- c) It may accept, totally or partially, the appeal and order the annulment, totally or partially, of the territorial decision, ruling on the complaint;
- d) It may reject the appeal as unlawfully grounded, if it is not motivated by the objector, or he answered the request to state the reasoning of his appeal.

The decision issued by the superior disciplinary commission must include the same elements as the appealed decision, issued by the territorial disciplinary commission.

Against this decision, the sanctioned physician can submit an action for annulment to the section for the contentious administrative of the tribunal on whose territory he performs his activities. The appeal term is 15 days from the notification of the decision.

Conclusions

The physicians' disciplinary liability is regulated by the law No 95/2006 on healthcare reform, as framework law, completed with the provisions stated by the Code of Medical Deontology and by the statute of the Romanian College of Physicians.

¹³ Art 114 Para 1 of the statute has similar provisions with the civil and criminal procedure law, where the requests regarding a mean of appeal are submitted to the court whose decision is appealed.

¹⁴ Art 115 of the statute of the Romanian College of Physicians

The specific of physicians' disciplinary liability to the common law results from the facts that constitute misconducts, from the specific sanctions applied to the physicians and also from the disciplinary research procedure.

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4. Law No 95/2006 on healthcare reform
5. Code of Medical Deontology
6. Statute of the Romanian College of Physicians

BRIEF CONSIDERATIONS REGARDING THE JURIDICAL PROTECTION OF PRIVATE LIFE IN THE REGULATION OF THE NEW ROMANIAN CIVIL CODE

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Abstract

This article, entitled Brief Considerations Regarding the Juridical Protection of Private Life in the Regulation of the New Romanian Civil Code, examines the new legal regime of how the private life of the person is respected, in connection to the inseparable link between the right to a private life, lato sensu, and its four intrinsic rights – the right to freedom of speech, the right of the person to dignity, the right to a private life and image rights.

The regulation was imperatively necessary, both to complete the framework of the values guaranteed by art. 8 of the European Convention of Human Rights, but also to establish an interference between the concept of private life and personal privacy, in the context of the excessive broadcasting of peoples' private lives.

Key words: the right to a private life, the right to privacy, image rights, the violation of the private life

Introduction

Assuming that there are minimum protection requirements and they are not treated exhaustively, the rights encompassed by the European Convention for the Protection of Human Rights and Fundamental Liberties¹, even though most are of a civil or political nature, they are also in a limited number and have precise limitations, when it comes to issues of national security, public safety, the economic interest or the prevention of crime².

Considered to be an important element in ensuring the harmonious development of the individual, the right to a private life has been included among the fundamental rights. It is protected and recognized by the international, European and national legislation. Based on the tripartite division of the human structure, the doctrine³ puts the private life in the category of the personality rights, which protect the human as a social being.

¹ The Convention for the Protection of Human Rights and Fundamental Liberties, also known as the European Convention of Human Rights, signed on November the 4th, 1950, in Rome, entered into force on September the 3rd, 1953 and ratified by Romania by the no. 30/1994 Law, regarding the ratification of the Convention for the Protection of Human Rights and Fundamental Liberties and of the additional protocols to this convention, published in the "Official Gazette of Romania", part I, no. 135, March 31st, 1994.

² M. Udroui, O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român. Tratat*, C. H. Beck Publishing House, Bucharest, 2008, p. 16-17.

³ C. Jugastru, *Reflecții asupra noțiunii și evoluției drepturilor personalității*, in the Yearbook of the „G. Barițiu” History Institute, Series Humanistica, tom. V, Cluj-Napoca, 2007, p. 329.

The right to a private life is characteristic for the English common-law, and the first sentences regarding the concept of private life were provided by the judge Thomas M. Cooley, in 1888, enunciated by the collocation the right to be left alone⁴.

Even though the concept of private life, presented by art. 8⁵, cannot be precisely defined because of the vast array of situations it encompasses and due to the fact that it is not an immutable⁶ right, according to the European Court of Human Rights, the right to a private life is not exhaustive; it incorporates and guarantees a series of other intrinsic rights on the right to privacy, in the sense of free provision over one's body and therefore, sexual freedom, the right of the individuals to have a home, from a broad point of view, the right to make a family and develop emotional relations amongst its members, the right to live in their home environment, the right to the privacy and confidentiality of their life⁷, of the information related to it (even of a medical nature) and of the private conversations⁸, the person's right to have an image⁹, regardless of the location (public – private) and hence the right to a reputation, the right to a social life in the sense of friendship relations with the peers (to whom he has no secrets), the right to a healthy environment (including no phonic¹⁰, chemical, radioactive or industrial¹¹ pollution).

⁴ Th. I. Emerson, *The Right of Privacy and Freedom of the Press*, „Harvard Civil Rights – Civil Liberties Law Review”, vol. 14, no. 2, Summer, 1979, *Faculty Scholarship Series*. Paper 2776. http://digitalcommons.law.yale.edu/fss_papers/2776

⁵Art. 8, paragraph 1 of the European Convention of Human Rights stipulates that *Everyone has the right to respect for his private and family life, his home and his correspondence*. Paragraph 2, art. 8 of the same convention states that *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*.

