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TABLE OF CONTENTS

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NOVELTY ASPECTS AND REFLECTIONS REGARDING THE RESPECT OF THE HUMAN BEING IN THE PENITENTIARY ENVIRONMENT*

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Abstract

This study is centered upon an analysis of the decisions that were ruled by the European Court of Human Rights against the Romanian state, mostly related to the infringement of the conventional requirements regarding the protection of the inmates' dignity and health. Among these, a special place is held by the recent ruling in the case of Iacov Stanciu versus the Romanian state.

Key words: *human dignity; jurisprudence of the European Court of Human Rights; prohibition of torture and inhuman or degrading punishments or ill treatments; enforceability and fore-closure of the decisions.*

Introduction

The convention for the defense of the fundamental human rights and liberties elaborated by the European Council and signed on the 4th of November 1950 includes no express mention of the respect of the human dignity in the penitentiary field, since a reference to this concept regarding the execution of freedom-depriving sentences is a jurisprudence creation of the European Court of Human Rights. Human dignity, implying that no one can be excluded from human community and that man must not be treated as an object in the hands of public power, is presently seen as a genuine guiding principle within the treatment of inmates[1], within the larger framework of rendering prison sentences more human.

General considerations regarding the right to prison conditions respectful of human dignity

What is remarkable is the fact that in the American Convention of Human Rights, at article 5 (2) it is clearly mentioned that "no one can be subjected to torture, or to cruel, inhuman or degrading punishments or treatments" and that "any inmate shall be treated with the respect which is due to the inherent human dignity". The set of principles for the protection of all those who are subjected to any form of detention or incarceration, adopted on the 9th of December 1988, stipulates, as a basic principle, that any person who is subjected to any form of detention or incarceration shall be treated "with humanity and respect for the dignity of the human being". In the Recommendation number R (87) 3 regarding the European regulations concerning penitentiaries adopted by the Ministry Committee of the

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[1] For further details, see M. Larralde, *Placement sous ecrou et dignité de la personne*, Séance inaugurale du séminaire de recherché, "Enfermements, Justice et Libertés", Sorbonne, the 15th of September 2009.

European Council on the 12th of February 1987 it is stipulated, as a basic principle, that "freedom depriving shall be done in moral and material conditions so as to ensure the necessary respect of the human dignity and to be in conformity with these rules"[2]. Also, in the Recommendation no. 2006 (2) of the Ministry Committee of the member states of the European Council regarding the rules of European penitentiaries adopted on the 11th of January 2006, the head note itself mentions that "all people who are deprived of their freedom shall be treated with the same respect for human rights". At article 18 (1) in the same document it is stipulated that detention locations must respect human dignity and intimacy and meet the minimal sanitary and hygiene standards, while taking into account the respective climate conditions. Inside the penitentiary order must be kept "by respecting all security, safety and discipline requirements and by providing such living conditions so as to respect the inmates' dignity, by a complete set of activities", according to article 49. As for the search and control activities, art. 54 (3) provisions: "The staff must be trained to perform these actions in such a way as to detect and prevent any escape or smuggling attempts, while respecting the inmates' dignity and personal effects". Lastly, it is shown in art. 72 (1) that the penitentiaries shall be managed within an ethical context, acknowledging the obligation to "treat the inmates with the same humanity and respect any human being deserves"[3].

As for the Romanian internal legislation, Law no. 275/2006[4] concerning sentences and measures ruled by law entities within the penal process contains a set of dispositions regarding human dignity in a penitentiary environment. All sentences shall be served in such conditions as to ensure the respect of human dignity according to article 3 in the mentioned document. According to article 4 it is forbidden and shall be sanctioned according to penal laws to subject a person to torture, or other inhumane, degrading or ill treatments. The respect of life and human dignity is a fundamental principle of the penal process established by the New Romanian Penal Procedure Code at art. 11.

As for the lack of conformity of material detention conditions with conventional dispositions, the European Court developed a rich jurisprudence against Romania. The main problem of the Romanian state lies in ensuring such material detention conditions so as to meet European requirements, within the context of an increasing number of inmates, from 28.244 in 2010 to 31.774 nowadays. Regular detention is not included in art. 3, as freedom-depriving measures often come with sufferings and humiliation. However, the Court decided, according to a uniform jurisprudence, that being deprived of their freedom does not mean that the respective inmate shall lose their Conventional rights[5]. Art. 3 imposes a positive obligation to the states to ensure that any prisoner is incarcerated in such conditions so as to respect human dignity, that serving the respective sentence does not subject the respective inmate to any suffering or trial exceeding the inevitable level of suffering which comes with detention and that, considering the practical detention requirements, the inmate's health and comfort are properly provided.

The European Court makes an *in concreto* examination of the detention conditions, by taking into consideration both their cumulative effects and the specific details of the complainant[6]. The main aspect of this analysis concerns the issue of over crowdedness, by

[2]Reccomendation Rec (87)3 of the Committee of Ministers to member stateson the European Prison Rules, of the 12th of February 1987.

[3]Reccomendation Rec(2006)2 of the Committee of Ministers to member stateson the European Prison Rules, of the 11th of January 2006, at http://www.anp-just. ro/.

[4] Law no. 275/2006 regarding serving the sentences and measures of the legal entities during the penal trial, published in the Official Journal of Romania no. 627 of the 20th of July 2006, modified and added to by Law no. 83/2010 published in the Official Journal of Romania no. 329 of the 19th of May 2010.

[5] See as an example the ECHR case of Păvălache versus the state of Romania, petition no. 38746/03, ruling of the 18th of October 2011, &87.

[6] See the ECHR, case of Dougoz versus the state of Greece, petition no. 40907/98, pt. 46, 2001-II.

determining the fact that the vital space an inmate is allotted is smaller than what the European legal department of human rights sees as bearable according to current specific practices[7]. Among the factors that were considered it can be mentioned the degree of occupation and the dimension of the cell and whether the inmate is provided with a bed[8]. Generally, the Romanian government only provided information concerning the degree of occupation of the available beds, not the surface which is available for each inmate. The Court ruled in the sense of breaking art. 3 if the personal space of an inmate is smaller than 3square meters, this fact in itself being seen as enough evidence that prison over crowdedness has gone beyond that limit[9]. It follows an analysis of hygiene conditions[10], such as access to natural light, air, and ventilation, lack of blankets, lack of hygiene, the presence of parasites, undrinkable water, low food quality, poor hygiene in the kitchens, and lack of any intimacy in an inmate's day-to-day life. An important factor in the above mentioned ruling is the stretch of time during which an inmate was held in the denounced conditions[11] and whether or not the inmate has their own bed. The European Court can also take into consideration other factors, such as the almost complete lack of outdoor activities and the fact that the inmates receive no food during transport to the courts or between two penitentiaries[12]. In the analysis of such a complaint, the Court refuses to take into consideration any argument related to the poor economical conditions in the accused state.

Some basic principles regarding the monitoring and medical treatment of freedom-deprived people derived from the Court practice enable the European instance to verify the way in which the Romanian state meets the positive obligation in article 3 of the Convention. The analysis grid used by the European legal department of human rights in order to determine whether or not the treatment of a sick imprisoned person is bad enough as to come against art. 3 should be centered on three aspects: the general detention conditions, the quality of the medical care and the necessity of maintaining arrest or detention[13].

First of all, the Court uncompromisingly states that art. 3 cannot be interpreted as imposing a general obligation of freeing an inmate on account of their health or of having them admitted into a civilian hospital in order to receive a certain type of medical treatment[14].

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[7] See as an example the conviction sentence in the case of Dimakos versus the state of Romania, petition no. 10675/03, ruling of the 6th of July 2010.

[8] In this respect, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment insistently stated its concern with the lack of beds, seen as a chronic issue at a nation-wide scale. Law no. 275/2006 regarding serving the sentences and measures of the legal entities during the penal trial, published in the Official Journal of Romania no. 627 of the 20th of July 2006 stipulates at art. 33 (3) that every convicted person shall receive a bed.

[9] In this respect, see the ECHR, case Păvălache versus the state of Romania, petition no. 38746/03, ruling of the 18th of October 2011, &94; in this case, the Court maintained that the plaintiff only had between 1.82 square meters and 2.55 square meters of personal space at the Jilava Penitentiary and 2.1 square meters at the Rahova Penitentiary; the ECHR case of Kantyrev against the state of Russia, petition no. 37213/02, ruling of the 21st of June 2007, &50-51, ECHR case of Andreï Frolov versus the state of Russia, petition no. 205/02, ruling of the 29th of March 2007, & 47-49.

[10] In this respect, also see ECHR, case of Măciucă versus the state of Romania, petition no. 25763/03, ruling of the 26th of May 2009, E.C.H.R, case of Marian Stoicescu versus the state of Romania, petition no. 12.934/02, ruling of the 16th of July 2009, &24, ECHR, case of Marcu versus the state of Romania, petition no. 43079/02, ruling of the 26th of October 2010.

[11] ECHR, case of Micu versus the state of Romania, petition no. 29883/06, ruling of the 8th of February 2011, published in the Of. B. no. 651/2011, &83, the ECHR case of Florea versus the state to Romania, petition no. 37186/03, ruling of the 14th of September 2010, &51, the ECHR, case of Alver versus the state of Estonia, petition no. 64812/01, ruling of the 8th of November 2005.

[12] See the ECHR case of Artimenco versus the state of Romania, petition no. 12535/04, ruling of the 30th of June 2009, &36.

[13] See the ECHR case of Sadak versus the state of Turkey, ruling of the 8th of April 2004.

[14] See the ECHR case of Kudla versus the state of Poland, mentioned above, & 92-94.

However, maintaining detention must be compatible with every inmate's specific situation. In this regard the European court makes a concrete examination, and the solution is given according to the specifics of the respective case. As such, an inmate's health is part of the factors that must be taken into consideration regarding the ways in which a freedom-depriving sentence can be served and especially the necessity of maintaining detention. Furthermore, it must be mentioned that the Court jurisprudence in this matter emphasizes the importance of a proper set of procedures instated in the member states regarding petitions for medical dismissing. The same jurisprudence shows that the general interdiction in art. 3 imposes all states the obligation to ensure that the means of serving a freedom-depriving sentence do not subject the respective person to more sorrow or trials than the inevitable level of suffering which comes with detention. Therefore, adapting the detention conditions to the inmate's health state and access to proper medical care are determinant for the solution of the petition[15]. Also, the measures that the penitentiary authorities imposes upon an inmate, such as isolation and immobilization without a prior medical exam to determine whether the inmate's psychological state is compatible with this set of measures and with life in prison are seen as posing a distinctive problem concerning the obligations imposed upon the member states by art. 3.

As for the quality of medical care, the Court believes that the protection of health should not be limited to fighting symptoms, but it should be part of a global therapeutic strategy[16] leading to the patient's healing or to the prevention of more serious illnesses. As such, a sick inmate must be monitored, which means specific examinations must be performed in order for the doctors to be able to elaborate and adapt the treatment scheme to the specifics of each patient's case. The mere fact that a prisoner had access to a doctor and that they were prescribed a certain treatment does not necessarily lead to the conclusion that they were given a proper medical care. Detailed records must be made of the inmate's health state, while diagnose and treatment must be prompt and appropriate. Also, apart from the positive obligation of maintaining the inmate's state of health and welfare, especially by providing the necessary medical care, the Court mentioned that art. 3 impose a positive obligation for the states to apply effective methods for the prevention and detection of contagious diseases inside the penitentiary. The European instance always takes into consideration the plaintiff's attitude, especially the authorities' refusal to provide them with a complete and adapted medical scheme, appropriate for their state of health. Finally, the penitentiary authorities must ensure proper conditions for the treatment to be implemented.

The importance of the ruling of the European Court of Human Rights in the case Iacov Stanciu versus Romania

The ruling on the 24th of July 2012 in the case of Iacov Stanciu versus Romania revealed the same problem that of poor detention conditions in Romanian penitentiaries. In this case, the plaintiff was sentenced to 12 and half years of prison, which he served in seven detention centers, between January 2002 and May 2011. The case is classical: the plaintiff accused the violation of the material aspects of art. 3 of the Convention in four penitentiary establishments on account of over crowdedness, insalubrious sanitary installations, parasites, poor quality food, lack of cold and hot water, lack of open-air activities, and the fact that all these insalubrious conditions have led to a series of illnesses (partial dentition, occipital neuralgia, chronic parodontitis, nose septum deviation, chronic rhinitis, duodenal ulcer, chronic hepatitis, chronic migraine and liver disease which became chronic because he did not

[15] Fl. Massias, *La protection de la santé et de la dignité du détenu par la jurisprudence de la Coue européenne des droits de l'homme,* C.R.D.F., no. 3, 2004, p.27. See as examples the ECHR cases, Price versus R.U. petition no. 33394/96, &30, ECHR, Gennadi Naoumenko versus the state of Ukraine, petition no. 42023/98, ruling of the 10th of February 2004, &112.

[16] See the ECHR case of Hummatov versus the state of Azerbaijan, the 29th of November 2007.

receive proper treatment. The court also took into account the fact that the space which was allotted to the inmate during his incarceration was, except for isolated occasions, smaller than 3 square meters and that for long stretches of time he had to share his bed with another inmate. The plaintiff's situation was furthermore made worse by the 38 transfers until 2011. I want to mention the fact that this ruling is particularly important since, upon realizing that this was a recurring problem and that there were some other 80 similar complaints, the European judge decided to rule on account of article 46 of the conventional text (referring to the enforceability and the fore-closure of the decisions). In the case in which the European court notices a violation occurred, the accused state is obligated to pay the plaintiff a certain amount of money as equitable reparation, and to choose, under the supervision of the Ministry Council, a set of general or individual rules to include in its internal regulations in order to terminate the violation which was noticed by the European judge and to cancel, as much as possible, the consequences of these sentences. This means that a state is free to choose the ways in which to fulfill its obligations deriving from art. 46, but the Court is entitled to indicate what measures should be taken by the state in question in order to prevent the occurrence of numerous similar cases and conviction sentences. In this perspective, the Court appreciated the efforts of the national authorities, including legal measures meant to improve the living conditions in a penitentiary environment, but it insisted upon the fact that consistent efforts are necessary over a long period of time and that an appropriate, effective set of preventive measures must be adopted in order for the national authorities to solve any situation that may come against the provisions in art. 3. The solution that was suggested by the Strasbourg court is to begin by presuming that these sub-standard detention conditions lead to non-patrimonial prejudice, and that reparations must be granted in the spirit of prior similar cases and Court rulings. The national instances should provide serious, convincing arguments should they decide to grant reparations consisting of significantly less amount of money (or no reparations at all).

Conclusions

Human dignity must also be respected within the penitentiary environment, and justice should not stop outside the prison gates.

The European Court has received 80 complaints against the Romanian state concerning the violation of article 3 regarding detention conditions. The European Court has recently ruled in the case of Iacov Stanciu versus Romania, while suggesting a possible solution for stopping such complaints. It consists of creating a proper system of preventive measures and granting reparations comparable to those granted by the Court in the case sub-standard detention conditions are noticed.

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DE FACTO ASSOCIATIONS IN ROMANIAN LEGISLATION BETWEEN LEGAL ESTABLISHMENT AND INAPPLICABILITY

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Abstract

In the context of the development and the diversification of the nonprofit sector in Europe, private actors play an increasingly important role on the stage of social and legal life. In Romanian legislation, along with associations and foundations, a residual category can be identified under the name of unincorporated associations.

Throughout this article we intend to capture the legal framework and the judicial treatment applicable in Italian law in order to understand the basic working mechanism of de facto associations.

Keywords: *association, legal capacity, Italian law.*

Introduction

In the Romanian legal system, under the constitutional provisions, both individuals and legal persons have the right to establish associations without legal personality. However, due to the fact that they do not have limited legal capacity, de facto or unincorporated associations are devoid of legal effects. As the legal texts have no practical effects, the unincorporated associations` reason of being may seem uncertain.

In contemporary national legislation, the association was sanctioned by Law 21/1924 on legal entities (associations and foundations). Article 31 defines the association as a "convention in which more people put together, permanently, their material contribution, knowledge and their work to achieve a goal that does not seek personal benefits or property." The optics of the Romanian legislator was dependent on the natural-legal person dichotomy. Thus, the Law only recognized association with legal capacity.

Law 21/1924 was repealed by Government Emergency Ordinance (G.E.O) 26/2000 on associations and foundations, currently in force. Article 4 states that the association is "the legal subject constituted by three or more persons who, according to an agreement, participate to the establishment of a patrimony, which is not subject to refund, with material contribution, knowledge and work in order to conduct activities in the public interest, that of the community or, if appropriate, in the personal non-profit interests of the partners". This legal definition places, *ab initio,* the association among legal subjects. The unincorporated association seems to have been excluded. As it does not benefit from legal personality, it cannot be subject of law.

However, art. 5 par. (2) of the Ordinance provides that the association without a legal capacity can be established if the aim permits so. However, the Romanian legislator does not provide specific legal rights to collective entity, strictly limiting itself to indicating that the source of this norm is the constitutional right of assembly. We believe that there is an obvious

mismatch between the definition of the association laid down in the Ordinance and the provisions of article 5 par. (2) of the same law which states the right to establish unincorporated associations. It is necessary to specify that according to Romanian law only individuals and legal persons can be subjects of law, in other words, parties of a civil relationship[1].

We find a similar provision, referring to partnerships, in the Romanian Civil code. According to article 1881 par. (3) "Partnerships can be with or without legal capacity".

It must be mentioned that the partnership and the association are two separate legal institutions. Both are established by the will expressed through a contract. However, the purpose of the society is economic, profit sharing for the associates. Article 1881 par. (1) Romanian Civil code states that the society is the contract under which "two or more persons mutually undertake an activity to cooperate and to contribute to it through material contributions, property, knowledge or work in order to share the benefits or use the economy that might result". On the other hand, the association is established by partners in order to achieve "general interest activities, communitarian or, if appropriate, the personal non-profit interests of the partners". The contract of society has an onerous nature. At the origins of this contract we can identify the legal institution known in Roman law under the name of *societas.* It was basically an agreement between at least two people - *socii* who share a common goal, that of distributing the profits and the losses[2] of the activity. On the other hand, the final aim of the association is non-profit.

However, the confusion persists even in legal texts. For example, although the legislator used the term "family association", it actually referred to a for-profit corporation. However, the situation has been remedied with the entry into force of G.E.O 44/2008 on economic activities of the sole partnership, individuals and family corporations, in which it was used the phrase "family business" instead of "family association". A broad interpretation of the association can be found in the Romanian Tax Code. Thus, Article 7 par. (2) point (5) defines unincorporated association as "any joint venture, economic interest groups, civil society or other entity that is not a separate taxable person for the purposes of income taxation, according to legal provisions".

In regard to de facto associations, an example is provided by Article 25 par. (1) of Law 69/2000 - Law on Physical Education and Sport. According to the legal text, "sports associations are unincorporated sport structures. Sports associations without legal personality can be established as private civil societies, according to the legal framework in force." However, generally, the sports associations are established as civil partnerships.

Therefore, Romanian unincorporated associations, despite the fact that the law recognizes the possibility of establishment, do not have the necessary legal means of implementation.

A different legal treatment is devoted in Italian legislation. It should be borne into mind that under Italian law, the concept of legal subjects is broader and it includes legal entities without legal capacity[3]. From a legal perspective, an organization has an independent existence from that of the members who formed it and benefits from legal capacity[4], although limited. Therefore, the provisions of the Italian Civil Code establish a distinction between

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[1] G. Boroi, Carla Alexandra Anghelescu, *Curs de drept civil. Parte generală*, "Hamangiu" Publishing House, Bucharest, 2011, pp. 86-87.

[2] A. Berger, *Encyclopedic Dictionary of Roman Law*, Vol. 43, The American Philosophical Partnership, 1991, p. 708.

[3] F. Galgano, *Trattato di diritto civile*, Seconda edizione accresciuta, Volume primo, Casa editrice dott. Antonio Milani, Padua, 2010, pp. 228-229.

[4] Barbara Vacca, *Le associazioni non riconoscute e i comitati*, dott. A. Giuffre Editore, 1999, Milan, p. 13.

unincorporated and corporate association. The latter is not granted with legal personality or such a request was denied.

Unincorporated associations have patrimonial and organizational autonomy and procedural capacity.[5] In other words, *de facto* associations can own a common fund on which the personal creditors of the partners do not any rights. Nevertheless, the unincorporated association can gain immobile assets through usucaption[6]. The inner organization of the association is established according to the will of the partners. The provisions of article 36 of Italian Civil code state that in juridical procedures, the association is represented by the president or the manager.

Regarding the civil responsibility of the partners, it must be mentioned that in unincorporated associations, according to article 38 Italian Civil code, the creditors who did not covered their debts from the common fund of the association, can turn to the personal assets of the partners who have represented the association, acting in its name or best interest. Their responsibility is solidary. Due to the lack of publicity of the assets owned by the association, the raison of such provisions is to protect those who have contracted or guaranteed for the association[7]. The partners cannot divide the common fund or ask for the restitution of personal contribution when the contract is terminated[8].

We mention that the legal regime applicable to *de facto* associations in the Italian legal system is rather different. Despite the fact that they do not benefit from full legal personality, incorporated associations have the needed rights in order to conduct the activity for which they were established. These rights are actually conferred to moral persons.

Conclusions

Due to the incoherent legal framework and to the formalism that characterizes the Romanian legislator, the unincorporated associations cannot be active participants in everyday life. Therefore, these entities remain basically just a legal text without application.

The assimilation of associations and corporations has led to an artificial extension of the sphere of associations over the for-profit legal persons. A consistent formulation of legal texts could determine a clearer separation of the two legal institutions which refuse, organically, any confusion.

The source of consecrating unincorporated associations is Article 40 par. (1) of Romanian Constitution. The sense of *the right of assembly* is that "Citizens may freely associate into political parties, trade unions, employers' organizations and other forms of association". However, in the context of the European Convention of Human Rights, the freedom of assembly implies the possibility to associate in the absence of an authorization from a competent state organism[9]. But, due to the fact that unincorporated association are devoid of the rights conferred to legal entities (having a common fund, procedural autonomy and a particular internal organization), we witness a lack of content of what is known as *de facto* associations.

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[5] C. Ruperto, *La giurisprudenza sul codice civile coordinata con la dottrina*, dott. A. Giuffre Editore, Milan, 2012, p. 646.

[6] Katia Mascia, *L'usucapione. La casistica giurisprudenziale di acquisto della proprietà di beni mobili e imobili e di altri diritti reali attraverso il decorso del tempo*, Harley Editrice SRL, Matelica, 2007, p. 74.

[7] G. Chine, A. Zoppini, *Manuale di diritto civile*, con il coordinamento di Marco Fratini, Secunda edizione, Nel diritto editore, Roma, 2012, p. 114.

[8] Art. 37 Italian civil code.

[9] N. Valticos, *Article 11*, in L.-E. Pettiti and others, *Convention européenne des droits de l`homme: Commentaire Article par Article*, Paris, Economica, 1995, p. 419 in J. – Fr. Renucci, *Tratat de drept european al drepturilor omului*, "Hamangiu" Publishing, Bucharest, 2009, p. 293.

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TAX AUTHORITY'S OBLIGATION TO COMMIT: WAYS OF ENFORCEMENT

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Abstract

Tax management procedures include particular obligations of tax authorities, with the main goal to solve legal occurrences. The taxpayer, as a rights holder, has a series of legal instruments, with litigant contain to ensure the public institution's obligations to commit.

Key-words: Obligation to commit, Lack of administrative act, Preliminary appeal, Contentious-administrative action, Enforcement

Introduction

Managing tax obligations involves a series of procedures and legal acts issued by both sides of the material fiscal rapport: taxpayer and tax authorities. Consistently, there is a number of obligations to commit of the tax authorities, normatively confirmed, in respect of which taxpayers have the right and legitimate interest to be executed, having at their disposal, a series of contentious-administrative instruments.

Legal hypothesis regarding obligations to commit

The Fiscal Procedure Code (FPC), in different phases establishes for tax authorities obligations to commit ex officio or at request. Traditionally, the linked right's holder is the taxpayer, but there are expressly provided interventions for third parties (other creditors, co-debtors).

Several effective hypotheses can be identified.

The fiscal authority is required, in cases expressly specified by law, to complete a factual situation by issuing a legal solution, comprised in an administrative-fiscal act. The administrative nature of the various documents issued by tax authorities (decision, notice, report) is beyond any doubt, when, according to article 2 par. (1) c) of Law no. 554/2004[1], these documents contain a manifestation of will for creating, modifying or extinguishing legal rapports. In this respect, certain procedures are at the disposal of tax authorities, delivered ex officio: according to article 109 par. (3) FPC, tax audit is completed by issuance of "a tax decision"2 or "a no chance to the tax base decision"3; according to article 134 FPC, the expiry of limitation on the right to request enforcement, compels the tax authority to remove the debts from its analytical evidence.

[1] Published in the Official Monitor of Romania, Part I, no.1154 from 7 December 2004.
[2] Ministry of Public Finance Order no. 972/2006 approving the form "Decision to impose the additional tax obligations set by the tax audit', Published in Official Monitor of Romania, Part I, no. 528 from 19 June 2006.
[3] Ministry of Public Finance Order no. 1267/2006 approving the form "Decision on not modifying the tax base", Published in Official Monitor of Romania, Part I, no. 738 from 29 August 2006.

Secondly, certain procedures are performed solely at request of the taxpayer: according to article 117 par. (1) FPC refunds are at the taxpayer's call; under article 76 FPC tax registration certificate is emitted upon taxpayer's statement.

Thirdly, we retain the fiscal authority's obligation, ex officio or upon request, to provide: according to article 47 FPC annulment of administrative-fiscal acts subsequent to main act canceled or revoked; pursuant to article 48 FPC correction of material errors; according to article 116 par. (6) FPC offset of tax debts.

A specific case is represented by the fiscal authority's obligation to settle the preliminary appeal, brought under article 205 FPC against an administrative-fiscal act, procedure consistently appreciated as a mandatory preliminary procedure. The legally designated tax body has the obligation to commit, namely to emit and communicate a solution to the preliminary petition.

Object of the preliminary appeal

The holder of a right in tax procedures has the opportunity to contest the enforcement of correlative obligation by the tax authority. Thus, the taxpayer deprived by a certain administrative act, to be delivered upon request or ex officio4 has the opportunity to make a complaint, under article 205 par. (2) FPC: *Is entitled to appeal only one who believes that his rights were violated by an administrative-fiscal act or by its absence.*

Introducing the preliminary appeal

In the first working hypothesis, we are in the presence of an obligation to commit, by issuing the act ex officio. There can be argued that the term in its absence (of the administrative-fiscal act AN) did not receive a lawful interpretation through the Guidelines for the application of Title IX of the Government Ordinance no. 92/2003 (FPC), Annex to the NAFA5 Order no. 2137/20116, as point 1.2 sets: The lack of administrative-fiscal act means not solving in the legal deadline a taxpayer's request to issue an administrative-fiscal act. Or the absence of the administrative-fiscal act can be determined in specific cases, in relation to a legal due date for issuing the document ex officio, not being necessary a prior request from the taxpayer.

The right to appeal is conditioned by the expiry of legal deadline set for completion of the obligation to commit. In this respect, a number of special terms are expressly provided for tax authorities: article 76 FPC - 10 days to issue tax registration certificate; article 109 par. (4) FPC - 30 days to communicate the decision at the end of tax audit. We notice a regulatory lack as to a general legal term to settle ex officio legal situations. A legislative solution is more than necessary; up to the normative intervention, we deem applicable to the procedures ex officio the general term stipulated by article 2 par. (1). g) of Law no. 554/2004, for resolving taxpayer's requests, been contrary to the spirit of the law an indefinitely deferred administrative-fiscal solution. At this term's expiry, arises the right of the taxpayer to introduce preliminary appeal.

In the second study hypothesis, we are in the presence of the obligation to issue an act at the taxpayer's request. In light of the provisions of section 1.2 NAFA Order no. 2137/2011, the right to introduce the preliminary appeal for lack of administrative-fiscal act arises on the expiry of 45 days provided for by article 70 FPC for solving the request. On his nature, the period for settlement of the taxpayer claims is a term recommendation, which applies strictly to procedures based on the taxpayer's request, as article 70 FPC bears the marginal note Deadline for settling taxpayers' requests.

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[4] D. Dascălu, C. Alexandru, *Explicaţiile teoretice şi practice ale Codului de procedură fiscală*, "Rosetti" Publishing House, Bucharest, 2005, p. 521.

[5] NAFA – National Agency for Fiscal Administration

[6] Published in Official Monitor of Romania, Part I, no. 380 from 31 May 2011.

The object of the preliminary appeal7 consists in forcing the tax authority, by its hierarchical command to issue the act (obligation to commit) and not the fact situation of fiscal nature. In a case solution8, the tax authority for settlement of administrative appeal and the cassation court, admit the prematurity except of the preliminary appeal against the tax audit report, in lack of the tax decision: as in that case as the tax audit has not been completed in the legal way, the preliminary appeal against the preparatory act was legally resolved by the defendant considering the exception of prematurity (...) the plaintiff's action must be dismissed as unfounded.

Solutions to the preliminary appeal

For both hypotheses, in regulation of article 216 FPC, there is not be found a formal solution in case of preliminary appeal's admission, in the sense that the analysis of the case on the merits confirms tax authority's obligation to commit, namely to perform the procedure or to issue the act. Legislature has expressly stipulated under article 216 FPC par. (2) In case of appeal admission is decided, if necessary, canceling all or part of the contested act, par. (3) The decision9 may terminate all or part of the administrative act contested, situation to conclude a new administrative-fiscal act taking into account strictly the considerations of the settlement decision without examining the hypothesis of lacking the administrative act. Regulatory failure is perpetuated in NAFA Order No. 2137/2011; we consider that a legal solution will be given in relation to the provisions of article 216 par. (3) FPC, by analogy with article 18 of Law no. 554/2004, which provides the solution to compel the tax authority to issue an administrative act, as determined by the settlement decision.

For the second possible solution, namely the rejection of the preliminary appeal, the settlement decision is likely to be contest in court, according to the general procedure.

Thirdly, it is possible for the lack of an administrative-fiscal act to intervene in the procedure of solving the preliminary appeal, through the lack of the decision for settlement of the preliminary appeal. In the literature, there was advanced the solution (acclaimed as criticizable by the author) that the lack of settlement decision is a simple lack of administrative act under article 205 FPC. So it requires the preliminary procedure, a new preliminary appeal for unjustified refusal (in fact, we are in the presence of a lack of an act, as unjustified refusal is materialize according to the legal definition in a challengeable act), which is solved by the superior body[10], prior to referral to court. Or, by reference to the provisions of article 8 par. (1) of Law no. 554/2004, the right to appeal before the contentious-administrative court is indeed censored by the preliminary procedure. Only one preliminary appeal is mandatory, given that the legislature orders expressly (…) or if he has not received an answer within the period specified in article 7 par. (4)[11], he may notify the competent administrative court. The conditions to notify the court are expressively indicates by law and prevail over other provisions.

Object of the contentious action

Under procedural requirements the benefit of addressing the court subsists in two hypotheses of default obligation to commit.

Firstly, as noted, tax authority can reject the preliminary appeal. The decision for settlement of the preliminary appeal disaffirms the tax authority obligation to commit. For example, settling the preliminary appeal, the tax authority considers there is no legal ground

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[7] See: M.I. Niculeasa, *Soluţionarea contestaţiilor în materie fiscală*, C.H. Beck Publishing House, Bucharest, 2009, p. 205ff.

[8] Court of Appeal (C.A.) Cluj, Administrative Claims Section (A.C.S.), Decision no. 1439/2008, available on www.jurisprudenta.org [reference from 1.09.2012].

[9] See: D. Şova, *Drept fiscal*, C.H. Beck Publishing House, Bucharest, 2011, p. 336.

[10] A. Fanu-Moca, *Contenciosul fiscal*, C.H. Beck Publishing House, Bucharest, 2006, p. 205.

[11] The term for solving the preliminary appeal is regulated by art. 70 FPC.

for returning sums or for limiting the right of enforcement and confirms the lack of the administrative-fiscal solution or the unjustified refusal given by the competent tax authority. "*The complainant has opened the way of contentious-administrative action*"[12], the claim's object is forcing the tax authorities to issue the requested document or to meet a specific procedure. Action is thus an action in obligation to commit against the lack of administrative act or administrative procedure and an action for annulment against the decision for settling the preliminary appeal.

Secondly, the preliminary appeal remains unresolved in legal term. The complainant will address the court under article 8 par. (1) of Law no. 554/2004, *when he did not receive any reply within* (...). Legal object of the action is given by: (a) an administrative-fiscal act when preliminary proceedings aimed for annulment of an act issued by tax authorities (annulment of the secondary acts subsequent to null act); (b) lack of an administrative-fiscal act when preliminary proceedings aimed for enforcement of an obligation to commit (refusal to issue the tax decision). Action should be qualified as an action in for annulment or as an action in obligation to commit related to the main legal obligation.

A nuanced situation is encountered in the presence of decision to settle the preliminary appeal, which does not settle the substance, but suspends the cause under article 214 FPC. The taxpayer-petitioner may appeal the solution to suspend the administrative procedure, before the court in a claim for annulment of the settlement decision and demand the court to settle the fiscal rapport.

In both cases, in lack of administrative settlement decision or in presence of a suspension decision, the main problem is if the court should settle the substance of the case. Art. 8 par. (1) of Law no. 554/2004 confers the right to address the court in default preliminary procedure, the petitioner addresses the court *to solicit the annulment, in whole or in part, of the act, the repair of caused damages and possibly repair for moral damages*. The court is competent to settle the substantial rapport and not to force a solution to the preliminary procedure. The court is to compel the tax authority to commit any obligation, except to issue the settlement decision.

As to contesting the administrative-fiscal act or the lack of administrative act, foundation of the preliminary appeal, we consider that the court should retain for trial the substance of the case, the preliminary procedure being flown. The preliminary procedure is simply a condition of action's admissibility; the tax authority has an opportunity to return to the solution and to reconsider the substance of the legal tax rapport. Its option not to rule on the material issues (by complete absence or by unjustified refusal to act) is not an obstacle for the court to settle on the merits.

The need for legal substantial solution is required for two reasons: the legislature expressly states the claim's object namely the cancellation of the act[13] or, in our opinion, issuance of the act; no settlement decision within the legal deadline can be equivalent to rejection of the preliminary appeal. Issuing the decision for settling the preliminary appeal after notification of the court leads to action's[14] completion for the purposes of attacking also the settlement decision.

We appreciate criticizable the jurisprudence solution, given in the case[15]: *The Court retains that FPC establishes a preliminary procedure derogating from the provisions of Law no. 554/2004 on administrative contentious, meaning that administrative-fiscal act may be*

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[12] D. Dascălu, C. Alexandru, *op. cit*. p. 545.

[13] See: Ioana Maria Costea, *Consideraţii privind contestarea actelor administrativ-fiscale în lipsa unei soluţii la procedura prealabilă obligatorie*, in "Curierul Fiscal" Review, no. 9/2010.

[14] D. Dascălu, C. Alexandru, *op. cit*. p. 545.

[15] Court of Appeal Constanţa, Administrative Claims Section, Decision no. 40/2011, available on www.jurisprudenta.org [reference from 1.09.2012].

challenged in administrative court but only after issuance of a decision for solving the preliminary appeal in administrative procedure. Likewise, the Court holds also the provisions of article 201 par. (1) FPC, with reference to article 218 par. (2) FPC, so, legally and thoroughly the first instance court held that the action requiring directly to the administrative court the refund decision's annulment is inadmissible. The court omits an essential aspect and adds to the law; pursuant article 8 par. (1) of Law no. 554/2004, the court is referred in two cases, not only after the issuance of solving decision, but also if the response to preliminary appeal is not received in legal due date. Petitioner must present the court not the decision for settling the preliminary appeal, but the evidence that he has covered the preliminary procedure, or proof that he has filed complaint and the resolving legal term has expired. The derogatory nature of the preliminary procedure provided by FPC has no bearing in this case. Petitioner's right to appeal the court cannot be indefinitely censored by tax authorities who fail to issue the settlement decision for preliminary appeal.

A mention is required to be made on doctrinal argument[16] regarding the scope of article 6 of the ECHR[17] for resolving the entire procedure in a reasonable time thus the obligation of the court to respond immediately. The ECHR case-law recognizes restrictive application of article 6 safeguards in taxation matters, by conditioned and limited assimilation to criminal[18] or civil issues[19], difficult to invoke in taxation procedures. For this reason, during the preliminary proceedings, the optimal solution for the taxpayer remains to suspend the administrative-fiscal act, under article 14 of Law no. 554/2004, by main, direct claim addressed to the court after filling the preliminary appeal. Thus, the duration of the procedure will not affect the petitioner.

The contentious administrative Court's solutions

Pursuant article 18 par. (1) of Law no. 554/2004, assuming an obligation to commit, the court may *order the public authority to issue an administrative act or to issue a certificate, a pass or any other document.*

Thus, the court compels the tax authority to issue the administrative-fiscal act (tax decision, imposable base decision, refund decision, registration certificate, tax certificate) when, ex officio or at the taxpayer's request, the obligation to issue the document has not act upon even after the preliminary procedure.

The court may, also require the tax authority to fulfill a certain internal procedure: removal for taxpayers' register, annulment of registration as a VAT payer, removal of debts from analytical records, correction of material errors, offset of debts.

Equally, the court may settle on the repair of damage caused by act's lack resulting in accessory debts and litigation expenses. About accessories, it is likely that the tax authority ends a tax audit without issuing the tax decision[20]. Taxpayer's concern to seek and obtain court's order against tax authorities for issuance of the decision, is explained also by decision's retroactive effect, which will determine accessory debts from the date of the legal imposing fact until the date of payment, including the post audit period.

Assuming actions based on article 117 FPC, frequent in recent case-law due to first registration tax, taxpayer's action has as object to compel the tax authorities to refund amounts paid without legal basis. In this case, the action is a claim action, an action in

[16] A. Fanu-Moca, op. cit., pp. 200-201.
[17] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.
[18] Administrative proceedings involving public authority are excluded from the scope of article 6 ECHR, specifically tax litigation. See: F. Sudre et. al., *Les grands arrêts de la Cour européenne des Droits de l'Homme,* 3e Edition, Presses Universitaire de France, Paris, 2005, p. 218.
[19] Tax penalties are treated as criminal matter under article 6 ECHR subject to the criteria confirmed in jurisprudence: Bendenoun c. France (1994), Janosevic c. Sweden (2002), Jussila c. Finland (2006).
[20] See: Court of Appeal Cluj, Administrative Claims Section, Decision no. 1439/2008, available on www.jurisprudenta.org [reference from 1.09.2012].

obligation to remit. The court compels the tax authority to reimburse the debt; the refund decision under article 88 FPC as claim title is replaced by court's decision.

Enforcement of obligation to commit

New Civil Procedure Code (NCPC)[21] introduces several novelties in the field of the obligation's to commit enforcement with a major impact in fiscal cases.

The hypothesis of the article 903 NCPC, namely authorizing the creditor to execute itself the obligation is inapplicable to tax matters. Tax obligations are obligations *intuitu personae* impossible to be execute by another: issuance of the administrative-fiscal, changing records on debtors, etc.

Thus, the enforcement procedure applicable is regulated by article 905 NCPC, namely the application of penalties. Enforcement court will determine a penalty in favor of the creditor, depending on the nature of the obligation. We appreciate that compared to the previous regulation in article 580^3 Civil Procedure Code, when the sanction was a civil fine, the current legal formula is truly applicable to fiscal matters. This is because, in tax matters, obligating the debtor (the tax authority thus the state) to pay a civil fine to the state through tax authorities did not give any real constraint. The debtor not executing his obligation was forced to pay itself a fine (by either component of the consolidated budget). The new enforcement formula offers the creditor an undeniable advantage through the benefit of these penalties.

In application of article 905 par. (2) NCPC, if the obligation is not measurable in money, as is quite common in cases of obligation to issue an administrative act, *the penalty will be set from 100 lei to 1.000 lei, established on day of delay until execution of the obligation under enforcement*. In application of article 905 par. (3) NCPC, if the obligation has an object assessable in money, *the penalty provided in par. (2) may be determined by the court between 0.1% and 1% per day of delay calculated percentage of the value of the obligation.* Also, we may notice note that in the light of NCPC, the time of applying penalties was reduced to three months. *De lege ferenda*, we consider it appropriate to dedicate a derogatory manner of enforcement of obligations in tax litigation.

Conclusions

Enforcement proceedings for tax obligations present undisputedly a series of peculiarities due to their object and to the nature of their subjects. A detailed analysis of possible practical assumptions reveals the need to qualify the nature and object of the petition, as in preliminary and also in contentious-administrative proceedings. Only then is it possible to identify a legal solution for practical hypotheses.

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[21] Law no. 134/2010 regarding Civil Procedure Code, Published in Official Monitor of Romania, Part I, no. 485 from 15 July 2010, modified, republished in Official Monitor of Romania, Part I, no. 542 from 3 August 2012.

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ISLAMIC FUNDAMENTALIST TERRORISM ISSUES

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Abstract

International coalition against terrorism, under the leadership of the United States, has as main objective the destruction of the last remnants of Taliban and Al-Qaeda fighters to prevent that, in the future, they return and find in Afghanistan a proper land for the development of fundamentalist organizations. Operation Enduring Freedom is not only conducted in Afghanistan but also in Pakistan and on territorial waters and seas, to the Mediterranean, where the International Coalition naval vessels monitor suspicious vessels that could have Al-Qaeda members on board. Moreover, all cells of terrorist organizations that are spread across dozens of countries on all continents are targeted.

Key words: *terrorism, attacks, Muslim, Jihad, groups, fundamentalism.*

Introduction

The terrorist attacks on the United States are not only assaults on a superpower but also strikes applied to civilization, contemporary principles of democracy, targeting strategic objectives representative of what the world was and also an attack on common values belonging to many countries. In addition to the meaning of the attacks, they also wanted to achieve strategic objectives by hitting the world trade center to destabilize an entire economic system. The symbols that were hit indirectly caused a global attack, taking into account the fact that citizens of 80 states were killed. Secularization of Islam is the main fact that led to the development of religious Muslim radicalism, because no symbol-targets for Islam or Christianity were hit as it would have been, for example, the Vatican, Tehran or Jerusalem, but a symbol that represents the values of culture and Western civilization was chosen. The so-called holy war, named like this by the Prophet Mohammed, has turned into a war of Islamic fundamentalists with the rest of the world that does not "obey the laws of Allah". The Holy war that called Mohammed from Medina to go to Mecca is played by the Muslim radicals and speculated with resentments given by the globalization and the inadequacy of companies led by the idea of modernity and tolerance.

Until 11 September 2001 terrorist attacks have generally pursued a large public impact with fewer victims. According to the history of terrorism, political assassinations had one or several targets and they even reached to the attack of some state representative buildings,

starting with the assassination of the Tsar of Russia and up to the attacks on U.S. embassies, bombs placed by ETA or IRA or gas attack on Aum sect in Japan. A recent case is that the attacks were completed by religious fanatics who do not accept values, rules and modern democratic systems. In this context, the counter-terrorism strategy should be reviewed both globally and in Romania.

Islamic terrorism or the Jihad is, in fact, the inability of Muslim societies to gain upgrades provided by Western civilization and culture[1]. This evolution was encouraged by some regimes that could not politically and culturally adapt the precepts of Islam to the ideas imported from the West. This context led to the development of the doctrine of jihad as a solution to the clash of civilizations. A great success of Islamist groups was their ability to present the ideology of this inexorable collision and the truth of Islam and thus, they attracted a relatively large Muslim public[2].

The next step was polarizing the Muslim public opinion around the idea that Muslims are in a permanent war which is part of the global struggle between Islam and the long list of enemies throughout history. The twentieth century has given the Muslim extremists the idea of "permanent withdrawal" in which they would be besieged by the threat of Western culture and modernization. The result was the secularization of religious precepts by social degradation of Islamic political culture. The superiority of the West gave a sense of despair to that war which is presented as a war of self defense to which the jihad is the only possible answer.

The main elements of the terrorist "equation"

Western analysts anticipated that successful attacks on the United States would encourage more and more terrorist organizations to apply similar methods characterized by conventionalism and asymmetry, multiple attacks respectively, unknown suicidal authors aiming at symbolic targets and the production of a large number of casualties. Moreover, these attacks will not be claimed, which will make it more difficult to deal with the attacker because it cannot be identified. It is estimated that, due to advanced technologies, terrorist attacks will be more destructive. It is possible that the measures taken by the international coalition against terrorist organizations to stop this phenomenon will only result in other attacks. The most dangerous terrorist threat is the attack with weapons of mass destruction. It is highly unlikely that future attacks should apply a scenario identical to that of the United States. Perhaps the attacks will change the place and the means used will be chemical, biological, radiological or nuclear weapons. It is possible that, in the future, terrorist organizations will use state facilities as targets with massive destructive effects. I refer to potential attacks on biological and chemical research institutes, which would cause the spread of viruses or lethal substances in the population. Attacks on offshore drilling platforms could lead to environmental disasters and the explosion of large dams would cause huge casualties and property damage. It is even possible that future terrorist attacks would target one of the 400 nuclear plants in the world.[3]

The atomic weapon, although it is frightening, requires a highly advanced technology and at least one state sponsor. I underline, though, that more countries are approaching the threshold of nuclear weapons technology. But there are other weapons of mass destruction: radiological, biological and chemical.[4] It is likely that countries that can attack democratic states, should not be, surprisingly, the currently labeled as "dangerous".

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1 The word jihad often translated as "the holy war" means effort and applies to all forms of effort against their indolence and negative inclinations. It must be said, however, that this jihad has allowed the recapture of Mecca (J. Delumeau, *Religiile lumii*, "Humanitas" Publishing House, Bucharest, 1996, p. 328).

2 S.O. Iosipescu, *The Koran*, Cernăuţi, 1912, p.77.

3 J. F. Cilluffo, D. Rankin, *Fighting terrorism*, in "NATO Review", winter 2002.

4 J. More, *The evolution of Islamic terrorism*, www.pbs.com, p. 103.

Leaders of these countries want to obtain and maintain power, especially, making any risk of loss of this power to lead to a cautious attitude. A possible response by international pressure, economic sanctions and use of superior force, in numbers and technology, can weaken the leadership positions of these leaders.

Although a study made by the National Intelligence Council of the United States claims that terrorist attacks with weapons of mass destruction "do not confer prestige, degree of deterrence or coercive diplomacy as the long-range missiles", the threat of terrorism with weapons of mass destruction is considerable and should be the source of much greater concern. Moreover, this very report pleads for greater vigilance against terrorism with weapons of mass destruction and it admits that such attacks are cheaper than the production of ballistic missiles, they can be prepared and implemented in secret and they would be more accurate than the ballistic missiles and also, the biological agents can be spread more efficiently and they can avoid anti-missile defense systems. Terrorist actions often have fewer funds, they use well trained agents spread across regions or cities whose gaps in the defense system were determined before the attacks. The aim is to have a national impact or even an international response. Based on this we can say that, in the near future, Romania is not among the main targets.

Potential terrorists are part of foreign nationals or ethnic groups and religious groups. A significant example is that now, both in the U.K., U.S. and in Canada; there are international terrorists in many organizations, a situation confirmed by the FBI and CIA[5]. The action of these "mole" terrorists is stimulated by the rivalry between countries, financial incentives or other international factors. The economic aspect should not be left aside as it involves sponsorships from corporations, holding companies or crime cartels (the latter case being increasingly more justified because lately there is a growing collaboration between terrorism and the organized crime).

To anticipate terrorist attacks, the reduction to absurdity must be included. Not without reason, the Pentagon, after the September 11 attacks, has called for consultation the best writers of action films. We also point out that terrorism has no rules or boundaries and it acts everywhere and always in an asymmetric, complex warfare, led through unexpected ways by all kinds of fighters. A very clever war so thoroughly prepared, with a high percentage calculated success[6]. Terrorism can perform long operations with extended, fragmented, perverse and insidious effects by means of centralized or disparate actions. We point out that front-line terrorists act fanatically as pawns of sacrifice, and they are military and psychologically well trained and they have reasons that cannot be understood by ordinary people. In comparison, terrorist leaders are very intelligent and they think they have a historical, messianic and judgmental mission. Or, as U.S. Colonel (r) Andrew Pratt Nicols, at the European Centre for Studies George C. Marshall said: "in the Middle East they all believe that they are right because they believe they have God on their side...". The terrorist attacks on the United States caused an international response by forming a coalition that Romania also joined. My opinion is that, due to this decision, our country will benefit in the short term but it should change its strategy for future response to terrorism, because, as we stated above, within ten years, Romania will be identified with the West. The advantage is that, as we are in the process of reform and restructuring of defense and national security system, we can build a military soon able to react quickly and effectively to threats of international terrorism. The reform of existing forces should consider the development of appropriate information structures for prevention and immediate response to capture conventional or unconventional

5 According to the testimony submitted to the Immigration Subcommittee of the House of Representatives of the U.S. terrorism expert, researcher Steve Emerson, executive director of the Terrorism Newswire.
6 L. Davidson, *Islamic Fundamentalism*, Greenwood Press, Westport, 1998, p. 89.

terrorist attacks[7]. Changes to the active strategy should be made in order to conduct anti-terrorist operations, starting, for instance, from protecting the weapon bases, the Cernavoda nuclear power and the medical research centers and to coordinate military and / or economic systems.