⁶ M. G. Losano, *Despre drepturi și despre îndatoriri: încă despre tutela vieții private*, in „Legea italiană în privința protecției vieții private”, translation by A. Lazăr, translation coordinator and edition editor – M. C. Eremia, All Beck Publishing House, Bucharest, 2004, p. 3.

⁷See ECHR, May 4th, 2000 ruling, published in the “Official Gazette of Romania”, part I, no. 19 of January 11th, 2001, in the *Rotaru v. Romania* case, paragraph 60, where the Court condemned the Romanian state for the violation of art. 8, in the sense that, the Romanian Intelligence Service owned and used a file containing the personal data of the plaintiff; the Court concluded that the Romanian system of collecting and archiving information does not provide sufficient safeguards against abuses. Please note that all the decisions of the European Court to which we refer in this article are available on www.echr.coe.int.

⁸See ECHR, October 22nd, 2002 ruling, in the *Taylor-Sabori v. the Great Britain* case. paragraphs 16-19; the notion of “correspondence” includes any type of communication between two people, regardless of the technical means used to achieve it. Consequently, art. 8 is also applicable when the police illegally intercept the messages sent to the pager of a person.

⁹See ECHR, June 24th, 2004 ruling, in the *Von Hannover v. Germany* case, paragraphs 76-80. The publishing in the press of the photos which portrayed the princess of Hanover, both alone and in the company of people from her daily life, even in public places, constituted a violation of the Convention's art. 8. Otherwise, see the ECHR's decisions from February the 7th, 2012, in the *Axel Springer AG. v. Germany* case, paragraphs 25-83, and in the *Von Hannover v. Germany* case (2), paragraphs 53-111, where the Court influenced large parts of the decisions, of the criteria applicable in the case of an existing conflict between the right to freedom of speech and that of respecting the private life, should take into consideration the contribution the published materials had in the case of a public debate, of general interest; they should also take into account the level of fame of the person present in those materials, his or her previous conduct, the method in which the materials were obtained and also their veracity, their content, form and the consequences of their publication, as well as the severity of the penalties imposed on the journalists or publication.

¹⁰There are a number of decisions where the Court ruled that art. 8 was violated, via phonic pollution; in this sense, see ECHR, February 16th, 2005 ruling, in the *Moreno Gomez v. Spain* case, paragraphs 46-63; ECHR, February 9th, 2011 ruling, in the *Dees v. Hungary* case, paragraphs 15-24; ECHR, November 25th, 2010 ruling, in the *Milevaet al v. Bulgaria* case, paragraphs 73-102; ECHR, November 22nd, 2011 ruling, in the *Zammit Maepel v. Malta* case, paragraphs 30-74; ECHR, February 21st, 1990 ruling, in the *Powell und Rayner v. Great Britain* case, paragraphs 37-46; ECHR, July 8th, 2003 ruling, in the *Hatton et al v. Great Britain* case, paragraphs 84-130.

¹¹See ECHR, December 9th, 2004 ruling, in the *Lopez Ostra v. Spain* case, paragraphs 44-58; ECHR, February 19th, 1998 ruling, in the *Guerra et al v. Italy* case, paragraphs 56-60; ECHR, November 30th, 2004 ruling, in the

In the context of modern individualism, even though it has a complex nature, susceptible to many interpretations, the notion of private life must be understood, in our study, as the right to privacy, both in terms of not being disturbed, harassed or pursued without a valid reason, in the public and private space, as well as in the terms of information or private conversations being confidential and the guaranteeing of personal relations' discretion.

Considered to be the classic framework of the private life's protection, the right to privacy or to the privacy of personal relations¹² is not to be confused with the right to a private life, because it has a more limited area of freedom and action, where the individual may freely externalize their thoughts, feelings in a designated space, be it with the people with whom they fully trust, or even alone, by themselves, uninfluenced by anyone.

Juridical regime

This right is rooted in art. 12 of the Universal Declaration of Human Rights¹³, which states that *No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.*

The right to have one's private life completely respected is also guaranteed by art. 40, paragraph 2, letter a) of the Convention on the Child's Rights¹⁴.

In matters of bioethics as well, the respect for the private life is guaranteed by art. 10, paragraph 1 of the Convention for the Protection of Human Rights and the Dignity of the Human Being, in relation to applications in the field of biology and medicine¹⁵, according to which *everyone has the right to respect for private life in relation to information about his or her health.* The Universal Declaration for Bioethics and Human Rights¹⁶ supports the same right, in the sense that, *the private life and the confidentiality of the personal information of said people must be respected. Where possible, this information must not be used or disclosed for purposes other than the ones they were collected for or for which consent was given, in accordance with the international law, including international human rights law.*

Another documents which, in art. 7, guarantees the respect for private and family life, is the European Union's Charter of Fundamental Rights¹⁷, according to which *everyone has the right to have their family and private life respected, along with their home and communication privacy.*

Öneryldiz v. Turkey case, paragraphs 158-160; ECHR, November 30th, 2005 ruling, in the Fadeyeva v. Russia case, paragraphs 64-134; ECHR, March 26th, 2007 ruling, in the Giacomelli v. Italy case, paragraphs 68-98.