In 1994 the Pentagon has completed an academic study entitled "Terrorism 2000" which made predictions on possible terrorist attacks to take place after 2000. This study was conducted by 41 military experts including specialists of the CIA and other U.S. intelligence services, researchers from Heaven Corporation of Israeli intelligence officers and even a former KGB major general. In essence the analysis emphasizes the development of a super-terrorism and anticipates the change of the forms of terrorism, with attacks on several targets, amplification of attacks on civilians and the use of ever more weapons of mass destruction. Although the study noted the emergence of terrorist leaders like Osama bin Laden, the information remained only in the databases of the Pentagon as the U.S. government considered it too "explosive" and, as such, it did not take any countermeasures. Among the predictions contained herein there were also included: the combination of organized crime and terrorism, the ever more targeting of the U.S. and their allies and the development of ethno-religious terrorism. To build strategies to fight this "new terrorism", the study of the Israeli-Arab conflict is recommended. An analysis was made by the specialists in Israel and it had similar results. A public opinion survey (conducted jointly with the Center for Strategic Studies at Bar Ilan University and the International Policy Institute for Counter-Terrorism Herzliya - Israel) in April-May 1999[8], highlights the fact that public opinion, even before 11 September, suicide attacks and a fear of war with Arab countries were the main concerns. Despite these findings, the counter-measures were not as required, which proves that these threats were considered exaggerated by the authorities.

Present danger posed by terrorism requires international understanding and cooperation, a process hindered by the large difference between the interests of different nations. Consensus should be based on the national policy makers and it should provide motivation for all individuals and all organizations. The State must make and provide the necessary legal framework to allow its forces to operate successfully where terrorism and organized crime meet. At the same time, all departments must improve their methods of action to cope with new forms of terrorism, preferably before they manifest. Consensus also includes the desire to get new partners who can provide support to national and international strategies.

Successful attacks of Al Qaeda[9] and Osama bin Laden stand out by professionalism which is a feature of the powerful organizations. Those who led the U.S. attacks knew that they would perform an act of martyrdom, but they have only found the purpose of the mission on the aircraft. Moreover, those who had taken driving courses did not know the members of their teams and those teams did not even know each other. These things are proved by the transcript of a video with Osama bin Laden, 13 December 2001.

The main features of the September attacks are:

1. Long time given to prepare action.
2. Detailed planning.
3. Operations depended on local infrastructure built by people trained in Afghanistan.
4. The attacks were coordinated by an expert from the headquarters in Afghanistan, who personally took care of the operations.
5. The attack aimed at causing massive losses.

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7 C. Youssef, *Islamic Fundamentalism*, Boston, Twayne Publishers, 1990, p. 132.

8 Lauren Langman, D. Morris, *Islamic Terrorism: From Retrenchment to Resentment and Beyond*, Loyola University of Chicago, p. 66.

9 Al-Qaeda in Arabic means "base" and 'Al-Qa'iadah- "vanguard"

6. More suicide terrorists were used.
7. Nobody has assumed direct responsibility for the attacks in order not to provide arguments to identify the guilty. Thus, bin Laden and his hosts in Afghanistan could dissociate themselves from the attacks.
8. The success of the operation has brought new Al-Qaeda followers.

The main landmarks of Islamic fundamentalist terrorism

Brief Chronology[10]:

- The '70s - Terrorist groups undertook limited attacks to kill certain individuals in parallel with the increase in urban incidents, using the principle of the guerrilla war.

- The '80s - A distinct movement towards urban attacks with an even larger number of casualties as a change in the methodology for choosing the target that is chosen mainly from among civilians. The conflict between the USSR and Afghanistan is the early proliferation and development of Islamic, militant fundamentalism.

- The '90s - Continuous attacks on civilians and players from different organizations are attracted on the basis of ethno-religious, religious and religious-nationalist misunderstandings, characters mainly coming from the left turn movements. The end of the Cold War and the creation of new states, the leaving other countries in unstable conditions and anarchy, created the conditions to develop a new type of extremism whose ideology allows or calls for the killing of the incriminated ones.

Researcher Bruce Hoffman (Rand Corporation) stressed that, if in 1980 two of the 64 terrorist organizations were recognized primarily for a large religious motivation, in 1995 almost half of the identified groups, 26 of 56, were classified as being extremist religious; the majority considers the Islam as the force for action.

In the late ‘60s Palestinian secular movements such as Al Fatah and the Popular Front for the Liberation of Palestine began attacks on civilians outside or near the area of conflict. After the defeat of Arab forces by Israel in 1967, Palestinian leaders have realized that the Arab world was unable to militarily confront the Israel. Movement occurs from the classic, guerrilla war to the urban terrorism. Radical Palestinians have used modern communications and transport systems in order to internationalize the struggle. They started a series of aircraft hijackings, kidnappings, bombings and bullets, culminating in kidnapping Israeli athletes during the Munich Olympics in 1972.

That group became a model for the Palestinian militants and provided many lessons for different ethnic and religious movements. Palestinians have created an extensive network comprising different sponsor-states like the Soviet Union, a number of Arab states as well as traditional criminal organizations. In the late ‘70s, Palestinian secular networks were the main channel of spreading terrorist techniques worldwide.

The evolution of society through the clash of civilizations

In the summer of 1993, Professor Samuel Huntington of Harvard University published an article entitled “The Clash of civilizations”[11] which caused controversy among the international academic community. Three years later, Professor Huntington published a book with the same title[12] in which he argued that the roots of the global conflict at the end of the twentieth century are neither ideological nor economic, but primarily cultural.

Huntington divides the history of conflict in modern and contemporary history in 4 stages:

1. Conflicts between monarchies: it is based on economic rivalries and territorial interests.

10 J. More, *The evolution of Islamic terrorism*, at www.pbs.org.
11 S. Huntington, *The Clash of Civilizations?* in Foreign Affairs, summer 1993.
12 S. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon & Schuster, New York, 1996, p. 98.

2. Conflicts between nations: once with the French Revolution and the development of nationalism, the main actors in the conflict are not the monarchs but the nations. Huntington states that "the kings' war disappears and the people's war begins". This stage lasted until the end of World War I.
3. Conflicts between ideologies: since the appearance of communism in Russia, the conflicts between nations have been replaced by conflicts between opposing ideologies - first among communism, fascism, Nazism and liberal democracy and later between communism and liberal democracies ("the Cold War or the West against the East").
4. Conflicts between civilizations: After the Cold War "the clash of civilizations is the main cause of the conflicts".

Huntington names eight major civilizations in the contemporary world: Western, Slavic, Sino-Confucian, Japanese, Indian, Latin American, Islamic and African. Of all these, the Islamic one is highlighted by Huntington as the most militant one and he also underlines the conflict between the Muslims and the West and the other civilizations. He highlights the historical evolution of this conflict, starting with the Crusades and continuing with the Ottoman Empire, Western colonization and wars.

After the Cold War Huntington reminds the following conflicts to support his theory: the war in Afghanistan, the Gulf War, the conflict between Serbs and Albanians, the confrontation between Greece and Turkey, ethnic and religious confrontation of the former Soviet republics, the war between Azerbaijan and Armenia. The following list is not mentioned but complements Huntington's listing after 2000:

- the war between Christians and Muslims in Sudan;
- war between Christian Ethiopia and Muslim Eritrea;
- the war in Kosovo between the Orthodox Serbs and the Muslim Albanians;
- wars in Chechnya and Dagestan and insurrection against the pro-Russian regimes in Tajikistan and Uzbekistan;
- the conflict with Iraq;
- disputes between India and Pakistan for Kashmir;
- Uighurs Muslim nationalist subversion in western China;
- conflict between Muslims and Christians in the Philippines for the control regime on the Moro Island;
- war between Indonesian Muslims and Christians in East Timor;
- Arab-Israeli conflict.

Although these facts reinforce Huntington's view, there must be some criticism. He describes all Muslim states as a single cultural block in conflict with the West and other civilizations. A closer study of the regimes in Muslim states shows that most of them are of secular origin, or of moderate or pragmatic-Islamic nature which, far from being in conflict with the Western world, have jumped at modernity and adopted its technologies, values and lifestyle[13]. Many of them became military, politically and economically allies with the West. Huntington does not distinguish between these states and the Islamic fundamentalism which is still a minority among the Muslim world.

These radical Islamic elements operate in all Muslim states with different levels of intensity. Their main objectives are: to bring to power the Islamic law in all Muslim countries, to set up new Islamic states and to obtain independence for the Muslim minority in countries such as China, Philippines, the former Yugoslavia and India[14].

In addition to the main groups (fundamentalist Islamic) there are at least two states (eliminating Afghanistan) - Iran and Sudan - whose fundamentalist Islamic regimes provide

[13] J. Delumeau, *Religiile lumii*, "Humanitas" Publishing House, Bucharest, 1996, p. 201.
[14] L. Davidson, *Islamic Fundamentalism*, Greenwood Press, Westport, 1998, p. 27.

spiritual and material support for radical movements[15]. These countries act independently and export Islamic revolutionary ideas throughout the Muslim world in parallel with the call to battle against alien civilizations - especially the Westerners.

The following events had a significant impact on the development of Islamic fundamentalism[16]:

- Islamic Revolution in Iran. This event has turned Iran into a radical Shiite country, exporting revolution in the Muslim world and supporting the conviction superpower hegemony.
- The victory of the Mujahedin in Afghanistan and the establishment of the Taliban resulted in the creation of "veterans" who have volunteered to spread Islamic fundamentalist ideas throughout the Muslim world. Conditions for the development of the Al-Qaeda group and Bin Laden's hosting have been created.
- Disintegration of the USSR that created a political and ideological vacuum in which the Islamic groups came into force.

Conclusions

According to a study by Dr. Cky J. Carrigan[17], there are over 1 billion Muslims in the world, divided in terms of faith into liberals, moderates and fundamentalists, the latter being the least in number. But if and only 5% of the world's Muslims support the idea of the terrorist attacks of September 11, the U.S. and their allies have over 50 million Muslim enemies in the world. Further on, Carrigan says that if 5% of the American Muslims approve the September 11 attacks, then approx. 300,000 Muslims are enemies even within the U.S. borders.

A Gallup poll conducted in February (2002) scientifically showed the dimensions of the Islamic fundamentalism. About 10 000 Muslim adults in nine Islamic countries were questioned. Approximately 15% of them thought that the September 11 attacks were morally justified. If this percentage is representative for the entire Muslim population in the world, one can say that is statistical and scientific evidence that over 180 million adults are radical Muslims and support the Islamic fundamentalism. Following this hypothesis we can say that if we agree that there are an equal number of Muslim children who share their point of view, we have over 360 million Muslim fundamentalists who claim that the September 11 attacks in the United States have moral justification.

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[15] J. More, *The evolution of Islamic terrorism*, p. 102.
[16] S. Huntington, *The Clash of Civilizations?* in Foreign Affairs, Summer 1993.
[17] J. Cky Carrigan, *What`s the Truth about Islamic Terrorism?*, http://ontruth.com/islamwtc.html.

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THE CIVIL CODE AND THE ENVIRONMENT

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Abstract

Appeared with the declared intention[1] to "meet the requirements of a dynamic present", by: "the newly promoted solutions, the revision of some classical institutions or emphasis on certain internationally recognized principles, not implemented in the Romanian space yet", the new Civil Code does not seem to integrate the environmental and related issues in the dynamics of the present. Moreover, except for some modest norms – such as art. 539 par. 2 which includes in the category of movables "the electromagnetic waves or those assimilated to them, as well as the energy of any kind" and art. 603 which provides the obligation of the owner to observe the tasks concerning the protection of the environment and the action of ensuring good neighborhood – nothing entitles us to assert that the new Civil Code "makes valuable use of provisions of European law instruments".

Keywords: *electromagnetic waves, protection of the environment, basic treaties of the European Union, sustainable development, solidarity between generations.*

Introduction

The article is structured into three parts emphasizing some of the deficiencies of the civil code, either by the failure to regulate some domains which should have been regulated, or by the criticizable regulatory framework, the arguments in favor of these opinions, accompanied by lege ferenda proposals. Thus, it is known that the basic treaties of the European Union – TEU and TFEU – in numerous articles establish the "sustainable development of Europe and of the Earth", "a high level of protection and improvement of the quality of the environment" as the main objectives of the European Union. This is the reason why art. 11 TFEU imposes that "environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities". One can notice that, except for some modest norms – such as art. 539 par. 2[2] and art. 603[3]– nothing entitles us to assert that the new Civil Code "makes valuable use of provisions of European law instruments".

The Civil Code and the protection of the environment

The first aspect concerns the fact that, as we know, the protection of the environment is an internal policy of the European Union, within which we are a member state. Therefore,

[1] From the presentation of the new Civil Code which has become a normative reality as a consequence of its adoption by Law no. 287/2009.
[2] Which includes in the category of movables "the electromagnetic waves or those assimilated to them, as well as the energy of any kind".
[3] Which provides the obligation of the owner "to observe the duties relating to environmental protection and to ensure good vicinity".

the basic treaties, TEU and TFEU, devote a significant number of articles to it. Thus art.3 TEU provides: "(1) The Union's aim is to promote peace, its values and the well-being of its peoples. (3) The Union shall establish an internal market. It shall work for the *sustainable development of Europe* based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and *a high level of protection and improvement of the quality of the environment.*... (5) In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the *sustainable development of the Earth*, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter." Along the same line, article 11 TFEU[4] stipulates: "*Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development",* and a full title (*Title XX*) contained in Part III *(The Policies and internal actions of the Union)* is devoted to the environment. The framework normative act in the matter of the environment, the Emergency Ordinance no. 195/2005 on the protection of the environment[5], establishes under art. 3 as the first principle: the principle of the integration of environmental requirements into other sectorial policies. This principle implies that, at the level of the entire economy, various sectorial policies must consider the impact that those activities (in agriculture, transport, industry, health etc.) may have on the environment, the declared purpose being the protection of the environment. The principle according to which the protection of the environment constitutes an objective of major public interest, although not found in art. 3 of the Ordinance on the protection of the environment, is a basic principle because in art. 1 par. 1, the Ordinance provides that "*the object of this Emergency Ordinance is the body of juridical regulations on the protection of the environment, an objective of major public interest, on the basis of the principles and strategic elements leading to sustainable development"*. An example of the application of these two principles is the Government Ordinance no. 19/1997[6] on transports which provides in one of its first articles (2): in all general transport activities the protection of human life and of the environment prevails.

Consequently, having established these coordinates, we would have expected to see not only more regulations regarding the environment, but also, among the general dispositions (Chapter I, *Preliminary title. On the civil law)* a norm which should impose the observance of the environmental protection requirements. We consider, *by lege ferenda*, that the amendments to the Civil Code should contain norms for imposing the observance of the environmental protection requirements in the relations that the Code regulates.

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[4] Title II Provisions having general application, TFUE.

[5] (Official Gazette of Romania no. 1196 of 30 December 2005) The Ordinance was amended and completed by Law no. 265/20069 for the adoption of Emergency Ordinance no. 195/2005 on the protection of the environment (Official Gazette of Romania no. 986 of 6 July 2006); the Ordinance was partially repealed by Emergency Ordinance no. 57/2007 on the regime of protected natural areas, the preservation of natural habitats, of wild flora and fauna (Official Gazette of Romania no. 442/2007) as amended by Emergency Ordinance no. 114/2007 for amending and completing Emergency Government Ordinance no. 195/2005 on the protection of the environment (Official Gazette of Romania no. 713 of 22 October 2007) and by E.G.O. no. 164/2008 for amending and completing E.G.O. no. 195/2005 on the protection of the environment (Official Gazette no. 808/2008).

[6] (Official Gazette of Romania no. 200 of 20 August 1997). The Ordinance was adopted and amended by Law no. 197/1998, for the adoption of Government Ordinance no. 19/1997 on transports (Official Gazette of Romania no. 425 of 11 November 1998) and amended by Government Ordinance no. 94/2000 for amending and completing G.O. no. 19/1997 on transports (Official Gazette of Romania no. 421 of 1 September 2000).

Preventive liability

The second aspect that environmental law would have expected to find in the Civil Code concerns preventive liability. By referring to preventive liability[7], we mean the case of those juridical relations in which, as a consequence of licit acts there is a possibility that, in the future, a prejudice may occur; the certitude does not exist, due to the limitations of human knowledge, a reason for which, at international, EU and national levels – by Emergency Government Ordinance no. 195/2005 on the protection of the environment – it was necessary to regulate the precautionary principle. The precautionary principle, emerged in environmental law, seems to be the answer to the search for "an ethical responsibility of a new type", necessary because "the rationality of science, which brutally intervenes in the field of biological life, can overthrow not only the order of nature but also the fate of mankind" [8].

A party in the triad of founding principles for environmental law – "the polluter pays", prevention, precaution – the precautionary principle appears as a mirror of our times where the wrongly driven science can have catastrophic effects. The "polluter pays" principle implies a polluter which, by its action (whether it considers it or not, whether it wants it or not), causes a damage that it must remedy; the prevention principle implies the obligation to act before the damage is produced; the precautionary principle is one of anticipation: the damage has not been produced, and the event of its occurrence is not demonstrated, beyond any doubt, and not provable either, the risk is uncertain, it is just possible[9].

The damage risk[10] has been considered "abnormal disturbance", lying at the basis of a decision disposing the removal of an aerial for mobile telephony, erected on a school roof. "The submission of children to the electromagnetic radiations emitted by the respective aerial represents a disturbance that goes beyond the normal vicinity inconveniences", specifies the decision in an innovative manner for this period, when there are still scientific uncertainties regarding the real effects of this type of radiations; just for the prevention of this kind of damage risk, they decided the removal of the aerial. Another decision is even more categorical, specifying as explicitly as possible: a neighbor cannot be exposed, against his own will, to any risk, even hypothetical, with the only alternative of having to move out, if he refuses to assume this risk[11] (in a case related to an aerial for mobile telephony). In an era characterized by great uncertainties, not at all solved by scientific controversies, generated and maintained by more or less economic interests, it is encouraging and refreshing to notice this tendency of getting from remedy, which can be too late sometimes, to prevention; from the "fatality-risk" to "the predictable and statistically probable risk", from the judge perceived

[7]A. I. Duşcă, *Răspunderea preventivă – formă a răspunderii ecologice* (Court of Sector 1, Bucharest, civil sentence no.864 of 24 June 2009), "Pandectele Române" Review, no. 4/2011, pp. 216-222; A. I. Duşcă, D. Ghiţă, *Din nou despre poluarea electromagnetică* (Court of Appeal, Craiova, section of fiscal and administrative dispute, decision no. 107 of 14 February 2006), "Pandectele Române" Review, no. 5/2011, pp. 202-211.

[8]D. Mazeaud, *Responsabilité civile et precaution* in Responsabilité civile et Assurances, no. 6 bis/2001, p. 72, cited by C. Teleagă, *Principiul precauţiei şi viitorul răspunderii civile*, in "Revista română de dreptul muncii" Review, year II, no. 1(3)/2004, pp. 29-57; C. Teleagă, *Armonizarea legislativă cu dreptul comunitar în domeniul dreptului civil în cazul răspunderii pentru produsele defectuoase*, Rosetti Publishing House, 2004, Bucharest, pp. 69-95; J. Lambert-Faivre, *Droit du dommage corporel. Systems d'indemnisation*, 5e édition, Dalloz, Paris, 2004, pp. 848-868.

[9]"The evolution marking the passage from the model of legalist, formal and logical justice, to a teleological justice whose ambition would be to find the appropriate solutions as related to the pursued objective..." is being accomplished (and certainly includes the precautionary principle) M. de Sadeleer, *Le statut juridique du principe de precaution en droit communautaire. Du slogan à la regle*, Cahier du droit européen, no. 1-2/2001, p. 116, cited by de C. Teleagă in *op. cit*., Principiul precauţiei şi viitorul răspunderii civile, p. 31.

[10]J.V. Borel, *La responsabilité pour troubles anormaux de voisinage: De la reparation à la prevention*, Revue de la Recherche Juridique Droit Prospectif, Presses Universitaires D'Aix – Marseille, no. 4/2007, p. 1758.

[11]Idem, p. 1759.

as a mere agent, to the judge who interprets not so much a vast legislature, but certain principles, such as the precautionary principle or the "polluter pays" principle[12].

But the attempt to make preventive liability fit in the pattern of liability in tort has to overcome some obstacles: there is no prejudice, causality relation, and the act is not illicit or it does not cause any damage. With regard to these findings, the solution that seems to occur is to consider preventive liability as the hard core of ecological liability. The basis of our conclusion will be presented in the following lines. Firstly, the specifics of the entire environmental legislation refer to prevention; the very article of the framework normative act in the matter – the Emergency Government Ordinance no. 195/2005 on the protection of the environment – stipulates: "the object of the ordinance is the body of juridical regulations on the protection of the environment, an objective of major public interest, on the basis of the principles and strategic elements leading to sustainable development". We hence understand that the principles of environmental law represent the starting point for the protection of the environment for the purpose of reaching the real aim – or the final aim – namely sustainable development[13].

The transfer into reality of the concept of sustainable development supposes the constant presence of prevention, more clearly, the development at this very moment, must be accomplished by thinking of future generations in order to prevent: the exhaustion of natural resources, the extinction of plant and animal species, irretrievable destruction of the environment. Along the same line, prevention also implies the anticipation of some possible negative effects as a result of introducing different pollutants into the environment, among which electromagnetic radiations[14]. Secondly, preventive liability speaks for a fundamental human right, the right to a healthy environment[15]. Among the attributes of this right, the framework normative act also includes "the right to make a request on environmental matters, directly or by the organizations for the protection of the environment, to the administrative and/or judicial authorities, regardless of the (non-)existence of a prejudice", and preventive liability appears as a means of carrying it out. It is obvious that, in case a prejudice has been produced, we can talk about another attribute of the right to a healthy environment, the right to remedy for the prejudice, the classical liability in tort being perfectly applicable. Thirdly, the framework normative act, in art. 95, provides: "the liability for the prejudice to the environment is of an objective nature, regardless of guilt". It thus results that in the matter of environmental law, the ground is the risk. For sure, a prejudice to the environment has consequences, sooner or later, in the quality of life, influencing the wealth and health of man. Therefore, we consider *de lege ferenda* that the changes in the Civil Code should contain regulations on *preventive liability.*

The right of property and the environment

A third aspect aims at the right of property and the protection of the environment. Art. 603 of the Civil code: "*The right of property implies the obligation to observe the duties*

[12]V. Wester-Ouisse, *Responsabilité pour troubles anormaux: le modèle d'une responsabilité fondée sur le dommage*, Revue de la Recherche Juridique, Droit Prospectif, Presses Universitaire D'Aix-Marseille, no. 2/2007, pp. 1119-1233.

[13]Art. 2, point. 23, E.G.O. no. 195/2005: sustainable development – development meeting the needs of the present, without compromising the possibility for future generations to satisfy their own needs.

[14]Art. 2 point 50 of E.G.O. no. 195/2005: pollutant – any substance, in solid, liquid, gaseous form, or as vapor or energy, electromagnetic, ionizing, terminal, phonic radiation or vibrations, which, introduced in the environment, modifies the balance of its components and of the living bodies and causes damage to material goods.

[15]Letter d) art.5 of E.G.O. no. 195/2005. The other attributes are: a) access to environmental information, by observing the confidentiality conditions provided by the legislation in force; b) the right of association in organizations for the protection of the environment; c) the right to be consulted in the process of decision-making with regard to the development of environmental policy and legislation, the issuing of regulatory acts in the field, the elaboration of plans and programs; e) the right to remedy for the prejudice which has been caused.

relating to environmental protection and to ensure good vicinity, as well as other duties incumbent on the owner, in accordance with the law or custom". This text is identical with art. 44 par. 7 of the Constitution[16]: "*The right of property implies the obligation to observe the duties relating to environmental protection and to ensure good vicinity, as well as other duties incumbent on the owner, in accordance with the law or custom"*. The two articles establish not only a proper obligation arising out of the ownership of some goods and creating duties only in relation to those goods[17], but also a limitation in the exercise of the right of property. By systematically interpreting art. 555 par. (1) of the Civil Code which disposes: *"Private property is the right of the holder to possess, use and dispose of an asset exclusively, absolutely and permanently, within the limits established by law"* and art. 556 par. (2) of the Civil code which provides: "*The law can limit the exercise of the right of property*" and if we consider the fact that art. 603 of the Civil Code is included in Section 1. *Legal limitations* of Chapter III *Legal limitations of the private property right*[18], we understand that these norms impose a limitation in the exercise of the attributes of the property right, not in the sense of obstacle, of obligation not to do, but in the sense of legal obligation to do. In the event of the infringement of this obligation, the owner lies under art. 630. Overcoming the normal inconveniences of vicinity: (1) *"If the inconveniences that the owner causes, by the exercise of his right, go beyond the limits of normal inconveniences with regard to vicinity relations, the court may, for equity reasons, compel the owner to pay damages to the prejudiced person, as well as the reinstatement wherever possible. (2) In the event that the prejudice is minor as related to the necessity or use of the performance of the activity causing damage by the owner, the court may approve the performance of that activity. The prejudiced person shall be entitled to damages. (3) If the prejudice is imminent or highly probable, the court may approve, by a court ordinance, the necessary measures for the prevention of the damage"*.

By systematically interpreting art. 630 and art. 1353 providing: *"the person causing a prejudice by the very exercise of his rights does not have the obligation to remedy it, except for the case where he committed the act with the intent to harm another"* it results that art. 630 does not set a judiciary limitation, as we might understand by considering that art. 630 is the single article of Section 3 *Judiciary limitations* of Chapter III The legal limitations of the private property right (Title II. Private property, Book III On goods) but a special case regarding liability.

Consecrating the moral imperative *Neminem laedere qui suo iure utitur* attributed to Ulpian, art. 1353 materializes the principle of the abuse of right regulated by art. 15 *"No right can be exercised for the purpose of harming or prejudicing another, or excessively and unreasonably, contrarily to good-faith"* [19]. Therefore, *art. 630 presents a case of abuse of right, which entails the liability of the owner who "failing to observe the duties relating to environmental protection and to ensure good vicinity"* (art. 603) *"causes, by the exercise of his right, inconveniences which go beyond the limits of normal inconveniences with regard to vicinity relations"* (art. 630). This is the reason why *the court may, for equity reasons, compel the owner to pay damages to the prejudiced person, as well as the reinstatement wherever*

[16] The Romanian Constitution of 8 December 1991 was amended and completed by the Revision Law no. 429/2003.

[17] M. Constantinescu, A. Iorgovan, I. Muraru, E. S. Tănăsescu, *Constituţia României revizuită - comentarii şi explicaţii*, All Beck Publishing House, Bucharest, 2006, pp. 92-96. This work specifies that "the constitutional provisions give a complex content to the property right, a content of right and obligation. This explains the provisions of art. 44 par. 7, in the sense that the property right compels to the observance of the duty to protect the environment and to ensure good vicinity, as well as the observance of other duties incumbent on the owner, in accordance with the law or custom".

[18] Title II. Private property, Book III On goods.

[19] S. Neculaescu, *Răspunderea civilă delictuală în noul cod civil – privire critică* -, "Dreptul" Review, no. 4/2010, p. 56.

possible (art. 630). Par. 2 under art. 630 disposes: *in the event that the prejudice is minor as related to the necessity or use of the performance of the activity causing damage by the owner, the court may approve the performance of that activity. The prejudiced person shall be entitled to damages.* This situation is paradoxical, in the sense that the owner, compelled by the Constitution and the Civil Code to *observe the duties relating to environmental protection and to ensure good vicinity* and not *go beyond the limits of normal inconveniences of vicinity* is exonerated from these obligations, if he pays damages and brings the situation back to the original position, just like the classical case of liability in tort[20]. The paradox also consists in the fact that by corroborating art. 602 (which disposes: (1) The law may limit the exercise of the right of property either for public interest, or for private interest. (2) The legal limitations for private interest may be altered or temporarily abolished by mutual agreement of the parties) with art. 603 (which disposes: the right of property implies the obligation to observe the duties relating to environmental protection and to ensure good vicinity, as well as other duties incumbent on the owner, in accordance with the law or custom) it results that the legal limitations for public interest, as is the case of the *duties to protect the environment and to ensure good vicinity,* cannot be modified or temporarily abolished by mutual agreement of the parties.

Nonetheless, the one who has to *overcome the normal inconveniencies of vicinity* during the *performance of the activity causing damage* is the very innocent owner and this happens because the court will establish – in accordance with unknown criteria – that the *prejudice is minor as related to the necessity or use of the performance of the activity causing damage,* a reason for which *the court may approve the performance of that activity.* We hence understand that the economic interest prevails, in particular when it is about "the vicinity of a plant, railway, a pig or chicken farm, dairy, slaughterhouse, a transport company, a mall, a touristic complex, a quarry, a site, a mine, a sawmill, high voltage power lines, GSM antennas, billboards..." [21] – numerous workers benefiting from these activities – therefore part of the prejudice which can consist in the diminution of the building value [22] as a consequence of abnormal vicinity disturbance, shall be covered by the owner as a victim.

Conclusions

The new Civil Code, a normative reality as a consequence of its adoption by Law no. 287/2009, implements a deep reform of the Romanian legal system. A modern instrument for regulating the fundamentals of the individual and social existence, the new Civil Code makes valuable use of the experience of recent reforms in the field of civil law accomplished by other states, as well as the provisions of European and international law instruments. This is what is asserted in the motivation of Law 71/2011 for the enforcement of Law no. 287/2009 on the Civil Code, where it is also shown that: in order to meet the requirements of a dynamic present, of living and ever-changing realities, new solutions are being promoted, classical institutions are being revised, internationally recognized principles are being emphasized, principles which have not been implemented in the Romanian space yet. Although the declared intention is to "meet the requirements of a dynamic present", the new Civil Code

[20] *Section 6 Remedy for the prejudice in the case of liability in tort.* Art. 1.381. – (1) Any prejudice entitles to remedy. Art. 1.385. – (1) The prejudice shall be remedied in full, unless otherwise provided by law. (3) The compensation shall cover the loss suffered by the prejudiced person, the benefit that he could have obtained under normal circumstances and of which he has been deprived, as well as the expenses that he covered in order to avoid or limit the prejudice. Art. 1.386. – (1) The remedy of the prejudice shall be in kind, by reinstatement, and if it is not possible or if the victim is not interested in a remedy in kind, by compensatory damages, established by mutual agreement of the parties or, in the absence of it, by judgment of the court.

[21] O. Ungureanu, C. Munteanu, *Propunere de lege ferenda privind reglementarea inconvenientelor anormale de vecinatate*, in "Revista Română de Drept Privat" Review, no. 4/2007, p. 187.

[22] Idem.

does not seem to place the environment and related problems within the dynamics of the present. Therefore, except for modest norms - art. 539 par. 2 and art. 603 - nothing entitles us to state that the new Civil Code "makes valuable use of provisions of European law instruments", a reason for which this paper aims at highlighting aspects which must be regulated or which may be better regulated.

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REFLECTIONS ON THE PROTECTION OF HUMAN LIFE ACCORDING TO THE NEW CRIMINAL CODE

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Abstract

The author presents at the outset certain general considerations regarding the special part of the new Criminal Code, subsequently focusing on the offences against life. He underlines the amendments brought by the new Criminal Code in the matter under review in terms of systematization and legal content of various criminalization norms, highlighting both positive aspects and the arguable ones in relation to which he puts forward several de lege ferenda proposals.

Furthermore, the author achieves a comparative research of the criminalization norms on the protection of human life that have a correspondent in the criminal law that is currently in force, a quick review of the ex novo criminalization norms; this analysis is accompanied by several critical observations and recommendations (de lege ferenda proposals) for improving the texts under review.

Keywords: *Criminal Code, criminal law, offence, penalty, person.*

Introduction

In terms of systematization, the drafters of the new Criminal Code, adopted by Law no. 286/2009, as further amended and supplemented, dropped the structure of previous criminal codes, regulating first the offences against the person and against the person's rights, followed by the offences against patrimony and only afterwards by the offences against the state's attributes or other fundamental social values.

The penalty treatment for the offences enshrined under the special part has been re-positioned within normal limits – according to their opinion –, so that it enables to turn into practice the contemporary vision regarding the role of the penalty in the social reinsertion of the persons who committed offences.

At the same time, the committee appointed for drafting the new criminal legislation has tried and managed mostly to streamline the criminalization norms (there is only one exception, namely the legal content of the offence of aggravated theft, which has 16 aggravating circumstantial elements) avoiding the overlaps between various criminalization texts or the overlaps with the texts in the general part.

GENERAL CONSIDERATIONS REGARDING THE SPECIAL PART OF THE NEW CRIMINAL CODE

1. In terms of **systematization**, the drafters[1] of the new Criminal Code, adopted by Law no. 286/2009[2], as further amended and supplemented, dropped the structure of previous criminal codes, regulating first the offences against the person and against the person's rights, followed by the offences against patrimony and only afterwards by the offences against the state's attributes or other fundamental social values. The same structure is found in most of the recent European codes (Austria, Spain, France, Portugal) and it reflects the current concept as to the place of the human being and his/her rights and freedoms in the hierarchy of the values that are safeguarded by means of criminal law as well.

Thus, the offences set out under the special part of the new Criminal Code have been clustered under 12 titles (offences against persons; offences against patrimony; offences regarding state authority and border; offences against the accomplishment of justice; offences of corruption and in relation to the official duties; offences of forgery; offences against public safety; offences that infringe upon the relations that concern social community life; election offences; offences against national security; offences against the fighting capacity of the armed forces; offences of genocide, offences against humanity and war offences), each of them having, as a rule, more subdivisions.

In the special part, 249 texts are enshrined, as compared to 209 texts that are included in the regulation that is currently in force. The increase in the number of the incrimination texts included in the code is justified either by the fact that certain texts from special criminal laws were taken over, with minor amendments (for instance, human trafficking, trafficking in minors, simple bankruptcy, fraudulent bankruptcy, cyber-crime, illegal state border-crossing etc.), or by the fact that new criminalization texts were introduced (for instance, homicide at the victim's request, injuring the fetus, violation of professional seat, violation of private life, breach of trust by defrauding creditors, insurance fraud offences, public bid rigging,etc.).

De lege ferenda, one should consider whether, given the importance of the protected social values and relations or the frequency of their perpetration, as the case may be, it would be appropriate to include under the same code certain criminalization texts such as terrorism or those regarding the illicit drug use and trafficking, or those against intellectual property or even but not least, offences against environment.

2. The penalty treatment for the offences enshrined under the special part has been re-positioned within normal limits – according to their opinion –; so that it enables to turn into practice the contemporary vision regarding the role of the penalty in the social reinsertion of the persons who committed offences[3].

Under this concept, the scope and the intensity of criminal repression has to remain under determined limits, first of all subject to the importance of the infringed social value in cases of those who breach criminal law for the first time, and increasing progressively for the

[1] The Committee for drafting the Criminal Code, set up at the level of the Ministry of Justice, according to the provisions Art. 26 of Law no. 24/2000 on the legal drafting, recast, as further amended and supplemented, is composed of: prosecutor Katalin-Barbara Kibedi, advisor to the Minister of Justice, president of the Committee; Professor Ph.D. Valerian Cioclei, Faculty of Law, University of Bucharest; Professor Ph.D. Ilie Pascu, Faculty of Law and Administrative Sciences, "Andrei Şaguna" University of Constanţa; Associate Professor Ph. D. Florin Streteanu, Faculty of Law, "Babeş-Bolyai" University of Cluj-Napoca; judge Gabriel Ionescu, High Court of Cassation and Justice; judge Ana Cristina Lăbuş, member of the Superior Council of Magistrature; judge Andreea Stoica, Appeal Court of Bucharest; judge Mihail Udroiu, Court of Bucharest, seconded to the Ministry of Justice; advisor Elena Cismaru, head of sector – Criminal Legislation and Legislation on Misdemeanors, Legislative Council and advocate Marian Nazat.

[2] Published in "Romania's Official Gazette", Part I, no. 510 of 24 July 2009.

[3] For this purpose, please see G.D. no. 1183/2008 for approving the preliminary works of the draft Criminal Code, published in "Romania's Official Gazette", Part I, no. 686 of 8 October 2008.

persons committing several offences before being finally convicted and even more for the persons who are in relapse.

This is the reason why the penalty limits provided for in the special part have to be in line with the provisions of the general part, which enable a proportional aggravation of the penalty treatment set out for concurrence of offences and relapse.

Last but not least, one should mention that the limits of the penalties provided for under the special part of the code are in line with the limits set out in most European criminal codes for similar offences, and also with the penalty limits provided for traditionally in our law, both by previous codes and by the criminal code that is currently in force, prior to the amendments made by Law no.140/1996.

In our view, this opinion might not confirm in all cases. Thus, for instance, one should consider whether such a dramatic reduction of the special limits of the penalties established for fraud would contribute to a reduction of relevant offences. In our opinion, the only answer is a negative one. The promptitude of criminal repression and a firmer response in relation to the causes determining the perpetration of the offences against the patrimony, and in particular the perpetration of fraud, could contribute to the decrease of the number of this category of inconvenient acts or, as the case may be, to the removal of the damages caused thereof.

3. At the same time, the committee appointed for drafting the new criminal legislation has tried and managed mostly **to streamline the criminalization norms** (there is only one exception, namely the legal content of the offence of aggravated theft, which has 16 aggravating circumstantial elements) avoiding the overlaps between various criminalization texts or the overlaps with the texts in the general part.

Thus, when a circumstance is set out under the general part as a general aggravating circumstance, it was not mentioned again in the content of the criminalization norms of the special part, and therefore the general text is to apply. This explains the fact that, considering that the aggravating element of the perpetration of an offence by three or more persons – Art. 77 (a) – was set out in the general part, one dropped the aggravating circumstantial element consisting in the commission of the offence by two or more persons, the differentiation between one and two offenders being made with enough accuracy when judiciary individualization is made. From this viewpoint, *de lege ferenda* one should consider the removal from the aggravating content of the offences set out under Art. 218 (rape), 219 (sexual assault) of the circumstance of perpetrating these criminal offences by two or more persons together. Similarly, one should remove the circumstance of perpetrating the offence by two or more members of the military together from the content of Art. 414 (desertion) and Art. 418 (constraint of the superior).

4. At the same time, in some cases, certain special aggravating circumstantial elements or special hypotheses for criminalizing certain anti-social acts were **repealed**, yet without decriminalizing them thereon. Thus, fraud is criminalized in Art. 244 of the new Criminal Code, coming under the category of those offences against patrimony that are characterized by breach of trust, laid down in Chapter III of Title II of the special part. The text does not include anymore par. (3), (4) and (5) of Art. 215 of the previous Criminal Code, apparently decriminalizing fraud in contracts, check fraud or fraud producing particularly serious consequences. Yet, repealing the criminalization norms lay down in Art. 215 par. (3), (4) and (5) of the Criminal Code of 1968 does not mean that these anti-social acts have been decriminalized[4]. Subject to the provisions of Art. 244, they will represent *factual* modalities for the perpetration of the offence of simple fraud or aggravated fraud, as the case may be.

[4] In a contrary sense, please see Gh. Ivan, *Drept penal. Partea specială*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2010, p. 314. With respect to fraud in contracts and cheque fraud, the author asserts that they

The same reasoning should apply in relation to the offences assimilated to fraud offence, laid down in the Criminal Code that is currently in force. For this purpose, mention must be made that the new criminal law does not include anymore certain offences assimilated to fraud offence, laid down in Art. 296 (deceitful measurement) or in Art. 297 (fraud regarding the quality of merchandises) of the Criminal Code of 1968, yet these offences, insofar as they would be committed[5], shall come under the provisions of Art. 244 of the new Criminal Code, as *factual* modalities of fraud.

Moreover, the repeal is not a notion that is a synonym of decriminalization, since the repealed offence may remain criminalized in a different text of law (in our case, in a different paragraph), having the same *nomen iuris* (as it is the case of the fraud offence) or coming under a different name (for instance, the offence of slanderous denunciation, set out in Art. 259 of the Criminal Code of 1968 shall be laid down in Art. 268 of the new Criminal Code that has as marginal name "misleading the judiciary bodies").

II. PARTICULAR CONSIDERATIONS REGARDING THE LEGAL CONTENT OF THE OFFENCES AGAINST LIFE

Title I of the special part enshrines the **offences against persons**, grouped under nine chapters (Chapter I – Offences against life; Chapter II – Offences against bodily integrity or health; Chapter III – Offences perpetrated against a family member; Chapter IV – Injuring the fetus; Chapter V – Offences regarding the obligation to assist the endangered persons; Chapter VI – Offences against the freedom of a person; Chapter VII – Trafficking and exploitation of vulnerable persons; Chapter VIII – Offences against sexual freedom and integrity; Chapter IX – Offences that infringe upon the domicile and private life.

Chapter 1 comprises **offences against life** (Art. 188 – Murder; Art. 189 – First degree murder; Art. 190 – Homicide at the victim's request; Art. 191 – Determining or facilitating suicide and Art. 192 – Negligent homicide), bringing more amendments in comparison with the texts of the criminal law that is currently in force.

1. Murder (Art. 188) is defined just as in Art. 174 of the Criminal Code currently in force, the same limits of penalty being retained; therefore no comments are to be made.

2. As for the new regulation, a single aggravated variant of murder was laid down – **first degree murder** (Art. 189) – that re-groups both aggravating circumstantial elements of particularly serious murder from the current regulation, and a part of the first degree murder. Yet, one has dropped a part of the aggravating circumstantial elements specific to first degree murder of the current regulation, either because they are found in the content of general aggravating elements (murder against a person who is unable to defend), or given that they are laid down in other texts (murder against the spouse or a close relative), or just because they are not justified (murder committed in public). As for this last case, one considered that a person who kills a victim in public (for instance, in case of a spontaneous conflict in a bar) is not necessarily more dangerous than a person who kills the victim at his/her home, and for this reason, it is preferable that the judge should assess the degree of danger on the occasion of judicial individualization[6].

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are not criminalized anymore, "although the factual reality did not require such a decriminalization (*abolitio criminis)*.

[5] See for this purpose: the Supreme Court of Justice, Criminal Section, decision no. 4012/2001, in the "Criminal Law Review" no. 2/2003, p. 158; High Court of Cassation and Justice, Criminal Section, decision no. 5524/2003, in the "Criminal Law Review" no. 1/2005, p. 165.

[6] For this purpose see the Justifying Note of the draft of the new Criminal Code, available at the address http://www.just.ro/MeniuStanga/Normativepapers/Proiectedeactenormativeaflate%C3%AEndezbatere/tabid/93/Default.aspx on the website of the Ministry of Justice at 24 January 2008. This option was received with reserves in relevant literature, yet without presenting the circumstantial elements that should have been retained under the new regulation. For this purpose, please see P. Dungan, in P. Dungan, T. Medeanu,

The drafters of the new criminal law have retained in the content of Art. 189 only those circumstances that justify – at least *in abstracto* – the possibility to apply the penalty of life imprisonment. Basically, of the 16 aggravating circumstantial elements, laid down in Art. 175 and in Art. 176 of the Criminal Code currently in force, under the new regulation, only half of them were retained. Moreover, some scholars expressed a sound criticism as to the legislative option to aggravate murder subject to the special statute of the murderer. Thus, one upholds that the introduction of this aggravated variant has not been justified by the detection of certain cases, and even less by the detection of an increase in the number of the cases of murder perpetrated by judges, prosecutors, members of the police, gendarmerie and military, and not anyhow, yet it has to be in relation to their public duties or offices[7].

At the same time, certain aggravating elements of the first degree murder were rephrased, to enable their scope to be more correctly delimited. For instance, a criminal antecedent to the first degree murder committed by a person who had perpetrated a murder will be not only the murder offence itself, but also an attempted murder, mentioning that for the attempted or accomplished act the offender must have been finally convicted. In this way, the existing controversy as to the offence set out in Art. 176 (c) of the Criminal Code currently in force – *murder committed by a person who had committed another murder* was brought to an end, the legislator of 2009 adhering to the opinion of the majority in this matter.

Thus, with respect to the regulation that is currently in force, in an opinion[8] one considered that previous murder must be an accomplished offence too, whilst in the contrary opinion[9] the afore-mentioned aggravating circumstantial element may exist even if the antecedence of the perpetrator consists in an attempted murder. The latter opinion was

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V. Paşca, *Manual de drept penal. Partea specială*, vol. I, "Universul Juridic" Publishing House, Bucharest, 2010, p. 25.

[7] Please see V. Cioclei, *Drept penal. Partea specială. Infracţiuni contra persoanei*, "Universul Juridic" Publishing House, Bucharest, 2007, pp. 63-64. For the same purpose: Gh. Diaconescu, in "*Tratat de drept penal. Partea specială*" by Gh. Diaconescu, C. Duvac, C.H. Beck Publishing House, Bucharest, 2009, p. 102.

[8] Please see V. Dongoroz, Gh. Dărângă, S. Kahane, D. Lucinescu, A. Nemeş, M. Popovici, P. Sârbulescu, V. Stoican, "*Noul Cod penal şi Codul penal anterior. Prezentare comparativă*", "Politică" Publishing House, Bucharest, 1968, p. 114. For the same purpose: R. M. Stănoiu, *Omorul deosebit de grav* in "Explicaţii teoretice ale Codului penal român. Partea specială" by V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. M. Stănoiu, V. Roşca, vol. III, "Academiei" Publishing House, Bucharest, 1971, p. 198; C. Bulai, *Curs de drept penal, Partea specială*, vol. I, Bucharest, 1975, p. 112; O. Loghin, *Cu privire la corecta încadrare a unor fapte în dispoziţiile art. 176 lit. c) C.pen.*, Annals of "Al. I. Cuza" University, Iaşi, 1983, p. 61; R. M. Stănoiu, *Omorul deosebit de grav* (Comentariu), in G. Antoniu, C. Bulai, R. M. Stănoiu, Av. Filipaş, C. Mitrache, Ş. Stănoiu, V. Papadopol, Cr. Filişanu, *Practica judiciară penală. Partea specială*, vol. III, "Academia Română" Publishing House, Bucharest, 1992, pp. 34-35. In the author's opinion, the text of Art. 144 of the Criminal Code that is currently in force has a different functionality than the one utilized by the supporters of the contrary opinion. From this opinion, one could not draw the idea that the attempt and the accomplished act would be equivalent notions, or, to put it in different terms that they are the same thing, so that the objective features separating them disappear. C. Niculeanu, *Alte argumente pentru caracterizarea şi sancţionarea infracţiunii de omor deosebit de grav comisă în modalitatea prevăzută în art. 176 lit. c C.pen.*, Decision no. 11/2009, p. 150.

[9] Please see J. Grigoraş, *Examen teoretic al practicii Tribunalului Suprem în materia unor împrejurări care determină formele calificate sau deosebit de grave ale infracţiunii de omor*, "Dreptul" Review, no. 8/1975, pp. 39-40. For the same purpose: O. Loghin, T. Toader, *Drept penal român. Partea specială*, "Şansa" S.R.L. Publishing House, Bucharest, 1994, p. 89; Gh. Diaconescu, *Infracţiunile în Codul penal român*, vol. I, Oscar Print Publishing House, Bucharest, 1997, p. 176; Ov. Predescu, A. Hărăstăşanu, *Drept penal. Partea specială*, 2nd (reviewed), "Omnia Uni S.A.S.T." Publishing House, Braşov, 2007, p. 65; V. Cioclei, *op. cit.*, p. 52; Gh. Mateuţ, *Omorul deosebit de grav* (Comentariu) in the "Codul penal comentat. Partea specială" by M. Basarab, V. Paşca, Gh. Mateuţ, T. Medeanu, C. Butiuc, M. Bădilă, R. Bodea, P. Dungan, V. Mirişan, R. Mancaş, Cr. Miheş, vol. II, "Hamangiu" Publishing House, 2008, p. 116; Gh. Diaconescu, *Omorul deosebit de grav* in the "Tratat de drept penal. Partea specială (Tratat)" by Gh. Diaconescu, C. Duvac, C.H. Beck Publishing House, Bucharest, 2009, p. 98; I. Pascu, M. Gorunescu, *Drept penal. Partea specială*, 2nd edition, Hamangiu Publishing House, Bucharest, 2009, p. 106; Gh. Ivan, *Drept penal. Partea specială*, C.H. Beck Publishing House, Bucharest, 2009, p. 46.

adhered to by the courts[10], the provisions of Art. 144 of the Criminal Code of 1969, regarding the meaning of the phrase "perpetration of an offence", being referred to.

The courts have had the tendency to give a signification to the afore-mentioned explanatory text not only in the cases where the legislator refers to the perpetration of an *undetermined offence*, but also to those cases in which one refers to a *determined offence*, provided it is sanctioned in the form of an attempted offence.

One should note that in the new regulation, the criminalized act is likely to concern the same passive subject. In concrete terms, he/she might have been the victim of an attempted murder first and afterwards, after a certain period of time, the defendant succeeds in murdering him/her, and in this case the aggravating circumstance set out in Art. 189 (e) of the new Criminal Code shall apply.

At the same time, the circumstance set out in Art. 175 (g) of the Criminal Code currently in force ("in order to elude or to elude another person's prosecution or arrest or penalty service") was rephrased by replacing the phrase "prosecution or arrest" by the phrase "criminal liability", a wider phrase which, in order to apply, one has recently mentioned[11] that criminal procedures do not necessarily have to be set in motion for that particular case.

It must be noted that, although the committee for drafting the Code had introduced in the scope of this aggravating circumstance the hypothesis in which the second murder was committed by a person who had perpetrated "an offence that contains a murder as a constitutive element or an aggravating circumstantial element" [Art. 186 (d) sentence II of the Draft[12]], this solution was not adhered to explicitly by the legislator of 2009. By way of interpretation, one can reach the conclusion that not only the murder offence itself may constitute an antecedent of the first degree murder committed by a person who had perpetrated a murder, but any offence whose content absorbs a murder (attack, act of terrorism etc.).

At the same time, the text of Art. 189 does not include anymore other three circumstantial elements proposed by the committee regarding the perpetration of a murder by a public servant who performs a duty that involves the exercise of state authority, in the exercise of duty or against a public servant who performs a duty that involves the exercise of state authority, in connection with the fulfillment of his/her office duties or by methods or means that are likely to endanger other persons' life. The legislator has deemed that in relation to these circumstances that may be met in the judiciary practice the assessment of the degree of danger must be made by the judge when individualizing the penalty that applies for each case.