¹² J. F. Renucci, *Tratat de drept european al drepturilor omului*, Hamangiu Publishing House, Bucharest, 2009, p. 241.

¹³ The Universal Declaration of Human Rights was adopted on December the 10th, 1948, by the 217 A Resolution, in the context of the Third Session of the UN General Assembly.

¹⁴ The Convention on the Child's Rights was adopted by the National Assembly of the united Nations, on the 20th of November, 1989, and ratified by Romania by the no. 18/1990 Law, for the ratification of the Convention on the Child's Rights, published in the "Official Gazette of Romania", part I, no. 314 of June 13th, 2001.

¹⁵ Also called the Convention on Human Rights and Biomedicine, signed in Oviedo, on April the 4th, 1997 and ratified in Romania by the no. 17/2001 Law, regarding the ratification of the European Convention for the Protection of Human Rights and the Dignity of the Human Being, in relation to the Applications in the Field of Biology and Medicine, the Convention on Human Rights and Biomedicine, signed in Oviedo, on April the 4th, 1997 and of the Additional Protocol to the European Convention for the Protection of Human Rights and the Dignity of the Human Being, in relation to the Applications in the Field of Biology and Medicine, regarding the banning of human cloning, signed in Paris, on January the 12th, 1998, published in the "Official Gazette of Romania", part I, no. 103 of February 28th, 2001.

¹⁶ The Universal Declaration on Bioethics and Human Rights, adopted on October the 19th, 2005; available on <http://www.unesco.org/new/en/social-and-human-sciences/themes/bioethics/bioethics-and-human-rights/>

¹⁷ The EU Charter of Fundamental Rights was established by the European Commission, European Parliament and the Council of the European Union, on December 7th, 2000, in the European Council of Nice.

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The protection of the private life is also stipulated in art. 26, paragraphs 1-2 of the Romanian Constitution¹⁸, which guarantees the respect of the private and family life, in the sense that *the public authorities shall respect and protect the intimate, family and private life. Any natural person has the right to freely dispose of himself unless by this he infringes on the rights and freedoms of others, on public order or morals.* In art. 27 of the Constitution, the *inviolability of the residence and domicile are guaranteed*, and in art 28. *the confidentiality and secrecy of the correspondence* if also guaranteed.

The new Civil Code¹⁹ guarantees the respect of one's private life and dignity of the human being, in section 3, chapter II of title II, dedicated to the natural person, by evoking four rights, namely the right to freedom of speech, the right to a private life, the right to dignity and one's own image, which all seem to permanently be in an inevitable relation of competitiveness and complementarity. Therefore, according to art. 71, paragraphs 1-3 *every person has the right to respect, for his private life. No one shall be subject to any type of interference in their intimate, private or family life, nor in their residence, domicile or correspondence, without their consent or without respecting the limits set out in art. 75²⁰. It is also prohibited to use, in any way, the correspondence, manuscripts or other personal documents, as well as other personal information for someone's private life, without their consent or without respecting the limits set out in art. 75.*

In conjunction with art. 75, art. 73, paragraphs 1-2 of the same code, guarantees the right to one's own image, in the sense that *every person is entitled to their own image. In exercising the right to their own image, they may prohibit or hinder the reproduction, in any manner, of their physical appearance or their voice or, depending on the case, the use of said reproduction.*

The specialized literature²¹ attributes the concept of private life a limited meaning, failing to encompass in its area the right to one's own image, even though it includes both the right to one's own physical appearance, as well as the right to the voice of said person who owns the right to reproduce and sell them, which leads us to state that they should not be treated in an isolate manner, because their legislator wished only to highlight their complementarity, through a thorough elaboration of these notions. Even the jurisprudence of the European Court established the inclusion of the right to an image in the area pertaining to the right of respecting the private life, regulated by art. 8 of the Convention.

The right to a private life is protected in the Romanian legislation by special laws as well, among which, the no. 506/2006 Law concerning the processing of personal data and the

¹⁸The Romanian Constitution of 1991, published in the "Official Gazette of Romania", part I, no. 233 of November 21st, 1991, amended and revised by the no. 429/2003 Revision Law, published in the "Official Gazette of Romania", part I, no. 758 of October 29th, 2003.