On this occasion, we would draw the attention to the fact that the circumstance of committing the murder against two or more persons was retained and took over as such from Art. 176 (b) of the Criminal Code of 1969 in Art. 189 (f) of the new Criminal Code, without

[10] Please see T.S., c.7, Decision no. 17/1979, Romanian Law Review no. 9, 1979, p. 66. For the same purpose: T.S., Military Section, Decision no. 12/1979, in V. Papadopol, M. Popovici, *Repertoriu alfabetic de practică judiciară în materie penală pe anii 1976-1980*, Bucharest, "Ştiinţifică şi Enciclopedică" Publishing House, 1982, p. 288; Supreme Court, Criminal Section, Decision no. 668/1979, in V. Papadopol, M. Popovici, *op. cit.*, pp. 287-288; Supreme Court, Criminal Section, Decision no. 2201/1983, in *Culegere de decizii 1983*, p. 224; Appeal Court of Bucharest, First Criminal Section, Decision no. 552/1999, *Culegere de practică judiciară penală 1999*, Rosetti Publishing House, 2001, p. 122; Supreme Court of Justice, Criminal Section, Decision no. 2369/2000, B.J., 2000, p. 270. The Supreme Court ruled that previous perpetration by the defendant of the attempted murder, even if amnestied, requires the application of this aggravating circumstance.

[11] V. Dobrinoiu, N. Neagu, *Drept penal. Partea specială (Teorie şi practică judiciară)*, "Universul Juridic" Publishing House, Bucharest, 2011, p. 27.

[12] Available on the website of the Ministry of Justice, at: http://www.just.ro/MeniuStanga/Normativepapers/Proiectedeactenormativeaflate%C3%AEndezbatere/tabid/93/Default.aspx

any other mention, and this makes the controversy engendered in this matter as to the accomplishment of the material, circumstantial element of the offence, resist.

Thus, according to the first opinion[13] one upholds that the aggravating circumstance can be taken into account in the alternative of murdering two or more persons only "*by the same action*" (explosion, poisoning the food destined for several persons).

Contrary to the afore-mentioned opinion, the supreme court[14], on a constant basis, upheld that "it is not necessary for the offence to have been perpetrated by a single act, yet suffice is for it to have been committed *under the same circumstance* or even *successively*, *by different acts*". Most of our authors[15] adhered to this fair solution.

When only one of the victims is murdered, in order to unify the judiciary practice in this matter, by Decision no. V of 20 February 2006, the supreme court ruled that violent acts

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[13] Please see V. Dongoroz, Gh. Dărângă, S. Kahane, D. Lucinescu, A. Nemeş, M. Popovici, P. Sîrbulescu, V. Stoican, *op. cit.*, p. 114. For the same purpose: R. M. Stănoiu, *op. cit.*, vol. III, p. 198; O. Loghin, *Cu privire la omorul deosebit de grav prevăzut de art. 176 lit. b şi c C.pen.*, Scientifically Annals of "Alexandru Ioan Cuza" University of Iaşi, 1975, pp. 77-78; O. Loghin, *op. cit.*, 1983, p. 41; O. Loghin, în O. Loghin, A. Filipaş, *Drept penal român. Partea specială*, "Şansa S.R.L." Publishing House, Bucharest, 1992, p. 42. The author considers that by failing to include the phrase "at the same time or by different actions" existing in Art. 464 par. (2) of the Criminal Code of 1936, the legislator of 1969 intended that the aggravating circumstance under review apply only if it occurred by means of only one action. O. Loghin, T. Toader, *Drept penal român. Partea specială*, "Şansa S.R.L." Publishing House, Bucharest, 1994, p. 87; O. Loghin, T. Toader, *Drept penal român. Partea specială*, 4th edn., as revised and supplemented, "Şansa" S.R.L." Publishing House, Bucharest, 2001, p. 106; C. Bulai, in C. Bulai, Av. Filipaş, C. Mitrache, *Instituţii de drept penal, Curs selectiv pentru examenul de licenţă*, 3rd edition. as revised and supplemented, "Trei" Publishing House, Bucharest, 2006, p. 297; O. Predescu, A. Hărăstăşanu, *op. cit.*, p. 65.

[14] Please see the Supreme Court, Criminal Section, Decision no. 2539/1969, in *Culegere de decizii 1969*, p. 321; "Dreptul" Review no. 12/1969, p. 182. For the same purpose: Full Court of the Supreme Court, dec. i. no. 4/1970, *Culegere de decizii 1970*, p. 54; "Dreptul" Review no. 7/1970, p. 130; Supreme Court, Criminal Section, Decision no. 318/1989, "Dreptul" Review no. 1-2/1990, p. 141; Court of Bucharest, Criminal Decision no. 48/1990, C.P.J.P., 1990, p. 112; Supreme Court of Justice, Criminal Section, Decision no. 2939/1995, "Dreptul" Review no. 9/1996, p. 136; High Court of Cassation and Justice, Criminal Section, Decision no. 338/2007, B.J., 2007, p. 27; Supreme Court of Justice, Criminal Section, Decision no. 2939/1995, Law no. 9/1996, p. 136.

[15] Please see G. Antoniu, *op. cit.*, vol. I, 1975, p. 93. For the same purpose: O. A. Stoica, *Drept penal. Partea specială*, "Didactică şi Pedagogică" Publishing House, Bucharest, 1976, p. 75; E. Stancu, *Câteva consideraţii privind elementele circumstanţiale ale conţinutului infracţiunii de omor deosebit de grav*, A.U.B., 1979, p. 76; M. Basarab, in M. Basarab, L. Moldovan, V. Suian, *Drept penal. Partea specială*, vol. I, Cluj-Napoca, 1985, pp. 61-62; I. Dobrinescu, *Infracţiuni contra vieţii persoanei*, "Academia" Publishing House, Bucharest, 1987, pp. 85-87; I. Gheorghiu-Brădet, *Drept penal român. Partea specială*, vol. I, "Europa Nova" Publishing House, Bucharest, 1994, p. 83; Gh. Diaconescu, *Drept penal. Partea specială*, course held in the period 1992-1993, re-edited, "*Dimitrie Cantemir*" Christian University, Faculty of Legal and Administrative Sciences, Bucharest, 1995, pp. 121-122; V. Dobrinoiu et al., *Drept penal. Partea specială*, "Continent XXI" Publishing House, Bucharest, 1996, p. 103; Gh. Diaconescu, *Infracţiunile în Codul penal român*, vol. I, Oscar Print Publishing House, Bucharest, 1997, p. 174; I. Vasiu, *Drept penal român. Partea specială*, vol. I, "Albastră" Publishing House, Cluj Napoca, 1997, p. 118; I. Tănăsescu, G. Tănăsescu, C. Tănăsescu, *op. cit.*, 2000, p. 726; Gh. Diaconescu, *op. cit.*, vol. I, 2003, p. 193; V. Dobrinoiu, *Drept penal. Partea specială*, vol. I, university course, "Lumina Lex" Publishing House, Bucharest, 2004, p. 31; I. Pascu, in I. Pascu, V. Lazăr, *Drept penal. Partea specială*, Lumina Lex Publishing House, Bucharest, 2004, p. 94; H. Diaconescu, *Drept penal. Partea specială*, vol. I, 2nd, All Beck Publishing House, 2005, p. 78; Gh. Diaconescu, in Gh. Diaconescu, C. Duvac, *Drept penal. Partea specială. Noul Cod penal* vol. I, university course, "Fundaţia România de Mâine" Publishing House, Bucharest, 2006, p. 40; Gh. Diaconescu, in Gh. Diaconescu, C. Duvac, *Drept penal. Partea specială*, vol. I, 2nd as revised and supplemented, "Fundaţia România de Mâine" Publishing House, Bucharest, 2006, p. 97; Gh. Diaconescu, in Gh. Diaconescu, M. Ketty-Guiu, C. Duvac, *Drept penal. Partea specială*, "Fundaţia România de Mâine" Publishing House, Bucharest, 2007, p. 66; V. Cioclei, *Drept penal. Partea specială. Infracţiunile contra persoanei*, "Universul Juridic" Publishing House, Bucharest, 2007, p. 49; Av. Filipaş, *Drept penal român. Partea specială*, "Universul Juridic" Publishing House, Bucharest, 2008, pp. 179-180; C. Duvac, *Pluralitatea aparentă de infracţiuni*, "Universul Juridic" Publishing House, Bucharest, 2008, p. 215; Gh. Diaconescu, *Tratat*, p. 96; I. Pascu, M. Gorunescu, *op. cit.*, p. 105; Gh. Ivan, *op. cit.*, p. 43; O. Predescu, A. Hărăstăşanu, *Drept penal. Partea specială*, "Universul Juridic" Publishing House, Bucharest, 2012, p. 77.

committed with the intention to kill, perpetrated under the same circumstance against two persons, of whom one deceased, represents both the murder offence – simple murder, first degree murder or particularly serious murder – committed against one person, as well as the attempted murder, as the case may be, simple, first degree or particularly serious one, being in concurrence of offences[16]. In this case, the aggravating circumstance set out in Art. 176 par. (1) (b) of the Criminal Code of 1969 does not apply for the afore-mentioned offences.

3. *Euthanasia* was defined in the relevant literature as being "the homicide committed under the impulse of a feeling of pity in order to relieve intractable pain of a person who suffers from an incurable disease and whose death is, hence, inevitable"[17].

Accepting or not the murder in such a context has represented the topic of numerous and important sociological, medical, religious and, not last, legal researches[18].

However, beyond the consistency or ability to persuade of the pros or cons of euthanasia, criminal legislation of modern states, Romanian legislation included, do not remove criminal liability for the authors of the murder committed under such conditions.

The legislator of 2009 explicitly regulated such a hypothesis, by criminalizing as a sui-generis offence **the homicide at the victim's request** (Art. 190), as a mitigating variant of murder, thus putting again the regulation in line with the tradition that exists in our law (Art. 468 Criminal Code of 1936), but also in line with certain European codes [§ 216 of the German Criminal Code, § 77 of the Austrian Criminal Code, Art.143 par. (4) of the Spanish Criminal Code, Art. 134 of the Portuguese Criminal Code, Art. 114 of the Swiss Criminal Code, § 235 of the Norwegian Criminal Code].

In the opinion of the committee appointed for drafting the code, reintroducing this text was needed, above all, as a consequence of the new treatment of the mitigating circumstances enshrined by the general part. Indeed, if under the current regulation, the circumstance considered in Art.190 may be used as a judiciary mitigating circumstance, thus leading to the application of a penalty going under the special minimum duration, under the new regulation, even if a judiciary mitigating circumstance exists, the applied penalty shall not be kept under this minimum threshold in a mandatory way. This is the reason why, in order to enable the application of a penalty to correspond to the social danger degree of this offence, a distinct legal regulation was needed. One preferred the marginal name of *homicide at the victim's request* and not murder at the victim's request, in order to exclude this offence from the antecedents of the first degree murder laid down in Art.189 (e).

In the relevant literature, one has proposed to drop this text for the reason that such situations have not occurred in the judiciary practice and that it would be unwise to regulate an extremely exceptional situation just for meeting foreign models[19].

At the same time, one has upheld that after this regulation, the texts regarding the infanticide and negligent homicide should have followed, and afterwards those on determining or facilitating suicide. This last offence does not represent a homicide (neither intentional, nor reckless) since suicide does not regard another person (*relatio ad alterum*),

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[16] Please see High Court of Cassation and Justice, United Sections, Decision no. V of 20.02.2006, http://www.scj.ro. For the same purpose: Gh. Diaconescu, *Tratat*, p. 97.

[17] Please see G. Antoniu, C. Bulai, Gh. Chivulescu, *Dicţionar juridic penal*, "Ştiinţifică şi Enciclopedică" Publishing House, Bucharest, 1976, p. 107.

[18] Please see Al. Boroi, *Eutanasia – concept, controverse şi reglementare*, Criminal Law Review no. 2/1995, pp. 78-82; H. Diaconescu, *Eutanasia. Schimbări şi perspective*, Law Review no. 9/2006, pp. 179-196.

[19] G. Antoniu, *Observaţii cu privire la anteproiectul unui al doilea nou Cod penal (II)*, Criminal Law Review no. 1/2008, p. 9. The author recalls that in 1969 the regulation that existed in the Criminal Code of 1937 was dropped, with the justification that the afore-mentioned circumstance shall constitute a serious mitigating circumstance that needs to be taken into account by the judges. For this purpose, P. Dungan, *op. cit.*, vol. I, p. 46. The author is against the inclusion of euthanasia since it does not represent a justifying cause, even if all the conditions laid down in the criminalization text are met.

yet it is directed against the own person. Consequently, neither the determination, nor the facilitation of the suicide is murder offence *per se*, yet they are assimilated to murder[20].

4. As for the regulation of **determining or facilitating suicide** (Art. 191), several regulatory differentiations were introduced. Thus, quite fairly, a regulation was introduced to distinguish between the act that was followed only by an attempt of a suicide and which led to the victim's suicide. Equally, one provided for a different penalty treatment whether the acts were committed against a person having an unaltered judgment, against a person having a diminished judgment, or against a person who lacks the judgment, for this last case the decision of the concerned person being out of any question, and the offence being punished just the same as the murder offence. The regulation is similar to the one set out in Art. 580 of the Italian Criminal Code, Art. 135 of the Portuguese Criminal Code, § 235 of the Norwegian Criminal Code).

In another opinion[21], one upheld that rephrasing the text is not justified by a necessity arising from the judiciary doctrine or practice and that there is no reason for the different treatments mentioned in par. (2) and (4). Such cases are extremely rare in the judiciary practice, and therefore all the delimitations in the texts seem exaggerate and useless. In this context, one has argued that the suicide of a person, even if determined or facilitated by another person, cannot be equaled to murder. By acknowledging this difference, quite correctly the suicide of the victim as an immediate consequence alternative to death was removed from the code.

De lege ferenda, the age limit of the under-aged person laid down in this text, namely 13 years, should be correlated with the one set out in Art. 113 of the new Criminal Code (14 years), even if it refers to the limits of criminal liability. This legislative misfit has resulted from the lack of harmonization between the modification of the minimum age limit from which a person may have a criminal liability (initially, in the draft Code, it was set at 13 years) with various provisions from the special part regarding the under-aged person of 13 years (we would recall here also, as an example, the criminalization's included in Art. 220, 221 and 222 of the new Criminal Code).

5. Negligent homicide (Art. 192). Under the Criminal Code currently in force, one of the most heated debate arose in connection with the legal classification of negligent homicide, committed when driving a vehicle or tram on public roads by a person whose blood alcohol level exceeds 0,80g per liter or a concentration in breath exceeding 0,40g per liter, and two opposed opinions have arisen in our relevant literature and judiciary practice[22]:

In a first opinion, upheld by our supreme court by a guiding decision[23] adhered to by most of the courts[24] and by certain scholars[25], one mentioned that the acts of a vehicle driver

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[20] G. Antoniu, *op. cit.*, p. 9.

[21] G. Antoniu, *op. cit.*, pp. 9-10. For the same purpose, P. Dungan, *op. cit.*, vol. I, pp. 52-53. The author deems that, considering the lack of relevant cases, as well as the lack of interest in the theoretical treatment of this criminalization, the amendments of the criminalization norm are void of theoretical and practical interest and they are even unjustified if we consider that the penalty system laid down for this offence is too harsh in comparison with other offences for which penalties were significantly reduced with no reason in the new criminal law, although the number of cases and the degree of social danger required more severe penalties. However, he expresses his agreement in connection with the criminalization hypothesis from paragraph (3).

[22] For details, please see C. Duvac, *Uciderea din culpă, infracţiune complexă?* Criminal Law Review no. 1/2010, pp. 116-126.

[23] Please see Supreme Court, Guiding Decision no. 2/1975, *Culegere de decizii 1975*, p. 50; Romanian Law Review no. 10/1975, pp. 33-35. For the same purpose: High Court of Cassation and Justice, United Sections, Decision no. I of 15.01.2007, http://www.scj.ro.

[24] Please see Supreme Court, Criminal Section, Decision no. 4437/1970, C.D., 1970, p. 341; Romanian Law Review no. 6/1971, p. 159. For the same purpose: Supreme Court, Criminal Section, Decision no. 329/1971, C.D., 1971, p. 306; Romanian Law Review no. 12/1972, p. 164; Supreme Court, Criminal Section, Decision no. 212/1974, C.D., 1974, p. 382; Supreme Court, Criminal Section, Decision no. 3174/1974, C.D., 1974, p. 384;

whose alcohol level in blood exceeds the legal limit or of a drunk vehicle driver, of killing by negligence – under these circumstances – a person, represents *the complex offence of negligent homicide*, set out in Art. 178 par. (3) of the Criminal Code of 1969. Most scholars[26]

Court of Timiş County, Criminal Decision no. 615/1972, Romanian Law Review no. 1/1973, p. 169; Court of Bistriţa County, Criminal Decision no. 7/1973, Romanian Law Review no. 6/1973, p. 166; Court of Caraş-Severin County, Criminal Decision, no. 163/1981, R. III, p. 277; Appeal Court of Ploieşti, Criminal Decision no. 607/R/2001; Appeal Court of Constanţa, Criminal Decision no. 630/2001; Appeal Court of Timişoara, Criminal Decision no. 184/R/2002 quoted by M. Bratiş, *Formele agravate ale infracţiunii de ucidere din culpă*, Criminal Law Review no. 4/2006, p. 100; Supreme Court of Justice, Criminal Section, Decision no. 3169/2002, Legal Bulleting, 2002, p. 462; N.C. Magraon, C. Crişu, *Repertoriu, jurisprudenţă selectivă în domeniul dreptului penal şi procesual penal, perioada 1990-2005*, Juris Argessis Publishing House, Curtea de Argeş, 2006, p. 746.

[25] Please see V. Pătulea, *Structura obiectivă şi subiectivă a pluralităţii de infracţiuni*, Romanian Law Review no. 11/1979, p. 29. For the same purpose: M. Zolyneak, *Unele aspecte teoretice şi practice ale recidivei*, Romanian Law Review no. 6/1983, p. 10; M. Petrovici, G.-L. David, *Unele consideraţii în legătură cu structura infracţiunii prevăzută de articolul 178 alineatul 3 din Codul penal*, Romanian Law Review no. 6/1986, pp. 41-44; Gh. Mateuţ, *Unele consideraţii în legătură cu structura infracţiunii prevăzută de articolul 178 alineatul 3 din Codul penal*, Romanian Law Review no. 6/1986, pp. 45-46; A. Oprea, "*Unele consideraţii de lege ferenda" în legătură cu infracţiunea de ucidere din culpă*, Law Review no. 1/1992, p. 60-62; V. Siserman, *Uciderea din culpă. Conducător auto în stare de ebrietate*, Law Review no. 1/1996, pp. 123-125; E. M. Gacea, *Investigarea criminalistică a accidentului de trafic rutier*, M.I. Publishing House, Bucharest, 2003, p. 43; V. Cioclei, *op. cit.*, 2007, p. 86; A. Filipaş, *op. cit.*, 2008, p. 219.

[26] Please see G. Antoniu, *op. cit.*, vol. I, p. 111. For the same purpose: O. Loghin, *Drept penal. Partea generală*, vol. I, Iaşi, 1975, p. 160; C. Bulai, *Curs de drept penal. Partea specială*, Bucharest, 1975, p. 158; O. A. Stoica, *op. cit.*, p. 83; O. Loghin, in O. Loghin, Av. Filipaş, *Drept penal. Partea specială*, Didactic and Pedagogical Publishing, Bucharest, 1983, p. 46; C. Turianu, V. Stoica, *Unele consideraţii în legătură cu structura infracţiunii prevăzută de articolul 178 alineatul 3 din Codul penal*, Romanian Law Review no. 6/1986, p. 50; I. Dobrinescu, *Infracţiuni contra vieţii persoanei*, Academia Publishing House, Bucharest, 1987, pp. 148-149; C. Turianu, *Legislaţia rutieră comentată şi adnotată*, Scientific and Encyclopedic Publishing, Bucharest, 1988, p. 311; A. Filipaş, in G. Antoniu, C. Bulai, R. M. Stănoiu, Av. Filipaş, C. Mitrache, V. Papadopol, Cr. Filişanu, *Practica judiciară penală. Partea generală*, vol. I, (Art. 1-51 of the Criminal Code), Academia Publishing House, Bucharest, 1988, pp. 207-208; C. Turianu, *Discuţii despre natura juridică şi structura infracţiunii prevăzute de art. 178 alin. (3) C.pen.*, pp. 61-70; I. Gheorghiu-Brădet, *Drept penal român. Partea specială*, vol. I, Europa Nova Publishing House, Bucharest, 1994, p. 88; G. Paraschiv, *Uciderea din culpă – infracţiune complexă?*, R.D.P. no. 4/1999, pp. 59-60; O. Loghin, in O. Loghin, Av. Filipaş, *Drept penal. Partea specială*, revised edition, "Sansa" SRL Publishing House, Bucharest, 1992, p. 47; Gh. Diaconescu, *Infracţiunile în legi speciale şi legi extrapenale*, All Publishing House, Bucharest, 1996, p. 199. The famous specialist in criminal law proposed *de lege ferenda* to enshrine by law the existence of the plurality of offences in such cases, and this recommendation was adopted both by the criminal legislator of 2004, and by the legislator of 2009; Al. Boroi, *op. cit.*, 1996, p. 208; V. Dobrinoiu, in Gh. Nistoreanu, V. Dobrinoiu, Al. Boroi, I. Pascu, I. Molnar, V. Lazăr, *Drept penal. Partea specială*, Europa Nova Publishing House, Bucharest, 1997, p. 120; Gh. Diaconescu, *op. cit.*, vol. I, 1997, p. 190; C. Butiuc, *Infracţiunea complexă*, All Publishing House Beck, Bucharest, 1999, pp. 155-156; M.-K. Guiu, *Elementul subiectiv şi structura infracţiunii*, Juridică Publishing House, Bucharest, 2002, p. 110. The author considers that obstacle-offences may never be absorbed into the subsequent offence, the result-offence; Gh. Diaconescu, *op. cit.*, vol. I, 2003, pp. 214-215; G. Potrivitu, Al. Sibinovici, *Consideraţii privind infracţiunea prevăzută de art. 184 din Codul penal şi cea prevăzută de art. 79 din Ordonanţa de Urgenţă a Guvernului nr. 195/2002. Privire comparativă*, Decision no. 1/2004, p. 154; I. Tomescu, Cr. Aninaru, D. Stănescu, T. Dobre, P. Stancu, C. Dogaru, *Drept penal. Note de curs*, vol. I, Zappy's Printing House, Câmpina, 2006, p. 161; V. Lazăr, *Drept penal. Partea specială*, Universitary Publishing, Bucharest, 2006, p. 113; M. Bratiş, *op. cit.*, p. 100; S. Bogdan, *Drept penal. Partea specială*, vol. I, SC Sfera SRL Publishing House, 2nd, as revised and supplemented, Cluj-Napoca, 1997, p. 68; O. Predescu, A. Hărăstăşanu, *op. cit.*, p. 70; C. Duvac, *Problematica legăturii de cauzalitate şi a activităţii ilicite cu prilejul investigării accidentelor de circulaţie care au avut ca urmare moartea victimei*, in the collective work "Forensic investigations of road traffic accidents, the contribution of media in their prevention", issued under the aegis of the Association of Forensic Scientists of Romania, Bucharest, 2008, p. 366; C. Duvac, *Pluralitatea aparentă de infracţiuni*, Universul Juridic Publishing House, Bucharest, 2008, p. 192; Gh. Diaconescu, *Tratat*, p. 113; C. Duvac, *Uciderea din culpă, infracţiune complexă?*, cit. supra, p. 121; C. Duvac, *Uciderea din culpă, infracţiune complexă?*, Criminal Law Review no. 1, 2010, p. 116-126.

and certain courts to[27] consider, quite fairly, that the acts of driving a vehicle or a tram on public roads by a person whose alcohol level in blood exceeds the legal limit and of killing by negligence a person under such circumstances represents both negligent homicide offence set out in Art. 178 par. (3) sentence I of the Criminal Code currently in force, as well as the road traffic offence set out in Art. 79 par. (1) of the Government Emergency Ordinance no. 195/2002[28], recast, as further amended and supplemented, in *concurrence of offences*, as set out in Art. 33 of the Criminal Code that is currently in force.

The main argument in support of the opinion of the concurrence of offences resides in the fact that, as a principle, *the absorption of an intentional offence into an offence committed by negligence is not possible*.

On the other hand, *negligent homicide is an instantaneous offence that is accomplished in a single moment, in which a continuous offence may not be absorbed*, as it is the one set out in the Road Traffic Code.

Thinking the same way, one has noted that from the viewpoint of accomplishing the justice, the solution of the supreme court invites, in this case, to an *injustice* insofar as the legal treatment is concerned. Thus, the road traffic offence, by losing its individuality as an effect of absorption, may not constitute a term of relapse, whilst the absorbing offence, set out in Art. 178 of the Criminal Code of 1969, being perpetrated by negligence, is not likely, according to Art. 38 par. (1) (a^1) of the Criminal Code of 1969, to engender relapse. Therefore, if the same driver perpetrates only the drink driving offence – without causing, under such circumstances, the death of a person –, in this case, although the degree of danger is definitely lower than the degree of danger in the previous hypothesis, the legal provisions regarding the relapse and its consequences would apply to him/her[29].

The Romanian legislator of 2004[30], under the influence of the doctrine[31], had removed this controversy which had been resolved in the sense of the existence of the concurrence of offences[32].