¹⁹ The no. 287/2009 Law, regarding the Civil Code, published in the "Official Gazette of Romania", part I, no. 511 of July 24th, 2009, amended by the no. 71/2011 Law, published in the "Official Gazette of Romania", part I, no. 409 of June 10th, 2011, republished in the "Official Gazette of Romania", part I, no. 505 of July 15th, 2012, the last amendment being made by the no. 60/2012 Law, regarding the approval of the no. 79/2011 Government Emergency Ordinance, for the regulation of certain measures necessary for the entry into force of the no. 287/2009 Law, regarding the Civil Code, published in the "Official Gazette of Romania", part I, no. 255 of April 17th, 2012.

²⁰According to art. 75 of the Civil Code, (1) *The prejudices which are allowed by the law or by the international conventions and pacts on human rights, to which Romania is a party, do not constitute a violation of the rights provided for, in this section.* (2) *The exercise of the constitutional rights and freedoms, in good faith and in compliance with the international pacts and convention to which Romania is a party, does not constitute a violation of the rights provided for, in this section.*

²¹ Fl. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *Noul Cod civil, comentariu pe articole (art. 1-2664)*, C.H. Beck Publishing House, Bucharest, 2012, p. 63.

protection of the private life in the electronic communications sector²², the no. 504/2002 Law on broadcasting²³ and the no. 46/2003 Law on patient rights²⁴.

The same provisions are also supported by the no. 329/2003 Law, regarding the practicing of the private detective profession²⁵. It allows the private investigator, when exercising his profession, to carry out investigations on the people, goods, acts, dates and circumstances covered by this activity, without prejudicing the right to a private, family or intimate life, or any other fundamental rights and freedoms²⁶.

Unfortunately, over the last years, in Romania, we have been faced with the tabloidization of the written press and audio-video media, which base their increase in rating, number of printed copies or traffic (online), especially on scandalous photos and titles, in order to create a sensational, vulgar image, which violates even the slightest resemblance of journalistic ethic.

By no means does this regulation restrict the journalists' right to freedom of speech; on the contrary, the regulation allows the encroachment of the private life of a person, within certain limits: *if it justifies a legitimate interest; if the injured party acted explicitly, with the intent of being seen or heard by the perpetrator; if they capture a crime or bring their contribution to uncovering and proving one, or if they detect acts that endanger a public interest.*

These provisions may be violated by any person (for example, the person who is a private investigator, who, under the employment of the jealous wife, uses long-distance interception means to record, on an audio-video support, the husband in the house of his mistress – journalists, reporters etc.) or even a legal entity (for example, the audio-video media service provider, the tabloid press).

²² Published in the "Official Gazette of Romania", part I, no. 1101 of November 25th, 2004, amended by the no. 272/2006 Law, which was elaborated to amend art. 7 of the no. 506/2004 Law concerning the processing of personal data and the protection of the private life in the electronic communications sector, published in the "Official Gazette of Romania", part I, no. 576 of July 4th, 2006, amended by the no. 298/2008 Law on the retention of the data generated or processed by the providers of electronic communication services destined for the public or of public communication networks, as well as for the amendment of the no. 506/2004 Law concerning the processing of personal data and the protection of the private life in the electronic communications sector, published in the "Official Romanian Gazette", part I, no. 780 of November 21st, 2008, amended by the no. 1.258/2009 Decision of the Constitutional Court, regarding the plea of unconstitutionality of the no. 298/2008 Law's provisions, on the retention of the data generated or processed by the providers of electronic communication services destined for the public or of public communication networks, as well as for the amendment of the no. 506/2004 Law concerning the processing of personal data and the protection of the private life in the electronic communications sector, published in the "Official Gazette of Romania", part I, no. 798 of November 23rd, 2009, the last amendment and addition being made with the no. 13/2012 Government Emergency Ordinance, published in the "Official Gazette of Romania", part I, no. 277/2012.

²³Published in the "Official Gazette of Romania", part I, no. 534 of July 22nd, 2002, amended numerous times, the last change being made via the no. 19/2011 Emergency Ordinance, regarding certain measures to amend certain normative acts in the electronic communications field, published in the "Official Gazette of Romania", part I, no. 146 of February 28th, 2011.

²⁴Published in the "Official Gazette of Romania", part I, no. 51 of January 29th, 2003. According to art. 25, *any interference in the private, family life of the patient is forbidden, except for the cases where such an interference positively affects the diagnostic, the treatment or the care provided and only with the consent of the patient. The cases where the patient is a danger to himself or to the public safety are exempted.*

²⁵ Published in the "Official Gazette of Romania", part I, no. 530 of July 23rd, 2003.

²⁶ At the request of individuals or legal entities, they conduct specific investigative activities, relating to:

- a) the public conduct and morality of a person;
- b) data on the solvency and credibility of a natural or legal person, that is a potential partner in a business;
- c) people missing from their homes;
- d) goods subject to civil or criminal litigation, estranged with the purpose of prejudicing the interests of one of the parties involved in the proceedings;
- e) ensuring protection against the leakage of information from the private life area or that of the activity of business operators who wish to remain anonymous.

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With an exemplificative title, not a limitative one, and subject to art. 75 of the new Civil Code, the following circumstances can be considered violations of privacy, in the sense of art. 74:

- a) *entering or remaining in the household without a right, or taking any object from it, without the consent of the one legally occupying it. By household we mean any location destined for the domestic use of the person, namely both their residence and domicile, that are inhabited or the room, namely any building intended to be used as a household; in this respect, one must highlight the intimate (private) nature of the life inside said spaces.*
- b) *It is not necessary for the victim to own the places under surveillance; it suffices if the spaces are used in an actual, private – intimate nature. Moreover, the act can also be performed in public, provided there is direct contact between the speakers, respectively a private conversation between two people or more.*
- c) *the unauthorized interception of a private conversation, committed by any technical means, or knowingly using such an interception. This method involves the perception of sounds, words, noises or of the private conversation of the person, aided by audio technical procedures, (microphones, regardless of their form, and the device in which it is put) as well as recording the words of private conversation, regardless of how the recording was stored (recorders or other silent recording means). Private conversations can take place both with the presence of the interlocutors, as well as without them, under the form of oral communications, by means of remote transmission.*
- d) *capturing or using the image or voice of a person found in a private area, without their consent. Capturing or recording images consists in gathering, collecting, obtaining, receiving and printing of a person, regardless of the medium used. Currently, in Japan²⁷, several complaints have been made, regarding the illicit use of smartphones, in the sense that some applications allow pictures to be taken without triggering a beep, so the person being photographed is unaware of what just happened. Moreover, there are applications that allow people to post on the screen of their phone a message or email, whilst the photo is being taken, so that the person concerned does not suspect a thing.*
- e) *The act, of a person of good faith, of photographing or filming the exterior of a building destined to be a residence, household or holiday home of someone, would not be considered a violation of said person's private life, due to the fact that the act does not violate the law, causing no prejudices to the owner of the building.*
- f) *broadcasting images representing the interior of a private area, without the consent of the person lawfully inhabiting it;*
- g) *keeping one's life under observation, by any means, except for the cases provided by the law; in this sense we can speak of the placement of audio and video technical recording means, respectively the mounting and fixing into place of the audio-video interception systems (even outside the private space). In this context, it is essential to be able to define the fine line between the citizen's right "to be left alone" and the state's right to interfere in his private and family life, when it is necessary to gather evidence and to substantiate a criminal charge.*
- h) *the broadcasting of news, debates, investigations or written or audiovisual reports on the intimate, personal or family life, without having the consent of the person in question.*
- i) *the broadcasting of materials that contain images regarding a person under treatment in the medical facilities, as well as of the personal data concerning health issues, diagnostic issues, treatment, circumstances regarding the disease and other various facts, including the result of the autopsy, without the consent of the person in question, and if they are deceased, without the consent of the family or other authorized people;*
- j) *the use, in bad faith, of the name, image, voice or likeness to another person;*

²⁷ For more details see <http://www.dailymail.co.uk/sciencetech/article-2081216/New-silent-camera-apps-cause-plague-voyeurism-Japan.html>

k) *the dissemination or use of the correspondence, manuscripts or other personal documents, including the data regarding the domicile, residence, as well as the telephone numbers of a person or of their family members, without the consent of the person to whom they belong or, where appropriate, have the right to dispose of them.* Broadcasting involves popularizing, emitting via radio waves, even the sale of the publication containing information on the private life of the individuals. In reality, broadcasting involves two steps: the presentation, an activity addressed particularly to the public, which consists of describing, showing, expressing or presenting audiovisual information and the transmission, which involves communicating or transmitting information via the media service providers²⁸ or a broadcaster²⁹.

In order to retain the violation methods of the private life, that we presented, it is imperative that these acts were committed *without the consent of the injured party*. However, art. 76 of the New Civil Code establishes the presumption of consent, when the one who the information or material refers to, puts them at the disposal of a person or legal entity of which they are aware carries out their activity in the field of public information. In this case, the consent is implied; there is no need of written agreement in this sense.

The violation of the right to a private life and to one's own image triggers the repairing of the damages, according to the civil or contractual tort rules, and if the offense meets the elements of the offense of violating the private life³⁰, the provisions of the criminal law also become incidental.

Conclusions

Even though the European states pay particular attention to the protection of the right to a private life, the acts being incriminated just as offenses punishable under the provisions of penal codes, Romania will have to take example from the experience of these countries, where, until recently, we witnessed a regulatory void in the area.

From what we have presented, we conclude that, for our country, the regulation was absolutely necessary, both to complete the protective framework of the values guaranteed by art. 8 of the European Convention, as well as due to the rapid and concerning growth of the tabloidization process of the written press and audiovisual media, in the context where the experience of the Romanian public life would require the abodement of certain conduct rules in order to respect the legitimate rights and interests of the individuals.