The new Criminal Code of 2009[33] took over the solution chosen by the legislator of 2004 in this regard, rendering effective the position of the large part of the doctrine, to which

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[27] See Supreme Court, Criminal Section, Decision no. 1041/1964, J.N. no. 2/1965, p. 173. For the same purpose: Regional Court of Iaşi, Decision no. 222/1965, J.N. no. 8/1965, p.163; Appeal Court of Bucharest, 2nd Criminal Section, Decision no. 909/2002, quoted by Gh. Ivan, *Drept penal. Partea specială*, C.H. Beck Publishing House, Bucharest, 2009, p. 75.

[28] Published in "Romania's Official Gazette", Part I, no. 958 of 28 December 2002, approved with amendments and supplements by Law no. 49/2006, published in "Romania's Official Gazette", Part I, no. 246 of 20 March 2006, rectified in "Romania's Official Gazette", Part I, no. 519 of 15 June 2006 and re-published in "Romania's Official Gazette", Part I, no. 670 of 03 August 2006, the texts being re-numbered.

[29] Please see Gh. Diaconescu, *op. cit.*, vol. I, 1997, p. 190; Idem, *op. cit.*, vol. I, 2003, p. 215; Idem, *Tratat*, p. 113-114.

[30] The Criminal Code of 2004 was adopted by Law no. 301/2004, published in the Official Gazette no. 575 of 29 June 2004, but its entry into in force was postponed successively (Government Emergency Ordinance no. 58/2005, published in the Official Gazette no. 552 of 28 June 2005; Government Emergency Ordinance no. 50/2006, published in the Official Gazette no. 566 of 30 June 2006 and Government Emergency Ordinance no. 73/2008, published in the Official Gazette no. 440 of 12 June 2008), up to 1 September 2009. By Law no. 286/2009, published in the Official Gazette no. 510 of 24 July 2009, Law no. 301/2004 was repealed in an arguable way from the viewpoint of the legal drafting rules, before entering into force.

[31] Please see G. Antoniu, *Noul Cod penal. Codul penal anterior. Studiu comparativ*, All Beck Publishing House, Bucharest, 2004, p. 61.

[32] "When the act by which negligent homicide was committed represents, in itself, an offence, the rules on concurrence of offences shall apply" [Article 181 par. (6) of the Criminal Code of 2004].

[33] "When the breach of the legal provisions or of the foreseeing measures represents, by itself, an offence, the rules on concurrence of offences shall apply" [Article 192 par. (2) sentence II of the Criminal Code of 2009]. In order to remove any doubt that may exist as to this issue, the drafters of the new Criminal Code dropped from the aggravated content of the negligent homicide the hypothesis under review.

we have adhered without reserves, with beneficial consequences as regards the right criminal law enforcement. Therefore, after the entry into force of the new Criminal Code, Decision no. I of 15 January 2007, of the High Court of Cassation and Justice shall cease to apply (as it will have not an object any longer) and implicitly the mandatory effect for the courts that they currently enjoy, on the basis of Art. 414^5 last paragraph of the Criminal Procedure Code that is currently in force, shall also cease.

Conclusions

After the entry into force of the new Criminal Code, the negligent homicide offence, committed when driving a vehicle or a tram on public roads by a person whose alcohol level in blood exceeds 0,80g per liter or a concentration in breath exceeding 0,40g per liter, will be charged both with the offence set out in Art. 192 par. (2) of the new Criminal Code, and in Art. 87 par. (1) of the Government Emergency Ordinance no. 195/2002 regarding the driving on public roads, recast, as further amended and supplemented, applying the rules governing the real concurrence of offences. A similar regulation in cases of the negligent homicide is included in Art. 589 of the Italian Criminal Code, whilst most of European legislations do not enshrine aggravated forms of this offence (§ 222 of the German Criminal Code, Art. 142 of the Spanish Criminal Code, Art. 117 of the Swiss Criminal Code, § 239 of the Norwegian Criminal Code).

Moreover, in our opinion, quite inspired[34] the text of *negligent homicide* was streamlined, being dropped a part of the aggravated forms that may be substituted without problems by applying the sanctioning rules of the concurrence of offences, even if one upheld[35] that the removal of par. 4 of Art. 178 of the Criminal Code of 1969 has no justification.

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[34] For the same purpose, P. Dungan, *op. cit.*, vol. I, p. 58.

[35] G. Antoniu, *op. cit.*, p. 10. The author also holds that the increase in the penalty laid down in Article 192 par. (3) is excessive, and that such amendments were not suggested by doctrine or jurisprudence.

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ON THE WAYS OF COMBATING CHILD PORNOGRAPHY BY THE INTERNET

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Abstract

Considering the seriousness of the phenomenon on a large scale, the age and innocence of the minors involved in pornography, there arises a strong motivation for the implementation of several measures against these acts, mainly because the application of a simple standard is not a satisfactory solution as long as child pornography is concerned.

Key words: *child pornography, Internet, combating means, prevention, sanctions.*

Introduction

It is generally admitted that the Internet allows universal access to information and the transfer of information between networks. It is a widespread means of communication which allows easy networking among an unlimited number of persons at long and extremely long distances from one another, offering new learning tools for children and many benefits for adults. But the huge benefits brought to mankind were and still are overshadowed by antisocial acts committed by an increasing number of users of the network. One of the most troublesome abuses is the involvement of children in pornographic images, especially because the content, the volume and the access are shocking.

The notion of child pornography

In general, the phrase "child pornography" describes the sexual image of a minor. Starting from it, we can say that child pornography refers to images, movies, text materials which explicitly describe sexual activities involving a minor. These materials can be erotic (with naked children in different positions), sexual (with the genitals of the child or himself in different positions and moments involving sexuality), obscene (presenting sexual moments involving a child and an adult), or violent (a child who appears in position involving cruelty and/or rape)[1] and are included in the category of sexual abuses on a minor.

In accordance with Directive 2011/92/EU[2] "child pornography" means (i) any material that visually depicts a child engaged in real or simulated sexually explicit conduct; (ii) any depiction of the sexual organs of a child for primarily sexual purposes; (iii) any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child,

[1] http://www.9am.ro/top/International/220311/copilarie-pierduta-care-sunt-dramele-cu-care-se-confrunta-copiii-din-intreaga-lume/4/Pornografia-infantila.html.
[2] On combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

for primarily sexual purposes; or (iv) realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes;

Besides this term, the Directive defines "child prostitution" as the use of a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment in exchange for the child engaging in sexual activities, regardless of whether that payment, promise or consideration is made to the child or to a third party, as well as the 'pornographic performance' as a live exhibition aimed at an audience, including by means of information and communication technology.

Law no. 161/2003 defines the notion of pornographic material with minors as "any material which depicts a minor engaged in sexually explicit behavior or any adult who appears to be a minor engaged in sexually explicit behavior or images which, although not depicting a real person, simulate, in a credible way, a minor engaged in a sexually explicit behavior"[3].

Technical features exploited by the producers, distributors and users of child pornography

Child pornography did not appear in the century of technological progress, but this century of technological progress opened new perspectives for producers, distributors and users who fully exploit technical means such as digital cameras, digital recorders, digitizing software and graphics processing, as well as the Internet. These are used for the purpose of production, exposure, transmission, exchange of real materials, but also the exchange of fake materials by replacing adults with minors or by changing the behavior of children.

The digitizing of photos, negatives or slides by scanning and memorizing them, facilitates multiplication and subsequent transfer. Videos in a classic format, like videotapes or VSH, can be captured in a numeric format and transmitted to other destinations by using the network.

There is a multitude of computer programs which process digital images by modifying the color, the contrast and the luminosity, by cutting them, by increasing and minimizing particular areas, the dimension or the clarity, by composing and overlapping two or more images etc. All these operations can have the effect of creating pseudo-pedophile images, for instance extracting the image of a child from the real context and placing it in a pornographic scene or transforming a facial adult feature into a child's feature. The effect of presenting these materials is the desensitization and manipulation of the public which, by a distorted presentation of reality, considers the pornographic activity including children as something normal. The virtual synthesis images can have the same effect, these images being created without using real children, but by means of three-dimensional animated sequences.

The internet, a worldwide environment, which permits to keep one's identity anonymous, volatile, easy to use, cheap and attractive, has offered new horizons to the manufacturers, distributors and pornographic material beneficiaries, thus becoming a favorable environment for the development of this industry on a large scale. Using the Internet space as an open space permits the transfer of digital images and movies to a number of users that cannot be determined, as well as their reproduction in any format without any quality loss, thus affecting the victim long after the original offence. Since the Internet offers the possibility for users to keep their identity anonymous and to hide their real identity and personal features (for instance, the age), attracting children for personal purposes makes of this space a threat with specific features. Last but not least, we can remember the live transmission and visualization of images and movies.

[3] Art. 35, letter i of Law no. 161/2003 on certain measures for ensuring transparency in the exercise of public dignities and public offices, and for the prevention and sanctioning of corruption.

Means of fighting

Using minors as the subject of pornography has a major social impact by causing psychological and emotional damage, by changing the sexual attitudes and by psychological manipulation of a minor.

Moreover, producing pornographic materials involving minors brings a very quick financial gain, and hence, an increasing interest in this type of activities. The number of child pornography websites is increasing and it is estimated that everyday there are about 200 new images containing child pornography, images of younger and younger children, in more and more violent images.[4]

On the other hand, a study of the Institute for Research and Crime Prevention shows that 70% of middle school students have come across indecent or pornographic messages by chance, on the internet, and 25% of them have offered personal information about them and their families including photos[5].

Considering the amplitude of the phenomenon, its seriousness, the age and the innocence of the children involved, we can say that at both international and national levels, there is a strong motivation to implement some measures against sexual manifestations involving minors, mainly because the application of a simple standard which should regulate obscenity is not a satisfactory solution as long as child pornography is concerned.

The fight against child pornography is a general fight at several levels, from prevention to action and punishment, in which governments, institutions, services providers and ordinary users[6] are involved with distinct roles, and the aimed at measures can be of an educational, technical, legislative, judicial nature and so on.

In this sense, we can talk about implementing educational and informational measures for minors and their supporters, reducing the circulation of materials with children subjected to sexual abuses, eliminating the content and punishing the people who distribute or download images with children subjected to sexual abuses.

Educational resources

Regarding the education of minors at a national level, a number of actions have been taken for the purpose of raising the awareness of minors, parents, teachers about the risk involved in the use of Internet.

Therefore, beginning with 2011, the Romanian Police carried out a campaign to prevent the victimization of children on the Internet entitled "Who do you accept?"[7] with the purpose of increasing the level of information of some target groups (children, parents, teachers) about the risks which can appear on the internet and the ways in which one can prevent them[8]. According to the surveys, it has been found that the action has an impact on students' behavior on the Internet, as well as a decrease in the number of those who send information and personal images to unknown persons on the Internet.[9]

The Romanian Centre for Missing and Sexually Exploited Children[10], in partnership

[4]http://www.mediafax.ro/social/intre-10-si-20-dintre-minorii-din-europa-posibil-abuzati-sexual-in-copilarie-ce-sanctiuni-vrea-parlamentul-european-pentru-pornografia-infantila-8909051.

[5]http://www.mediafax.ro/social/tu-cui-dai-accept-campanie-impotriva-pornografiei-infantile-de-pe-internet-video-7965056.

[6] Cynthia Guttman, *Internet et la pédophilie*, in Le Courier UNESCO, September 1999, p.43, http://unesdoc.unesco.org/images/0011/001170/117043f.pdf.

[7] A component of the Project "The development of the capacity to prevent and investigate the cases of child pornography on the Internet", financed by the European Economic Mechanism. It is the result of a partnership between the Romanian Police and the Norwegian Police.

[8] http://b.politiaromana.ro/index.php?option=com_content&view=article&id=1932.

[9]http://www.mediafax.ro/social/igpr-pornografia-infantila-pe-internet-nu-este-un-fenomen-dar-exista-o-vulnerabilitate-9576959.

[10] http://www.copiidisparuti.ro/ro/.

with the Romanian Police, ANCOM[11], and the support of ANISP[12], launched[13] at http://www.safernet.ro/ the Focus Internet Hotline site, as a civil point of contact that receives and handles complaints on the Internet about illegal and harmful acts affecting children. The complaints may concern: children sending or posting nude photos of them or their colleagues on Internet sites, containing images with naked children, sites containing pornographic images with adults and being allowed to children, conversation of the chat type between a child and an adult, in which the adult asks the child to send or post nude photos or to meet him and have sexual intercourse.

Technical measures

With regard to reducing the circulation of pornographic materials involving minors, one can establish certain mechanisms for blocking the access to websites identified as containing or disseminating child pornography. The removal and blocking of content with child abuse, may establish and strengthen cooperation between public authorities, in particular to ensure national lists as complete as possible, of web pages containing child pornography. Safer Internet Program has established a network of hotlines whose purpose is to collect information, to ensure proper coverage and to exchange the reports about major types of illegal online content[14].

The technical limitation of the phenomenon is much hampered by the very nature of the Internet and technological progress, an important issue being the identification of images containing sexual abuses of children. Those are transmitted in pedophilia networks, the same image can be found in computers around the world. An important tool was initiated in 2009 by Microsoft and Dartmouth College[15]. The application PhotoDNA is designed to find and remove hidden copies and to eliminate from virtual space the images of sexually exploited children[16], based on "*robust hashing*" technology, which calculates the particular feature[17] of a digital given image and after that checks if those particular features match to other existing images in virtual space.[18]

Legislative measures

From a legal perspective there is a deep concern in Europe for criminalizing the most serious forms of sexual abuse and of sexual exploitation of children, for extending national jurisdiction and ensuring a minimal level of assistance to victims.

An innovating legislative tool and a step ahead for protecting children[19] is the new

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[11] The National Authority for Administration and Regulation in Communications – the institution protecting the interests of communication users in Romania, by promoting competition on the communication market, by administering limited resources, by encouraging effective investment in the infrastructure and innovation, http://www.ancom.org.ro.

[12] The Romanian National Association of Internet Service Providers – a professional, apolitical, non-governmental organization, of a non-profit nature, consisting of natural and legal persons, in accordance with the provisions of Government Ordinance no. 26/2000 and 37/2003 on associations and foundations, http://www.anisp.ro/.

[13] Within the project "Sigur.info".

[14] See in this sense the recommendations of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011.

[15] http://www.microsoft.com/en-us/news/presskits/photodna/.

[16] The application was implemented in the services on Bing, SkyDrive and Hotmail, and since 2011 on Facebook too.

[17] Hash value or digital print of the photo.

[18] New Technology Fights Child Porn by Tracking Its "PhotoDNA", http://www.microsoft.com/en-us/news/features/2009/dec09/12-15PhotoDNA.aspx.

[19] Roberta Angelilli (EPP, IT), an EP rapporteur cited by Mediafax in "Between 10 and 20% of the minors in Europe, possibly sexually abused in childhood. The sanctions the European Parliament wants for child pornography" http://www.mediafax.ro/social/intre-10-si-20-dintre-minorii-din-europa-posibil-abuzati-sexual-in-copilarie-ce-sanctiuni-vrea-parlamentul-european-pentru-pornografia-infantila-8909051.

Directive[20] for combating the sexual abuse and sexual exploitation of children and child pornography which establishes minimal rules concerning the definition of criminal offences and the sanctions regarding child sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes. The Directive also introduces provisions to ensure a better prevention of those offences and a better protection for their victims on combating the sexual abuse.

The Directive established by Article 25 the action against those Internet pages containing or disseminating child pornography, as follows:
(1) Member States shall take the necessary measures to ensure the prompt removal of web pages containing or disseminating child pornography hosted in their territory and to Endeavour to obtain the removal of such pages hosted outside of their territory. (2) Member States may take measures to block access to web pages containing or disseminating child pornography towards the Internet users within their territory. These measures must be set by transparent procedures and provide adequate safeguards, in particular to ensure that the restriction is limited to what is necessary and proportionate, and that users are informed of the reason for the restriction. Those safeguards shall also include the possibility of judicial redress.

The Directive also proposes to criminalize the offences[21] by the following facts (3) Knowingly obtaining access, by means of information and communication technology, to child pornography shall be punishable by a maximum term of imprisonment of at least 1 year. (4) Distribution, dissemination or transmission of child pornography shall be punishable by a maximum term of imprisonment of at least 2 years. (5) Offering, supplying or making available child pornography shall be punishable by a maximum term of imprisonment of at least 2 years. (6) Production of child pornography shall be punishable by a maximum term of imprisonment of at least 3 years.

These rules are in addition to the Convention on Cybercrime[22], which provides in art. 9 crimes relating to child pornography.

At a national level, the prevention and combating of child pornography are regulated by art. 18 of Law no. 678/2011 on the prevention and combating of trafficking in persons, art. 7 and 11 of Law no. 196/2003 on the prevention and combating of pornography, art 198 of the New Criminal Code. Moreover, art. 51 of Law no. 161/2003[23] expressly incriminates as offence: producing in order to disseminate, offering or making available, disseminating or transmitting, procuring, for oneself or for another, pornographic materials with minors by information systems, or possessing, without any right, pornographic materials with minors in an information system or in a database. The penalty in this case is 3 up to 12 years imprisonment, as well as the loss of certain civil rights, and the attempt is also punishable.

Case Law

At a national level, there have been disposed a series of convictions for people who were guilty of the offence of pornography by information systems according to art. Article 51. 1 of Law no. 161/2003. For instance, one can include: criminal decision no. 31/10.02.2010 of Craiova Court of Appeal[24], criminal sentence no. 11/05.03.2009 of Rm. Vâlcea Court[25], criminal sentence no. 873/19.05.2009 of Pitesti Court[26], criminal decision no. 235/6.10.2008

[20] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011.
[21] Art. 5, Offences concerning child pornography.
[22] Council of Europe Convention concluded in Budapest on November 23, 2001.
[23] On certain measures for ensuring transparency in the exercise of public dignities and public offices, and for the prevention and sanctioning of corruption.
[24]http://www.legi-internet.ro/jurisprudenta-it-romania/decizii-it/criminalitate-informatica/pornografie-infantila-10-februarie-2010-curtea-de-apel-craiova.html.
[25]http://jurisprudentacedo.com/Pornografie-infantila.-Emenente-constitutive.-Infractiune-continuata.html.
[26] http://jurisprudentacedo.com/Infractiuni-la-alte-legi-speciale.html.

of Prahova Tribunal etc.

Conclusions

In conclusion, we can say that the fight against child pornography on the Internet has been launched by initiating measures at several levels (educational, technical, legislative, judicial) in which governments, institutions, services providers and ordinary users are involved, with distinct roles.

Although some effects can be observed at a national and especially international level, the fight is far from being over, since the producers, distributors and users of child pornography make use of more and more skilful methods for avoiding such measures.

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THE ENFORCEMENT OF FOREIGN DECISIONS ON INTERNATIONAL BANKRUPTCY

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Abstract

In relations between European states, the conditions to obtain the exequautur are provided by the EU Regulation no.1346/2000. The enforcement of bankruptcy judgments will be made in accordance with Regulation no.44/2001. When executing a decision on international bankruptcy involving a Member State and non-Member States, different rules apply, drafted by UNCITRAL Model Law provisions in 1997. The execution is granted subject to the rules of public policy in private international law.

Keywords: *exequatur, recognition, declaration of bankruptcy decision, enforcement proceedings, public order.*

Introduction

The most important goal for each creditor in a collective procedure is to obtain effective and full satisfaction of his claim against the debtor. In most cases, the assets available in a particular jurisdiction will not be sufficient for complete coverage of claims. Since participation in various bankruptcy proceedings undertaken against the debtor in jurisdictions of several states involves significant costs, most creditors will require enforcement of decisions rendered in the national proceedings.

Judicial character of *exequatur*

Since enforcement of a judgment involves the exercise of coercive force, state sovereignty cannot be removed. Enforcement of decision opening insolvency proceedings given by a foreign court, or enforcement of writs of execution for this procedure, requires that the requested court to rule on an application for a declaration of enforcement orders or for establishing conservatory measures.

Recognition of effects of the foreign insolvency procedure and obtaining *exequatur* have a judicial nature. Court addressed may refuse recognition if the foreign judgment violates public order in private international law of the requested state, or if the foreign judgment is the result of a fraud committed in proceedings abroad. Thus, a ground for refusal of recognition or enforcement consists in infringement of legal provisions on exclusive jurisdiction of the forum court.

It should be noted that certain rights established by a foreign judgment can be gain independently of *exequatur* or recognition procedure[1].

Specifically, effectiveness of certain rights is possible in terms of declaratory bankruptcy decisions[2].The achievement of the effects of declaratory bankruptcy is possible in

[1] See I. Macovei, *Drept international privat*, CH Beck Publishing House, Bucharest, 2011, p. 277.
[2] See D. Stăncescu, *Despre efectele internationale ale hotărârilor judecătoresti*, in The New Justice Review, no. 6/1960, p. 1102.

so far as it does not involve tracking the goods or acts of coercion on people. Even in these cases, the validity of the foreign judgment declaration of bankruptcy can be verified as a preliminary issue or as a principal issue.

Regarding the effects of bankruptcy judgment which are enforceable, the enforcement of foreign decisions lies with national authorities, by usual methods of imposing coercive force of the state, adapted to the procedure. A formality required for enforcement is getting an authorization, called *exequatur*.

Requirements to obtain *exequatur*

The requirements obtaining *exequautur* are provided for in EU Regulation no.1346/2000 on insolvency proceedings[3], which states expressly and exhaustively the cases in it can be refused. Since Regulation is directly applicable in Europe, its provisions are respected in all European countries, including Romania, without requiring adoption of other provisions in this respect[4]. Approval of the enforcement of the foreign judgment involves fulfillment of certain requirements, similar to those for granting recognition.

Any decision of a court of a Member State taken in a main or secondary insolvency proceedings, should be recognized without any further ado fulfillment (Art. 16), such as *exequatur* or publication in Member States, as soon as it takes effect in the opening state, and will have the same effects in all other Member States as in the country where the proceeding was initiated (Art. 17). It should be noted that, in accordance with the national legislation of the Member states, recognition is restricted by various rules of internal public order, as apparent from the content of Art. 6. If it is necessary a review of the foreign judgment, to see whether if it benefits of automatic recognition provided for in *Regulation*, it will be done as a preliminary issue.

Decisions on management and closure of insolvency proceedings must also be recognized in other Member States, under Art. 25 of the *Regulation.* Are thus recognized, without any further formality, any other decisions concerning the course and closure of insolvency proceedings, or the composition or reorganization plan confirmed by the court, judgments arising directly from the procedure and are closely related to it, even if they were adopted by a another instance, and also declaration of temporal enforcement measures, adopted after the request for the opening of insolvency proceedings, which have been given by the court whose judgment opening was recognized. Formulation of text in Art. 25 of the *Regulation* has received broad interpretation, about the category of decisions included in this category.[5]

In matters of recognition and enforcement of judgments, *Regulation* does not deal with insolvency procedure as a whole, but as a sum of successive decisions, each one with distinct effects[6].Therefore, Art. 16 concerns recognition of decision to initiate the procedure and its main effects (by Art.: 17, 18, 20, 24), while recognition and enforcement of consequential decisions is governed by Art. 25. This means that it is possible that a subsequent decision, taken during the procedure, will not be recognized, if it does not meet the requirements of *Regulation,* although a decision to initiate the procedure was recognized before.[7]

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[3] European Council Regulation no. 1346/2000 on insolvency proceedings came into force on May 31, 2002.

[4] Until the accession of Romania to the European Union, the provisions of the Regulation no.1346/2000 were embedded in content of Title II of Law no. 637/2002 on cross-border insolvency. Later on, by O.U.G. no.119/2006, the provisions of Title II were repealed, since European Regulation has become directly applicable.

[5] See Gabriel Moss, Ian F. Fletcher, Stuart Isaacs, *The EC Regulation on Insolvency Proceedings – A Commentary and Annotated Guide*, Oxford University Press Publishing House, London, 2002, p. 194.

[6] See Diana Ungureanu, *Falimentul international*, Lumina Lex Publishing House, Bucharest, 2004, p. 96.

[7] See Miguel Virgos, *The 1995 European Community Convention on Insolvency Proceedings: an Insider`s View*, in Forum International Review, no.25/1998, p. 26.

The *exequatur* procedure

The procedure of obtaining the *exequautur* is not covered by Regulation UE no.1346/2000, because in matter of enforcement of the decisions rendered in foreign insolvency proceedings, the text of Art. 31 -51 refers to the provisions of Brussels Convention of 27.09.1968 on the recognition and enforcement of judgments Thus, according to Art. 25 of the *Regulation*, decisions concerning the course and closure of insolvency proceedings, handed down by a court whose opening decision was recognized under Art. 16, the composition or reorganization plan confirmed by the court, judgments deriving directly from the insolvency proceedings and which are closely related to it, as the declaration of temporary enforcement measures, taken after the request for opening the insolvency proceedings, are to be executed in accordance with Art. 31-51 of the Brussels Convention of 1968, except of Art. 34 paragraph 2).

In applying these provisions[8], it must be noted that, from 1 March 2002, Brussels Convention was replaced by EU Regulation no. 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters. Accordingly, enforcement of judgments provided by art. 25 of Regulation no. 1346/2000 shall be in accordance with Art. 38-56 of Regulation no. 44/2001.