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²⁸ According to the Broadcasting Act, the media service providers means *that person or legal entity, charged with the editorial responsibility of choosing the audiovisual content of the audiovisual media service and that determines its organization manner.*

²⁹ By broadcaster we mean *the audiovisual service provider in the television program service area and/or radio broadcasting*, and by the radio/TV broadcasting service we mean *the linear, audiovisual media service provided by the broadcaster, where the programs are broadcast in a continuous sequence, regardless of the technical means used, with a fixed content and timetable, for the simultaneous viewing/listening of/to the programs, based on a program grid, under a different name and identified by a logo, in the case of television, or by a jingle, in the case of the radio.*

³⁰ In addition to the traditional incriminations, the New Penal Code criminalizes in art. 225, *The violation of the private life* (chapter IX – *Offenses that violate the domicile and the private life*) along with two other new crimes (the violation of the professional office and the disclosure of the professional secret), designed to patch-up the regulatory void and to offer answers to the new forms of violation and endangerment of the private life, in general and especially of the intimacy.

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CONSIDERATIONS ON THE "INTERNATIONAL CHARTER OF HUMAN RIGHTS"

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Abstract

"International Charter of human rights" is generic name under which shall meet the main international instruments relating to human rights, namely: Universal Declaration of Human Rights, the International Pact on civil and political rights, the International Pact on economic, social and cultural rights and the two optional Protocols at International Pact on civil and political rights. Documents forming "The Charter of International human rights" have represented international instruments which have been triggered an active process in the evolution of legal instruments and mechanisms consecrating and protection of the human being in universal and regional plan.

In this way at the international relations the man is now a supreme value to be protected and promoted.

Key words: charter, consecration, protection, human rights, non-discrimination.

Introduction

"International Charter of human rights" represented by the five international documents constitutes the international legal frame that marks significant changes in process of establishing a system for the protection of human rights at the level of the United Nations¹. These international instruments are:

1. *Universal Declaration of Human Rights;*
2. *International Pact on civil and political rights;*
3. *The international pact for the economic, social and cultural rights;*
4. *Optional protocol of the International Pact on civil and political rights;*
5. *The second optional protocol of the International Pact on civil and political rights.*

The idea of making a "book of human rights" was born at the Conference in San Francisco from April to June 1945 (when was adopted the U.N. Charter - 26 June 1945), but steps taken in this respect have not been retained by the Conference and, in the end, the U.N. Charter they have laid down a few general provisions relating to fundamental human rights and freedoms.

Further proposals to the compilation of "Charter human rights" have resulted after the constitution within the framework of the Economic and Social Commission of Human Rights (16 February 1946). The Commission has been therefore entrusted to draw up "International Charter on human rights". Due to object sensitivity of this rules which was that the development of treated in the grounds may have been difficult enough, the Commission

¹ Tănăsescu Tudor – *International protection of human rights*. University course, Sitech Publishing House, Craiova, 2013, p.12 și 25; Niciu I. Marțian, *Public international law*, Servosat Publishing House, Arad, 2004, p.197; Scăunaș Stelian, *International law of human rights*. University course, All. Beck Publishing House, Bucharest, 2003, p.5

ordered gradual achievement of its adoption, respectively in the initial phase of a declaration and, subsequently, it is therefore necessary to develop texts of treaties which implement it. As a result, after the adoption of Universal Declaration of Human Rights have been developed and adopted much later the two tacit agreements international human rights and the first and the second optional protocol of the International Pact on civil and political rights.

The two agreements and optional protocols who took over the Universal Declaration of Human Rights but have enshrined and other rights which the Statement do not argued, thus legal instruments with vocation of universality, which have an impact, along with the Universal Declaration of Human Rights, The evolution of United Nations system for the protection of human rights, but also regional systems to this topic².

Considerations relating to the content and legal nature of the documents which constitute the "International Charter of human rights"

A. Universal Declaration of Human Rights.³

The Universal Declaration of Human Rights has been adopted by the IIIrd session of the General Assembly of U.N. on 10 December 1948.⁴

The declaration is the document which sets out affirmed, for the first time, fundamental rights and freedoms to be guaranteed any man or woman from around the world. The document marked the beginning of the process of edifying a seamless system with vocation of the universality guarantee and to promote human rights.

Universal Declaration of Human Rights sets out civil and political rights of man (Articles 3 to 21) and the economic, social and cultural rights (Articles 22 to 27).

In the first Article of the Universal Declaration of Human Rights are set out philosophical truths that stand at the basis of this document. These are: "*All human beings are born free and equal before the law. They are endowed with reason and conscience and should act relative to each other in a spirit of brotherhood*". Consequently, the right to liberty and equality are human rights from the moment of birth. The man is a human being equipped with reason and conscience may require certain rights.

Human Equality and non-discrimination in the application of rights and fundamental freedoms are basic principles of the declaration.