According to Art. 38 of Regulation no. 44/2001, decision given in a Contracting State, which is enforceable in that State, shall be enforced after having been declared enforceable at the request of any party.[9] Compared to common law, Brussels Convention provides a simpler procedure for enforcement, procedure that Regulation no. 44/2001 simplifies it even more.

In order to obtain *exequatur*, the party seeking issuance of a statement which reveals the enforceability force of a decision, must submit a copy of it, to be certified, also a certificate issued by the court which delivered the decision, and a certified translation of the supporting documents, if it is requested by the court or the authority jurisdiction, according to Art. 53 of Regulation no. 44/2001. If these conditions are cumulatively met, the decision shall be declared enforceable in accordance with Art. 41 of Regulation no. 44/2001, without the need to examine the conditions of Art. 34, 35 of Regulation no. 1346/2000, relating to cases where recognition may be refused. Accordingly, automatic recognition decision is accompanied by the award of direct execution effect. Thus, the procedure is initially carried in a non-contradictory manner and becomes contradictory only in the event of complaints. Researching grounds for refusal shall be made only if the decision on the application for a declaration of enforceability is attacked with an appeal by the claimant. This examination may not imply revising the substance of the decision, being restricted to a formal verification, in order to ascertain whether the decision falls within the scope of the Insolvency Regulation and whether it is enforceable.[10]

The aforementioned provisions involve the risk that, in the absence of a minimum preliminary control of the bankruptcy decision which is subject to execution, local creditors'

[8] According to art. 1 par. 2 letter. b) of the Brussels Convention of 1968 on the recognition and enforcement of judgments, "bankruptcies, compositions and analogous proceedings" does not fall within its scope. The reference in art. 25 of Regulation no. 1346/2000 on insolvency proceedings, to the provisions of art. 31-51 of the *Convention* makes that its provisions on matters of enforcement of judgments to apply also on judgments of bankruptcy.

[9] See Carmen Tamara Ungureanu, *Dreptul european privat al afacerilor*, "Junimea" Publishing House, Iasi, 2002, p. 17.

[10] See Patrizia De Cesari, *L'esecuzione delle decisioni civili straniere nello spazio giudiziario europeo*, in Diritto del Commercio Internazionale, no. 2/ 2002, pp. 285, 303.

interests are not adequately protected[11]. Moreover, it was noted that Regulation no. 44/2001 continues to distinguish between getting *exequatur* and enforcement of the decision.[12]

Refusal of enforcement

In accordance with Art. 25. 3 of Regulation no. 1346/2000, courts are not bound to recognize or enforce judgments which would have the effect of limiting personal freedom or postal secrecy. At the same time, according to Art. 26 of *Regulation*, recognition of an insolvency proceeding opened in another Member State, or enforcement of a judgment taken under such procedure, or directly related to it, will be refused, if recognition or enforcement would be manifestly contrary to the public order in private international law, in particular to the general principles and fundamental rights and freedoms, enshrined in the Constitution. International public order is based on consideration of a determination, evolutionary by its very nature, of the essential rules in a society. These rules, often unwritten, are determined directly by judge, being subject to more effective sanctions for the litigants, than the violation of written rules, as it is the case of most constitutional rules.[13]

The incidence of the public order on insolvency proceedings presents certain features related to the specificity of the matter. Such procedures often involve limiting creditors' rights in another state, without their consent, and also, the participation in these procedures is regulated differently in national systems of Member States[14]. In fact, relative to international bankruptcy, the problem of public order is more related to the content of the right, than to the legitimacy of a legal order to rule, on the principle of universality and by applying its own rules, the situation of assets located abroad. In this regard, *Regulation* penalizes incompatible judicial decisions amongst two states which are related by accepting the postulate of universality of the bankruptcy.

To overcome the intervention of such inconveniences, *Regulation* provides that rights of the third parties are protected abroad, by specific provisions on informing creditors and their ability to participate in the proceeding (Art. 40) and by the recognition of the right to institute secondary proceedings. In this way, unlike the regulation established by the Brussels Convention, the situations in which recognition may be refused are restricted to the grounds on manifestly contrariety to public order in private international law.

Another reason for refusing recognition and enforcement of judgments may be the inconsistency of the provisions of *Regulation* with those of International Conventions. Thus, Art. 44 paragraph 3) states that the provisions of *Regulation* are not applicable in any Member State, to the extent that there is a discrepancy between this and the obligations on bankruptcy, stemming from an international agreement, concluded by a Member State with a third country, prior to its coming into force.

Enforcement of decisions outside the European area

Since the application of the EC Regulation no. 1346/2000 is limited to U.E. territory, where enforcement an international bankruptcy decision involving a Member State and a non-Member State, different rules apply. Most relationships are governed by rules developed by the provisions of the UNCITRAL Model Law 1997[15].

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[11] See Jean –Luc Vallens,, *L'exequatur des jugements étrangers de faillite après le règlement communautaire sur les procedures d'insolvabilité*, in Petites Affiches Review, June 2002, p. 15.

[12] See Dominique Foussard, *Entre l'exequatur et l'exécution forcée,* in Travaux du Comite français de droit international prive, 1996-1997, p. 175.

[13] See Giulio Cesare Giorgini, *Methodes conflictuelles et regles materielles dans l`aplications des "nouveaux instruments" de reglement de la faillite internationale*, Dalloz Publishing House, Paris, 2006, p. 299.

[14] See Diana Ungureanu, *Recunoasterea procedurilor străine de insolventă în România*, în *Dreptul Privat al Afacerilor*, in Private Business Law Review, no.1/2004, p. 97.

[15] UNCITRAL Model Law on Cross-border Insolvency 1997 is an instrument recommended for states to be incorporated into their national legal system as its own law.

Given that Romania has adopted the UNCITRAL Model Law by Law no. 637/2002[16], enforcement of judgments on bankruptcy involving non-European countries will be achieved by the principles set out in its content. Specifically, Title I of the Act no. 637/2002, entitled "Relations with foreign countries in general" takes and adapts *Model Law*'s provisions, those referring to recognition and enforcement of bankruptcy decisions being encountered in the contents of Chapter III (Art. 16 - 25).

To attain recognition, *exequatur*, or temporary measures under a foreign judgment of insolvency, it is necessary to appoint a representative of the procedure. A foreign representative may apply to the court recognition of the foreign proceedings in which he was appointed. The application for recognition of the decision to initiate the foreign procedure shall be made on principal issue. The competent court to consider such an application is designated within each state`s provisions. In Romania, the claims are within the exclusive jurisdiction of the tribunal, according to article 5 of Law no. 637/2002. Where the debtor has an establishment in Romania, the competence belongs to the tribunal from this location. Otherwise, jurisdiction lies with the tribunal where debtor`s immovable property is located, or, as appropriate, there where is situated the company headquarters, in which the debtor holds securities.

Model Law defines the main procedural requirements for submitting, by a foreign representative, of an application for recognition of the procedure. Through the articles 15 and 16, *Model Law* provides a fast and simple structure for use by the foreign representative to obtain recognition[17]. It should be noted that the issue of recognition abroad of national proceedings, opened in a State which has adopted *Model Law*, is not covered by regulatory framework of the *Model Law*, but instead, it is subject to international treaties concluded by states, or it is solved according to the principle of reciprocity[18]. Of a particular practical utility has proven to be implementation, in the states law, of the provisions recommended in Art. 17 of the *Model Law*, which establish a presumption of legality of the foreign judgment subjected to recognition. Subject to the exceptions of public order, indicated by Art. 6, recognition conditions do not include reasons which would give the court the opportunity that, analyzing the demand, to evaluate the reasons of foreign court opening decision, or of the decision by which the foreign representative was appointed. Although the law expressly mentions only the main demand way to attain recognition, it does not prohibit either the possibility of formulation such a request as an incidental issue. A decision recognizing the foreign procedure enjoys relative authority of *res judicata*[19]. The provisions of Art. 15, 16, 17 and 18 shall not preclude amendment or retraction of the recognition decision, if it is proved, subsequent to its adoption that the reasons on which it was based were absent in whole or in part, or have ceased to exist. Remaining differences between national law systems do not create obstacles in practice, in relation to the cross border cooperation, nor a competitive advantage or disadvantage between European states. Anyway, at present, does not seem to exist, within their political, the will to adopt a harmonized system for the enforcement of bankruptcy decisions from third countries.[20]

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[16] Law no.637/2002 on regulation ratios in Private International Law in matters of insolvency was published in Official Monitor of Romania, Part I, no. 931 from 19 December 2002.

[17] See Andre J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, in Tulane Journal of International and Comparative Law, vol. 6, no. 1/1998, p. 350.

[18] See Diana Ungureanu, p. 131.

[19] See Gheorghe Piperea, *Insolventa: legea, regulile, realitatea*, Wolters Kluwer Publishing House, Bucharest, 2008, p. 791.

[20] See J.A. Pontier, E. Burg, *EU Principles and Recognition and Enforcement of Judgments in Civil and Commercial Matters*, in T.M.C. Asser Press, 2004, p. 23.

The incidence of public order

Model Law authorizes courts to refuse to approve a measure covered by this law, if that action would be manifestly contrary to public order of that State (Art. 6). Since the concept of public order is determined by national laws and it can differ from state to state, no uniform definition of this concept is given in regulations. Among the reasons that may justify refusal of recognition of a foreign judgment, Romanian Law no. 637/2002 stipulates in Art. 7 the infringements of legal provisions on court exclusive jurisdiction of the Romanian courts.

In most states, the public order exception is limited to fundamental principles of law, in particular to the safeguards enshrined in the Constitution; in those states, public order shall be used only to refuse the applicability of a foreign law, or to refuse the recognition of a foreign court or arbitration decision, when thus would be violated those fundamental principles.

The purpose of the qualificative *manifestly*, used in many other texts of international law as a qualification of the expression "breach of public order", is to establish that the public order exception should be interpreted restrictively and that Art. 6 is intended to be invoked only in exceptional circumstances, concerning matters of fundamental importance for the countries that adopted the *Model Law*.[21]

Conclusions

Both recognition of foreign insolvency proceeding effects as well as the *exequatur* have a judicial character. For a declaration of enforceability of an opening decision of a bankruptcy proceeding and other decisions derived from the procedure, in the European Union will apply the requirements of Regulation no.1346/2000 on insolvency proceedings. Any decision of a court of a Member State, taken in a main or a secondary insolvency procedure, should be recognized without any further formalities fulfillment, once it becomes effective in the State of the opening and will have the same effect in all other Member States as in the State where the proceeding was initiated.

Enforcement proceedings will be conducted in accordance with Regulation no.44/2001, which sets a presumption of legality of foreign decisions. To ensure the enforcement of decisions of bankruptcy involving non-member states, the interested countries have adopted the 1997 UNCITRAL Model Law on Insolvency. Decisions that violate rules of public order in private international law will not receive recognition and will not be enforced abroad.

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[21] See J.A. Pontier, E. Burg, *op. cit.*, p. 24.

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THE NOVELTIES BROUGHT BY LAW NO. 287/2009 IN THE MATTER OF SEVERALTY SUCCESSION

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Abstract

Law no. 287/ from 2009 concerning the Civil Code reforms, generally, the matter of successions, preserving from the previous civil regulation only those principles whose accuracy and timeliness were not denied in time by the jurisprudence and by the doctrine. We find the same orientation in the case of the severalty succession. In principle, the rules established by the previous regulation are kept in this matter, the innovation existing only in some areas.

Therefore, in this paper, we intend to underline both the consistency elements as well as the novelty elements that characterize the matter subjected to our analysis and to appreciate on the opportunity and on the justice of such option to legislate. For our part, we believe that our scientific approach is actual and useful. Since the entry into force of Law no. 287/2009 has been a relatively short time, so that the doctrine has failed to reveal all the innovations embodied in this bill. By looking at this issue, still not addressed by the literature, it helps, we consider, the best achievement of justice, helping all the interested parties: judges, lawyers, public notaries, civil servants with expertise in probate, faculties and students and any person interested in this matter.

The legislator himself, we consider, is interested in the views of the theorists about his legislation work, in the fair and appropriate, evidenced by the ferenda bill automatically uses them in subsequent acts amending this legislation of far-reaching legal resonance – the Code civil.

Key words: *severalty; co-proprietorship on quota-parts; co-ownership; legal acts; material acts; actions in court; division action; agreement to suspend the division, imprescriptibility of the action of exit from severalty.*

Introduction

Inheritance severalty[1] *arises only if the legacy is collected by at least two heirs and the deceased has not made one apportionment for ascending. If the inheritance goes to a single heir, he will have property ownership rights exclusively.*

Therefore, a condition of severalty is the plurality of holders, and its specificity lies in acquiring the inheritance property by the joint-heirs, in the ideal share, abstract, inheritance according to their vocation.

[1] Ilioara Genoiu, *Dreptul la moştenire în Noul Cod civil*, C.H. Beck Publishing House, Bucharest, 2012, pp. 427-436.

The notion, the legal regulation and the characteristics of the inheritance severalty

Law no. 287/2009 regarding the Civil Code[2] regulates the severalty in Book IV "About inheritance and liberals, Title IV," "The transmission and shared heritage," Chapter IV "Shared inheritance and report" Section 1 "General provisions on the division of inheritance", art. 1143.

In article 1143 paragraph (2), the enactment that contains the provision according to which its incident provisions in relation to the apportionment of the joint property (Articles 669-686) shall apply to the division of inheritance; to the extent they are not inconsistent with it.

Inheritance severalty[3] arises only if the legacy is collected by at least two heirs and the deceased has not made one apportionment for ascending. If the inheritance goes to a single heir, he will have property ownership rights exclusively.

Therefore, a condition of severalty is the plurality of holders, and its specificity lies in acquiring the inheritance property by the joint-heirs, in the ideal share, abstract, inheritance according to their vocation.

Please note that the heir with a particular title does not create severalty, since in accordance with the dispositions of art. 1059 from the Civil code, "the heir with a particular title of an individual determined property acquires it as a result of the opening of the inheritance". "The heir to the title of the particular kind of goods is the holder of a claim on the inheritance...". In the literature[4], it was shown that severalty involves a plurality of holders, but not necessarily more heirs with a universal vocation. Thus, severalty may arise, at least partially and in the assumption of a single heir with a universal vocation. It is offered, in this respect, the example of the only heir that competes to inherit with the widow of the deceased, unworthy or fold. In such circumstances, severalty arises on the share of the surviving spouse from the communed property.

As for the common property on quota-shares, the severalty is characterized by the fact that the heirs (co-owners) only know what it is the ideal rate, not the materiality of their goods. Unlike however, the common property in quota-shares, whose object is the individual determined property, the severalty carries to universality (deceased's legacy).

Please note however, that literature sometimes, the two terms are used interchangeably, the difference between them is only quantitative, not the quality. There are also authors who have shown the difference between the two very similar legal institutions[5].

So, from the opening sequence, the heirs acquire some abstract share of each molecule of each item and not some specific inheritance of the succession.[6]

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[2] Republished in Romanian Official Gazette, part I, no. 505 from July 15th 2011.

[3] Ilioara Genoiu, *Dreptul la moştenire în Noul Cod civil,* C.H. Beck Publishing House, Bucharest, 2012, pp. 427-436.

[4] Fr. Deak, *Tratat de drept succesoral,* Second edition, updated and supplemented, "Universul Juridic" Publishing House, Bucharest, p. 489.

[5] Fr. Deak, *op. cit.*, pp. 487-489; G. Luţescu, *Teoria generală a drepturilor reale,* Bucharest, 1947, p. 350; D. Lupulescu, *Dreptul de proprietate comună pe cote-părţi şi aplicaţiile sale practice,* "Ştiinţifică" Publishing House, Bucharest, 1973, pp. 10-12; C. Stătescu, C. Bârsan, *Drept civil. Drepturi reale,* Bucharest University, 1988, p. 177; I. Adam, A. Rusu, *Drept civil. Succesiuni,* All Beck Publishing House, Bucharest, 2003, pp. 491-493.

[6] Fr. Deak, *op. cit.*, p. 488; D. Chirică, *Drept civil. Succesiuni,* "Lumina Lex" Publishing House, Bucharest, 1996, p. 289; L. Stănciulescu, *Drept civil. Contracte şi succesiuni,* "Hamangiu" Publishing House, Bucharest, 2008, p. 461.

The legal regime applicable to the succession severalty

As noted, it applies to the severalty, on which the Romanian legislation does not contain specific provisions; the law of material interest in common property is governed by two principles:

A) Each co-owner (coheir) has an exclusive right to the ideal inheritance quota [article 634 paragraph (1) from the Civil Code].

Under this principle, the co-owner may dispose of its ideal share of the universal, freely, without the consent of the other co-owners (the rule of the free provision on the ideal quota).

The place of the co-owner will be taken in the severalty, by the acquirer[7], which in turn, may only have share of the good and not of the ideal quota of it, seen in its materiality.

B) None of the co-owners has an exclusive right of inheritance to any good, considered in his individuality.

Under this principle, none of the co-owners cannot perform acts on the materiality of the property that was in severalty, without the consent of other co-owners (either with the consent of all the co-owners the unanimity rule or with the consent of the co-owners that own the majority of quotas shares). The unanimity rule was qualified by the doctrine[8], as embarrassing. For this reason, as we will show below, the Civil Code in force keeps it only for the documents available (and for those assimilated thereto) as well as for the material acts for individual goods, in other cases replacing it with the rule of the majority of shares (for the acts of administration) or even waiving it (for the acts of conservation).

It is necessary therefore to distinguish if the co-owner has done regarding the individual property, legal documents and if he performed the material acts.

a) Relative to the *legal documents* signed by the co-owner concerning the individual goods, the Civil Code in force includes the following requirements:

- *The documents of disposition* of the individual property cannot be completed by one co-owner without the unanimous consent of the other [article 641 paragraph (4) from the Civil Code]. So, for the disposition documents on the individual good, the unanimity rule must be respected. Also, according to the laws mentioned above, the unanimity rule must be respected for the use of free papers, for the assignment of income real estate and rental agreements for consideration term exceeding three years, as well as the acts aimed exclusively for the embellishment the property. The Civil Code expressly provides that any free legal document (including transfers of income real estate for free), concerning a good in possession shall be considered as an act of disposal.

Analyzing these laws, we find that the new Civil Code takes from the previous regulation only the unanimity rule on acts of disposition of individual property. Therefore, this rule takes the constant status of law. The Civil Code in force assimilates though, as already noted, the documents available on individual property and several other legal acts (such as acts of free use, regardless of their duration or use documents for consideration whose term is higher than three years). Thus, we identify the first element of novelty, enshrined in the Law No. 287/2009 in the matter of successor severalty.

- *The acts of administration*, such as the completion or termination of tenancy contracts, disposals of property and other similar income, on individual property, to the extent that they have character and are entered into consideration for a period longer than 3 years may be made only with the co-owner shares in the majority holding.

It is thus instated the rule of the majority of the quota-shares. If not (for free papers use, assignment of income real estate and rental agreements for consideration term exceeding

[7] The Supreme Court of Justice, Civil Section, Decision no. 1306/1995, in "Dreptul" Review, no. 2/1996, p. 109.
[8] M. Eliescu, *Moştenirea şi devoluţiunea ei în dreptul Republicii Socialiste România*, "Academiei" Publishing House, Bucharest, 1966, p. 208.

three years), the unanimity rule works, as shown. This solution results in corroborating the provisions of art. 641 par. (1) and (4) from the Civil Code.

According to the provisions of article 641, paragraph (2) from the Civil Code, however, the acts of administration which substantially limit the possibility of a co-owner to use the individual good in relation to its share or which impose an unreasonable burden in relation to its share or expenditure incurred by the other co-owner, will be made only with consent. Therefore, in such circumstances, the majority rule is waived, the respective injured co-owner consent being necessary. We encounter such an exception to the general rule, governing the conclusion of the asset management acts on the individual good.

By interpreting *per a contrario* the provisions of article 641 paragraph (2) from the Civil Code., we find that each co-owner can make management acts of the individual good, with the co-owner shares in the majority holding agreement, whenever, by those acts of administration is not substantially limited the possibility of a co-owner to use the common good in relation to its share, or by those acts do not it is not imposed an unreasonable burden on the co-owner, in relation to its share or expenditure incurred by the other co-owners.

On shares in majority rule, established by article 641 paragraph (1) from the Civil Code, we mention that the legislature governs the possibility that the court supplements the approval of the co-owner who was unable to express the will or abusively opposed to the performing of an act of managing, essential for utility maintenance or value of the individual property [article 641 paragraph (3) from the Civil Code.]. Thus, if it is proved that the condition of the majority of the quota-shares cannot be met in order to perform an act of good management on individual goods, because one of the fact that one of the co-owners is unable to express their will or they oppose abusively, the court may substitute its consent, thereby enabling the conclusion of that management act. To allow such a possibility, it is necessary though that the act in question to submit an indispensable character for maintaining its utility or the value of individual good.

Please note, however, that under the Civil Code from 1864, in principle, the conclusion of the acts of administration was governed by the unanimity rule. Thus, Law no. 287/2009, as a major novelty established on matters of the acts of administration on individual asset the rule of the majority of the quota-shares, thus giving up the unanimity rule.

In another vein, we mention that under Art. 642 from the Civil Code, "Legal acts (both provision and management – A/N) concluded with disregard to these rules are not opposable to the co-owner who did not consent, express or imply, to the completion of the act. The injured joint proprietor is recognized the right that before the share, to file proceedings against the third party owners who have come into possession of the common good after completion of the act. However, the possession of property restitution will be made for the benefit of all co-owners, with damages, if any, charged to those who participated in the last act". Thus, the legal document concluded in violation of the rules mentioned above is not void, but only not opposable to the co-owner who has not consented to its completion.

Also we state that both the provisions of article 641 from Civil Code (that regulates the acts governing the provision and the asset management on individual goods) and the provisions of article 642 paragraph (1) from the Civil Code (governing the penalties applicable to infringements of the rules to achieve these acts), is permissible by the end, with the consent of all the co-owners, under the conditions stated in article 644 from Civil Code, for a property management contract (of severalty). This possibility is explained by the nature of the legal norms specified device. As a result, by the will of all the co-owners, materialized in a property management contract, it may be compromised, where appropriate, the unanimity rule, the rule of the majority share-party for the unenforceability of legal act.

- Regarding the *documents of conservation* concerning the individual good, the Civil Code regulates in the sense that they can be made by each co-owner, without the agreement of the others [article 640 Civil Code].

According to the previous Civil Code, the unanimity rule had to be upheld, mainly, as in the case of the conservation documents on an individual good. Still, in the prior practice[9] to the force entry of Law no. 287/2009[10], have been considered viable, in terms of the silent agreement or in that of the business management, administration acts and preservation of the successor property, if these acts, made only by one of the co-owners have proven useful to the others, in the sense that they profited from them and that none of them opposed to their completion.

Consequently, the new Civil Code, by taking the judicial orientation in the matter, renounces the unanimity rule regarding the preservation documents of the individual good. It follows that, they can be drawn up by each co-owner, without the others agreement. Hence we note that in the case of the preservation documents of such a good, the majority rule of the quota-shares mustn't be respected, this being characteristic only for the administration documents.

b) *The material documents* (their possession and use) on the individual goods can be made by the co-owner, without the others consent, provided that the destination of the good is not changed and that it does not affect the right of the latter [article 636, paragraph (1) from the Civil Code.]. The co-owner may affect the others' rights, by turning the individual goods or by changing their use.[11] The one that, against the will of the other co-owners, uses the common good exclusively may be forced to pay compensations [article 636, paragraph (2) from the Civil Code].

In this context, we state that the legal dispositions mentioned above have a dispositional character, so that they may waive from the conclusion of a property management contract (severalty), with the consent of all co-owners, as provided by article 644 in the Civil Code. As a result, by the will of all the co-owners, materialized in a property management contract the unanimity rule may be compromised for material acts on the individual goods.

We find therefore that, in terms of materials acts on individual properties, the new Civil Code uses the established rule by its predecessor.

The fruits of the individual goods are entitled to the co-owners in proportion to the ideal share that individuals have in common (article 637, Civil Code) and are collected under this rule, regardless of division[12]. In this respect, therefore, Law no. 287/2009 does not innovate either.

But this regulates in detail the right to the reimbursement of costs, a need for good fruit production or collection of individuals. Thus, in accordance with article 638 from the Civil Code, the co-owner who incurred the costs of producing or collecting fruit alone is entitled to the reimbursement of these expenses by the co-owners, in proportion to their quotas parties. The natural or industrial fruits of the individual goods, acquired by a co-owner, are part of the shared mass while they weren't consumed or disposed of or destroyed and cannot be identified separately. Otherwise, the concerned co-owner shall be entitled to compensation, unless the fruit has perished by chance.

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[9] See also: The Supreme Court, civil section, decision no. 884/1968, in "Dreptul" Review, no. 1/1969, p. 152; The Supreme Court, civil section, decision no. 361/1968, in "Corpus of decisions for the 1968 year", p. 65; The Supreme Court, civil section, decision no. 106/1969, in "Dreptul" Review, no. 5/1969, p. 175.

[10] It had entered in force on 1st of October 2011.