Universal Declaration of Human Rights proclaims: "*Any person has the right to life, to liberty and security of person*" (Article 3). These fundamental rights of human beings provides the framework for her to benefit from all other rights and fundamental freedoms.⁵ Article 3 of the Declaration in the series of articles, in which they are set out civil and political rights of the individual. These rights are:

- the right of every human being to life, liberty and security of its person (Article 3);
- the right not to be held in slavery or servitude (Article 4);
- the right not to be subjected to torture or inhuman or degrading treatment (Article 5);
- the right to legal recognition of each person, wherever they are (Article 6);
- the right to equality before the law and to equal protection of the law, without distinction (Article 7);
- the right to an effective satisfaction of the competent national legal bodies in the event of infringement of fundamental rights guaranteed (Article 8);
- the right not to be arrested, held or exiled arbitrarily (Article 9);
- the right to be listened to, in full equality, fair and publicly by an independent court and partially (Article 10);

² Scăunaș Stelian, op.cit., p.27

³ The text in Vida Ioan, *Human rights in the international regulations*. Lumina Lex Publishing House, Bucharest, 1999, p.49-56

⁴ „*Universal Declaration of Human Rights*” was adopted with 48 votes for, 8 abstentions and no votes against. It has been adopted by Resolution no. 217, A/III

⁵ Vezi Niciu I. Marțian, op.cit., p.198; Tănăsescu Tudor, op.cit., p.26 and *Public international law*. University course., The second edition revised and added, Sitech Publishing House, Craiova 2013, p.117.

- the right to the presumption of innocence until proven guilty will be legally within the framework of a public trial, with all the necessary guarantees insurance defense. Nobody will be doomed to act or omission which, at the time when their heavier did not constitute criminal offenses under national law or international law (Article 11);

- the right to be protected under the law against arbitrary interference in private life, as regards family, the domicile or mail, as well as to some multi-touch brought honor or reputation of person (Article 12);

- the right to circulate freely and to choose their residence in any state (Article 13);

- the right to seek asylum and the right to benefit of the asylum-seeker in other countries in the case persecution (Article 14);

- the right of each man to a citizenship, it shall not be arbitrarily deprived of their citizenship, and the right to change his citizenship (Article 15);

- the right to marry and to found a family on the basis of equality of rights of man and woman (Article 16);

- the right of every person to property and not to be free, arbitrarily by it (Article 17);

- the right to freedom of thought, conscience and religion (Article 18);

- the right to the freedom of opinion and expression (Article 19);

- the right to freedom of assembly and of peaceful assembly association (Article 20);

- the right to take part in the public affairs of his country, either directly, or by means of elected representation and the right of everyone to have access, on an equal conditions, to public offices of his country (Article 21).

Article 22 of the Universal Declaration of Human Rights provides for the right of the individuals to social security benefits and being entitled to meet economic, social and cultural rights "indispensable for human dignity and the freedom of developments of her personality".

Universal Declaration of Human Rights proclaims the economic and cultural rights:

- the right to social security (Article 22);

- the right to work, to free choice of its work, to fair working conditions and to protection against unemployment (Article 23);

- the right to an equal wages for equal work, to an equitable remuneration and satisfactory to have him and his family an existence worthy (Article 23);

- the right to establish trade unions and to join the trade unions to defend their own interests (Article 23);

- the right to rest and leisure, as well as the periodic paid leave (Article 24);

- the right to a fair standard of living satisfactory to ensure the health and well-being and that of his family (Article 25);

- the right mother and child to the aid and special assistance (Article 25, paragraph 2);

- the right to education (Article 26);

- the right of every human being to take part in the cultural life of the Community, to enjoy the arts and to participate in scientific progress and to the blessings resulting from it (Article 27);

- the right to each man to protect the interests of moral and material arising from any scientific work, literary or artistic whose copyright is (Article 27, paragraph 2);

The last articles in the Universal Declaration (Article 28 to 30) proclaim each man to a social and international order in which the rights and freedoms set out in the declaration can be carried out fully (Article 28). Also, Specify that the man has the *duties and responsibilities to the Community in which he lives*, that the exercise of his rights and freedoms it is only subject to limitations meant removal of established by law, but only for the purpose of ensuring respect of recognition and rights and freedoms of others and in order to meet the requirements of fair morals, public order and general welfare in a democratic society (Article 29). Also, the Declaration stipulates that its provisions shall not be construed as would entitle a state, a group of people or a person "to engage in any activity or to commit any act which would pursue destruction of rights or freedoms set out in this Declaration" (Article 30).

CONSIDERATIONS ON THE "INTERNATIONAL CHARTER OF HUMAN RIGHTS"

Universal Declaration of Human Rights does not contain provisions relating to an international system of guarantee of its provisions, it is not an international treaty generator of rights and legal obligations.

Universal Declaration of Human Rights is an act of General Assembly of U.N. has a recommendation character for the Member States of the organization, as provided by the U.N. Charter (Article 13, paragraph 1). That's why it was imposed the need that the provisions of Declaration to be included in international treaties, which to turn in legal obligations for the signatory States.⁶

At the VIth session, in the year 1951, the general meeting of U.N. adopted a resolution and asked the Commission for human rights "to draw up two tacit agreements relative to international human rights, one on civil and political rights, and the other on the rights economic, social and cultural rights" (Resolution 543/VI).⁷

B. International pacts with regard to human rights⁸

The Universal Declaration of Human Rights provisions were incorporated into conventional text after 18 years through the adoption of the two international agreements in 1966.

The texts of the two international agreements with regard to human rights to the Human Rights Commission has been carried out as from the year 1952, as they are transmitted after completion, to debate and adopting General Assembly of U. N..

The proceedings of the documents in the General Assembly took place in the year 1966, and on 16 December of that year, the General Assembly of U.N., reunion held in the XXIth session, adopted, by its Resolution 220A/XXI /16.12.1966 *International Pact on civil and political rights and the International Pact with regard to economic, social and cultural rights.*⁹

On the same day, was adopted the third legal instrument - *Optional Protocol to the Pact on civil and political rights*¹⁰ - rules which enable and private individuals to submit complaints of Human Rights.

A second Protocol to the International Pact on civil and political rights was adopted by the General Assembly at 15 December 1989¹¹ and affects abolish death penalty.

*International covenants with regard to human rights adopted in the year 1966 shall include in addition to the two categories of provisions distinct*¹² (civil and political rights and economic, social and cultural rights) *and more common provisions.* So, in the preamble to their general sets out the principle that "the recognition of dignity inherent in all human members of the family and of their rights equal and inalienable constitutes a basis freedom, justice and peace in the world" (paragraph 1).

The two agreements have international common Articles 1, 3 and 5. In their first article shall devote this right of the peoples to dispose of them (such as the right to self-determination).

⁶ The Universal Declaration of Human Rights provisions were included in 1948 in the two international agreements with regards to these rights in 1966.

⁷ *Activités de l'ONU dans le domaine des droits de l'homme*, New York, 1986, p9, pct.17, apud. Niciu I. Marțian, op.cit., p.199

⁸ The texts of the two agreements in Vida Ioan, op.cit., p.56-97

⁹ The International Pact with regard to economic, social și cultural rights entered into force on 3 January 1976. The Pact on civil and political rights entered into force on 23 March 1976. Romania has ratified the two agreements by D.C.S. no. 212 of 31 October 1974 (Official Gazette no. 146/20.11.1974). On 26 September 2008 were parties to the Treaties 159 states and concerned, 162 states.

¹⁰ It entered into force on 23 March 1976. Romania has acceded to this Protocol on 20 July 1993, from Law no. 39/1993. On 5 March 2008, 111 states were parties to the Protocol.

¹¹ It entered into force on 11 July 1991. Romania has become part to this Protocol on 27 February 1991, by ratifying it by Law no. 7 of 25 January 1991. On 29 September 2008 were parties to the Treaty 68 states.

¹² For details Beșteliu Raluca Miga and colab., *International protection of human rights*, Course notes, Universul juridic Publishing House, Bucharest, 2008, p.45.

First article of the two agreements may provide for an obligation of States parties to encourage the attainment of people's right to dispose of them and comply with this right (item 3).

Article 3 of the two agreements oblige States parties to ensure that "*the equal right to the man and the woman*" to benefit from all the economic, social and cultural rights, as well as civil and political rights set out in these tacit agreements.

Common Article 5 provides for a "*clause protection*" of the rights enshrined in the two international agreements, or in other international instruments relating to human rights.

Under the aspect legal nature we remind our readers that both agreements shall be lodged in legal instruments with vocation of universality and produce legal effects in the case of member parties.

Conclusions

◆ "*International Charter on Human Rights*", for example its instruments of incorporation have triggered a process active in the evolution of legal instruments and mechanisms for the promotion and protection of the human being in universal and regional plan.

◆ *International acts* as well as Universal Declaration of Human Rights, the Pact international civil and political rights, the International Pact with regard to economic, social and cultural rights, Optional Protocol to the International Pact on civil and political rights and the second optional protocol with regard to civil and political rights, having *regard generic name of "International Charter on human rights"*, constitute legal framework that marks significantly enhance setting up the system for the protection of human rights at the level of the United Nations.

◆ *The provisions of the international regulations presented affects civil and political rights and economic, social and cultural rights*, for example fundamental human rights and freedoms, inherent and inalienable human being.

◆ *International documents analyzed, except Universal Declaration of Human Rights* which under the aspect legal nature is only meant for a recommendation, shall be lodged in tools which produce legal effects in the case of member parties, for example generates legal obligations for them.

◆ Between Universal Declaration of Human Rights and the two *International agreements* with regard to human rights *there is a close connection*. As a matter of fact, *international pacts in question have been accepted in their content, the provisions of Universal Declaration of Human Rights which they have turned in recommendations in legal obligations* for the contracting parties.

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