[11] See also: The Supreme Court, civil section, decision no. 257/1970, in "Dreptul" Review, no. 7/1970, p. 181; The Supreme Court, civil section, decision no. 549/1978, in "Corpus of decisions for the 1978 year", p. 10.

[12] See also: The Supreme Court, civil section, decision no. 818/1980, in "Repertoire III 1975-1980", p. 147.

As far as the *actions in justice* are concerned, the Civil Code regulates in article 643, the following:

- Any of the co-owners may appeal on his own to justice, either as plaintiff, either as defendant, in any action regarding the severalty, including in case of the claim action;

- The judgment decisions given in the benefit of the severalty for all co-owners' benefit, whichever promoted the action, is favorably resolved;

- In the event that the action is brought only by one or some of the co-owners, the introduction of the other co-owner, as plaintiffs may be requested only by the defendant on terms and conditions covered by the Code of Civil Procedure.

In this context, we underline that the judicial practice prior to October 1st, 2011 adopted different solutions, not only for the legal documents signed by the co-owners, but also in matters of legal actions pursued by them.[13] So sometimes the action brought by one co-owner was admitted, by which he claimed compensation for the damage produced to the individual good, as being dismissed the claim for an individual good, promoted only by one side of the co-owners.

To all these, as far as we are concerned, we believe that by governing in detail the issues of the exercise of individual property ownership, including the exercise of legal proceedings on individual property, the legislature removes the risk of future solutions of non-unified court.

The imprescriptibility of the right to request the exit from the severalty

According to the dispositions of the article 1143 paragraph (1) from the Civil Code, "No one can be forced to stay in severalty. The heir can ask out of the severalty at any time, even then when there are conventions and testamentary clauses that don't allow this."

Therefore it is obvious that the action of getting out from the severalty has, also in the regulation of the Civil Code in force, an imprescriptible character, being able to be promoted at any time.

The dispositions of the Civil Code, circumscribed to the succession apportionment, are completed with the incident dispositions in the matter of the common property apportionment. So, regarding the apportionment, there can be closed, according to the article 672 from the Civil Code, postponement conventions, but they cannot last more than 5 years. In the estates cases, the conventions must be closed in an authentic form and must be subjected to the advertising formalities foreseen by law.

Analyzing these legal dispositions, we notice in the first place, the fact that the present Civil Code uses the term of "apportionment", instead of "distribution" that we were used to find in the 1864 Civil Code.[14] It results that it is reached one of the new civil Code goals, namely to update the specialized language.

Second of all, we notice the fact that Law no. 287/2009 (keeping the imprescriptible character of the action of getting out from the severalty) establishes double news. Therefore:

a) it no longer regulates the possibility of keeping the severalty for a period longer than 5 years;

b) it imposes to be realized in an authentic form and to be subjected to the advertising forms all the suspension conventions of the apportionment regarding the succession estates.

Under the conditions when the novelty of this second mentioned aspect cannot be denied, we will refer next only to the first mentioned aspect, namely to the impossibility of renew the suspension convention of the apportionment.

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[13] See also: The Supreme Court of Justice, civil section, decision no. 1474/1992, in "Dreptul" Review, no. 7/1993, p. 91; CAS I, decision no. 1430/1935, in "General Jurisprudence 1936", p. 526.

[14] The civil codex was published in the Official Gazette of Romania no. 271 from 4th of December 1864. It was abrogate through Law no. 71/2011 for applying Law no. 287/2009 regarding the Civil Code. Law no. 71/2011 was published in the Official Gazette of Romania, Part I, no. 409 from the 10th of June 2011.

Regarding this aspect, we mention that the old regulation in civil matter expressly enshrines, through the dispositions of the article 728 paragraph (2) second thesis, the renewal possibility of the apportionment suspension condition, on a 5 years period. In this context, the literature appreciated that only once could have been extended the 5 years term.

To all these, we believe that the present Civil Code (which, in article 672, the first thesis foresees that "The conventions regarding the suspensions of the apportionment cannot be closed for a period longer that 5 years…") no longer allows the extension possibility of the suspension convention of the apportionment, so that it cannot have a period of time longer than 5 years. It is true though that article 672 from the Civil Code does not forbid this possibility and, mainly, an extended convention of the apportionment suspension could be closed between the parties, as long as it is not against the law, the public order or the morality. In order to sustain our opinion we invoke mainly the following argument: if the legislator would have wanted to extend the suspensions of the apportionment, he expressly regulated this possibility, like in the Civil Code from 1864. Moreover, the Civil Code in force has maintained from the old Civil Code all the principles for which their actuality and justness have not been contested during time by the doctrine and jurisprudence. As a consequence, the new civil Code could have taken exactly the text of the article 728 paragraph (2) from the 1864 Civil Code, if he wanted to allow the renewal of the apportionment suspension convention. In the alternative, to support our opinion, also we state that by the suspension of the division, the uncertainty about the ownership of the property owners is extended, consequently on the civil circuit, too. Whereas from the whole matter successor regulation, we beget that the legislature is not animated by such a desire.

In another context, we underline that, in light of the previous Civil Code, the agreements for share suspension could not be inserted in a will, testamentary clause that would require to maintain the severalty, even for a period determined, being absolutely void. We believe that in light of the current Civil Code, the suspension of the apportionment must be the effect of a convention and not that of a testamentary clause.

Conclusions

At the end of our analysis, we reveal the merit of the Civil Code at force to use an updated terminology, which makes the will of the legislator easier to understand by the recipients. Considering this, we state as an example that, in the matter of the succession severalty, the Civil Code at force uses, instead of the archaic notion of "division", used by the Civil Code from 1864, the term of "apportionment".

Also we add that the Law no. 287/2009 maintains in the matter of the succession severalty those principles established by the previous Civil Code, whose justice has not been questioned over time. Regardless, Law no. 287/2009 innovates to some extent and even substantially. Thus, when comparing the two mentioned regulations, we identify the following novelty elements, enshrined by Law no. 287/2009:

- the exercise of individual property ownership is governed in a detailed manner, being established more new elements, presented in detail in the content of our work;
- the state of severalty may be preserved for maximum five years, not being established the possibility to renew the clause of suspension of the apportionment;
- the conventions to suspend the apportionment regarding successor estates must be performed in an authentic form and they must be subjected to advertising forms.

In the end, we appreciate that the new Civil Code ensures a modern regulation for the succession severalty, rendering it a supple, coherent, just and an adapted form to the new realities of the social life.

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BRANCH STATUS IN CROSS-BORDER INSOLVENCY PROCEDURE

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Abstract

The accelerated development of the legal relations specific to international trade determined in time the increase of the cases of cross-border insolvency, which determined the international legislator to try to achieve as possible, considering the procedural rules specific to every state, a set of standard rules which to be enforced and complied with in the national legislations regarding the procedure for cross-border insolvency. This way, the legislator was seeking to unify the international law of insolvency with the purpose of simplifying the international process in this respect and of obtaining some unitary solutions from this perspective.

Key words: *insolvency, cross-border nature, extraneity item, bankruptcy, creditor, debtor, judicial reorganization.*

Introduction

In all the world states, the legal reality of the bankruptcy's institution was not and cannot be challenged; therefore this procedure had a special attention from professionals in this field. As a result, although the background of the problem is the same – the entrance of the debtor in ceasing payments - the procedural forms of enforcement are different from one state to the other.

The first regulations in the field occurred since the ancient time, when there were not differences between traders and non-traders. Subsequently, in the Middle Age, the procedure applies only to traders, one of the first regulations in the field being the Ordinance from 1673 given by Louis the XIVth which included provisions regarding "bankruptcies and insolvencies"[1]. Also France was the one that regulated in a fairly rough manner the situation of the one being under bankruptcy by means of the Commercial Code established by Napoleon, giving way to two purposes of this normative document: on one hand ensuring the payment by the debtor of the receivables due to the creditor and on the other hand recovering the activity of the in-difficulty trader, purposes which we also find in the current legislation. This new form of regulation of bankruptcy was conceived as a procedure of collective execution, being considered "a form of protest against the common law of individual effect"[2].

The Romanian commercial code from 1887 had as source of inspiration the Italian commercial code which, on its turn, took over the entire regulation of the French commercial code. In the content of the Romanian commercial code from 1887, the 3rd Book titled "About

[1] S. D. Cărpenaru, *Tratat de drept comercial român, Ediția a III-a revizuită conform noului Cod Civil*, "Universul Juridic" Publishing House, Bucharest 2012, p. 666.
[2] I. L. Georgescu, *Autonomia dreptului commercial*, "Revista de drept commercial" Review, no. 4/1993, p. 7, cited in S. D. Cărpenaru, *op. cit.*

bankruptcy" represented the legal ground of this institution until the moment of coming into force of the Law no. 64/1995 regarding the procedure of judicial reorganization and bankruptcy[3]. Subsequently, under the pressure of the changes occurred in social and economic level, this normative document was replaced by abolition by the Law no. 85/2006 regarding the insolvency procedure[4].

On international level, in legal terms, the interest manifested towards this institution is maximum, every state having regulated specific procedures, depending on the existing economic and social realities.

Therefore, in the United States of America, Uniform Commercial Code includes regulations as regard to *insolvency proceeding*[5] whereby it establishes the transfer in favor of the creditor and also other procedures whereby the patrimony of the debtor can be liquidated or their economic status can be restored. From the analysis on the international regulations we can observe that the intention of the legislator was, almost in any state of the world, the one of trying to restore the economic situation of the bankrupt and then, in case of failure, to liquidate their patrimony in order to pay their creditors. This is the case of France, Germany, Greece and other states. Also, there are regulated preventive procedures, that usually apply before the commencement of the insolvency proceeding, as it is the case of the preventive composition[6], regulated in several states, among which Romania or Belgium.

The globalization and permanent expansion of the trade generated the need for a legislative harmonization in the field of insolvency proceeding, harmonization which took place by concluding treaties, covenants, regulations or adopting domestic normative documents whereby the international documents adopted in this respect to the transposed.

On European level, in 1933, Denmark, Iceland, Norway and Sweden adopted, for the first time, the Convention of the northern states, which was establishing the theory of unity and universality of bankruptcy[7]. This convention was providing that the goods of the debtor, irrespective of the state where they might be, can be followed during the procedure of bankruptcy, the privileges or guarantees which affect these goods being governed by the law of the state where they are.[8]

An important event in the calendar of legislative harmonization in the field of insolvency is marked by the draft-Law UNCITRAL[9] from 1997, draft law which represents a legislative text recommended to the states to be adopted in their own legislation. In Romania this draft law was taken and transposed according to the national social-economic realities by the Law no. 637/2002[10] which regulates the relations of private international law in the field

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[3] Law 64/1995 regarding the procedure of judicial reorganization and bankruptcy was published in the Official Gazette of Romania, Part I no. 130 from the 29th of June 1995, by means of art. 130 rescinded art. 695-888 from the Romanian commercial code. The Law 64/1995 suffered several amendments and republications, being finally rescinded by the Law no. 85/2006 regarding the insolvency procedure.

[4] Law no. 85/2006 regarding the procedure of insolvency was published in the Official Gazette of Romania, Part I, no. 359/21th of April 2006, suffering, on its turn, until now, several successive amendments and completions.

[5] Art. 1-201 (22) from the Uniform Commercial Code: "*insolvency proceedings"* includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved".

[6] Law 381/2009 regarding the introduction of the preventive concordat and the ad-hoc mandate published in the Official Gazette of Romania, Part I no. 870 of December 14th, 2009.

[7] I. Macovei, *Dreptul comerțului internațional,* C.H. Beck Publishing House, Bucharest, 2006, pp. 186-188; Diana Ungureanu, *Falimentul internațional*, "Lumina Lex" Publishing House, Bucharest, 2004, pp. 41-44; I. Schiau, *Regimul juridic al insolvenței comerciale,* All Beck Publishing House, Bucharest 2001, p. 522.

[8] Adrian Dobre, *Evoluția reglementării insolvenței pe plan internațioanl,* in "Revista de note și studii juridice" Review, 20th of September 2011.

[9] The UNCITRAL draft Law was adopted on the 30th of May 1997 by the United Nations Commission for the International Trade Law (UNICITRAL), subsidiary body of the United Nations Organization, at the 30th edition of UNICITRAL.

[10] The Law 637/2002 with regard to the regulation of the relations of private international law in the field of insolvency, published in the Official Gazette of Romania, Part I no. 931/19th of December 2002.

of insolvency. The field of enforcement for this draft law is represented by the following cases[11]:
- a foreign court or a foreign representative requests assistance in the state that adopted the draft law in connection with a procedure that takes place abroad;
- it is requested assistance in a foreign state in connection with a procedure that takes place in the state which adopted the draft law;
- the concomitant development of a procedure triggered in a foreign state and a procedure triggered in the state that adopted the draft law;
- the foreign creditors or other foreign stakeholders have the interest to request or to participate in a procedure developed according to the laws of the state that adopted the draft law.

The draft law establishes the principle of supremacy of the international conventions to which a state is part over the domestic legislation[12], so that the recognition, abroad, of a national procedure open in the state which adopted the draft law, will be subject to the international treaties concluded with that state, either to the provisions of the draft law, eventually adopted by the foreign state, either the principle of reciprocity of legal treatment.

The draft law represented the most important guide for the legislation of several states such as Romania, Poland, Spain, Germany or Belgium, who amended significantly their legislation on cross-border insolvency under the influence of this normative document.

On European regional level, the cross-border insolvency remains also after the occurrence of this draft law, a problem of general interest, the idea to harmonize the legislation of EU member states being a challenge which is desired to be reached.

The year 2000 represents the most prolific year on European level as regard to the adoption of the regulations on cross-border insolvency proceeding. In this year, following a long-term legislative harmonization process, was adopted the (EC) Regulation no. 1346/2000 of the Council, regarding the insolvency procedures[13], Regulation which entered in force starting with the 31st of May 2002. This regulation represents a real progress as regard to the unification of the international law on insolvency at European level[14] and is directly applicable in the domestic law of the EU member states, becoming applicable including in Romania after adhesion.

According to Art. 1 of the Regulation, this applies to "*the collective procedures that arise in the context of debtor insolvency which result in its partial or total discontinuance and appointment of a liquidator*". There are exempt from the provisions of this Regulation the procedures on insurance companies, credit institutions, investment companies that deliver services involving the holding of funds or securities of thirds and also bodies of collective investment.

The competence of opening the procedure provided by this Regulation is within the courts from the member state on territory of which is the center of main interests (COMI) of a debtor, in case of companies or legal persons COMI being presumed to be, until contrary, the place of the headquarters. Paragraph (13) from the Preamble of the Regulation also provides that the center of the main interests should correspond to the place where the debtor usually manages its interests and, therefore, can be checked by thirds.

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[11] A. Dobre, *op. cit.*

[12] Including the provisions of art. 10 of Law no. 105/1992 regarding the regulation of the relations of private international law, provide for this principle.

[13] (CE) Regulation no. 1346/2000 of the Council from the 29th of May 2000 regarding the procedures of insolvency was published in the Official Bulletin of European Communities L160/1, p. 143.

[14] Marcela Dogar (Comșa), *Insolvența transfrontalieră, Rezumatul tezei de doctorat*, University of Bucharest, Bucharest, 2011, p. 17 (http://www.unibuc.ro/studies/Doctorate2012Martie/Dogaru%20Comsa%20Marcela%20-%20Insolventa%20transfrontaliera/Rezumat%20Dogaru%20Marcela%20(Com%C8%99a)%20insolven%C8%9Ba%20transfrontalier%C4%83.pdf).

As regard to the applicable law, the provisions of the Regulation are providing that, in case there are no contrary provisions, the applicable law will be the one of the member state on which territory the procedure is developed, referred to as "*opening state*".

The deficiency of this Regulation resides in the fact that its applicability is only targeting the cases where the center of the main interests of the debtor is located within the European Union and, also, is only targeting the bankruptcy procedure, without the possibility to be invoked in case of judicial reorganization.

The main purpose pursued by the provisions of this Regulation targets the equal treatment applied to all the creditors, being prohibited to discriminate foreign creditors from EU member states on the submission of receivable statements and in participating in the main or secondary procedure, depending on the case.

The legal regime of insolvency in Romania. Romania, EU member state starting with the 1st of January 2007, preoccupied within the issues raised by insolvency proceeding both before adhesion and after. Therefore, as specified previously, preoccupations targeting the regulation of bankruptcy[15] have been since the XIX-th century, being included in the Caragea Code from 1817, Calimach Code from 1817, the Trade Register adopted in 1840 or the Romanian Commercial Code from 1887.

Currently, in Romania, the legal foundation of the insolvency procedure is represented by the Law no. 85/2006, and as regard to the procedure of cross-border insolvency, the provisions of the Law no. 85/12006 are completed with the provisions of the Law no. 637/2002 with regard to regulating the relations of private international law in the field of insolvency, of the Law no. 105/1995 on the regulation of relations of private international law, and also with the provisions of the (EC) Regulation no. 1346/2000 of the Council regarding the procedures of insolvency.

The categories of debtors against which the law is enforced. Art. 1 of Law no. 85/2006 on insolvency proceeding regulates the categories of debtors against which the law may be enforced under the form of general or special procedure: companies, co-operative companies, co-operative organizations, agricultural companies, groups of economic interest, any other legal person of private law that develops economic activities, and also the administrative-territorial units[16], traders physical persons that act individually, and family associations.

According to the provisions of the Law no. 85/2006, the insolvency proceeding can be started at the request of the debtor or of the creditor. Practically, the normative document allows to the debtor to call for the legal provisions on the insolvency proceeding.

The procedural position of the branch within the procedure of insolvency provided by the Law no. 85/2006 and within the cross-border insolvency proceeding. According to the specialized literature[17], the procedure of insolvency applies to the companies as legal persons, irrespective of their form.

Therefore, the branch being a division without legal personality of the company, it is presumed that this cannot be subject of the insolvency proceeding. Nevertheless, also in the specialized literature[18] there is the opinion to which we fully agree, that the insolvency proceeding can be applied including to the Romanian branches of the foreign companies. According to Law no. 31/1990 amended by Law no. 441/2006, the foreign companies may form in Romania, in compliance with the Romanian law, subsidiaries and branches, agencies,

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[15] S. D. Cărpenaru, *op. cit.*, p. 668-669.

[16] See Art. 75 of Law no. 273/2006 on local public finances according to the provisions of which the administrative-territorial units under insolvency are subject to the general procedure.

[17] V. Pătulea, *Sfera de aplicare a prevederilor Legii nr. 64/1995 privind procedura reorganizării judiciare și a falimentului*, in the "Dreptul" Review, no. 2/2005, p. 29, cited in Stanciu D. Cărpenaru, *op. cit.*, p. 684.

[18] Ion Turcu, *Legea procedurii insolvenței. Comentariu pe articole*, 3rd edition, C.H. Beck Publishing House, Bucharest, 2009, p. 66.

representatives or other secondary offices, if this right is acknowledged by the law of their organic statute.

We consider that, in practice, the courts of law should make a clear distinction as regard to the procedural quality of a branch depending on the type of insolvency applied. Therefore, if it's not about a procedure of cross-border insolvency, but it is required based on the Law no. 85/2006 to open the insolvency proceeding by a creditor with main office in Romania against a debtor branch of a company - legal person of Romanian law, the solution of the courts, should correctly remain the one of inadmissibility of such a request, the branch being a division without legal personality of the company, so the request for opening the procedure of insolvency should be directly made against the mother-company.

The situation is completely other in the case of international commercial relations taking place between economic agents from member states, out of which some are companies with legal personality and others are branches constituted in Romania by foreign companies. Therefore, there are shaped two situations that raise questions in practice with regard to the quality and even the procedural capacity of the branches:

- the debtor - branch constituted in Romania, of a foreign company - requests from own initiative the opening of insolvency;
- the creditor requests the opening of insolvency procedure against a branch constituted in Romania by a foreign company.

The analysis of these two situations should be made under the (EC) Regulation no. 1346/2000 of the Council regarding the procedures of insolvency. Because Romania is an EU member state, this Regulation is fully applicable on its territory starting with the 1st of January 2007, according to art. 4, par. (2) of the Treaty of adhesion of Romania and Bulgaria to EU, signed on the 24th of April 2005. According to art. 3 of the same Treaty, from that time, Romania enjoys from all the rights and is held by all the obligations of a member state. Therefore, the provisions of art. 249 of the Treaty that regulate the documents of derived community law are incident, and their adoption is grounded on the primary law. This text expressly stipulates that the regulations have a general applicability, being mandatory in all their elements and directly applicable in all the member states, without making the object of any measure of transposition, being imposed to the national legal order from the time it enters in force.

Therefore, because we are in both situations in front of extraneity item, the provisions of art. 3 of the Regulation are applicable, according to which the competence of opening the insolvency procedure is within the courts from the member state on which territory the center of the main interests (COMI) of the debtor is - Romania -, following that, in accordance with the provisions of art. 4 from the same Regulation, the law applicable to the insolvency procedure and its effects to be the law of the member state on which territory the procedure is opened - Romania, Law no. 85/2006.

Paragraph (13) from the Preamble of the Regulation also provides that the center of the main interests should correspond to the place where the debtor usually manages its interests and, therefore, can be checked by thirds.

In the case of a company or another legal person, COMI is presumed to be, until the contrary, the place of the main office.

The assumption with regard to the place of COMI is removed in case that a company with main office registered in a member state has a secondary office (subsidiary, branch, agency, etc.) registered in another member state and it develops, in fact, the trading activity at that secondary office. Therefore, COMI will be in the place where the secondary office is located, the activity of the company taking place there and, therefore, a main procedure of insolvency will be opened in the member state of the secondary office that meets the conditions to be considered the "*center of main interests*" – COMI.

Moreover, the branches of the foreign companies constituted in Romania are managed, as we specified, by the law of the mother-company – *lex societatis.* By derogation from this rule, as established in practice and in the specialty dogma, in order to answer to some rules of the international trade, the branch can be summoned in the country where it has its establishment, but only for the operations concluded there.

In support of the above opinion are also the provisions of art. 5 of Law no. 637/2002 amended by GEO no. 119/2006 according to which, "*... in the sense of this law, it is considered that the foreign legal person has its main office in Romania and in case that in this country has a branch, agency, representative office or any other entity without legal personality...*". In the same respect are the provisions of art. 149 item 2 of Law no. 105/1992 according to which "*the Romanian courts of law are competent if,.... the main office of the defendant, legal person, is in Romania. In the sense of this article, the foreign legal person is considered with main office in Romania also in the case that it has in this country a subsidiary, branch, agency or a representative office*", corroborated with the provisions of art. 150 item 7"*the Romanian courts are, also, competent to judge....the bankruptcy or any other judicial procedure on the ceasing of payments in case of a foreign company with main office in Romania*".

According to Art. 3, letter p) of the Law no. 637/2002 amended by GEO no. 119/2006 "*main office is any work point where the debtor performs, with human and material means of non-transitive nature, an economic activity or an independent profession*".

Therefore, in case that it is invoked the lack of the active or passive procedural quality of the debtor-branch constituted in Romania of a foreign company, we consider that the correct solution of the courts should be the one of rejecting this exception because, the branch constituted in Romania by a foreign company has a procedural quality both passive and[19] active[20]. Therefore, we consider it wrong the interpretation of the court which, having for settlement the application with object the opening of the simplified procedure of insolvency against a debtor - branch formed in Romania by a company with main office in the Moldavian Republic, rejected this application on the grounds of lack of passive procedural quality because the branch it does not have legal personality and it is not distinct subject of law. In our opinion and in this case we are in a case of cross-border insolvency and, even if there cannot be enforced the provisions of the (EC) Regulation no. 1346/2000, the Moldavian Republic not being a EU member state, in the given situation the provisions of the Law no. 637/2002 were applicable, law which regulates the relations of private international law, with the residents of non-EU member states, this law being inspired from the draft law UNCITRAL from 1997.

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[19] See the commercial sentence no. 1429/26.03.2008 given by the Bucharest Court - the VIIth Commercial Department in the file no. 31113/3/2007, whereby although the court admits the appeal of the debtor SC Astaldi Italy, the Bucharest Branch, rejects the exception of the lack of passive procedural quality invoked just by the debtor; Also the commercial sentence no. 1452/2009 given by CAB in the file no. 2278/2009 whereby the court admitted the appeal and amended in part the challenged sentence, rejecting the application for opening the insolvency procedure but maintaining the provisions with regard to the rejection of the exception of passive procedural quality invoked in its defense by the branch debtor.

[20] See the conclusion given by the Bucharest Court - the VIIth Commercial Department on 24.08.2009 in the file no. 33914/3/2009 whereby SC Mivan Kier Joint Venture Limited Newpark, Bucharest Branch, requested the opening of the insolvency procedure under the Law no. 85/2006. We specify that, after the cause have been withdrawn from the court following the commercial sentence no. 1082/14.09.2010 by CAB, the same company under the new name SC Rathenraw Limited requests within the file no. 56658/3/2010 the opening of the same procedure, and by the conclusion from 30.11.2010 the court expresses in the sense of admitting the request of the debtor and opening the bankruptcy procedure in simplified form as main procedure of insolvency, under the art. 3, par. (1) of the (EC) Regulation 1346/2000 regarding the insolvency procedures, corroborated with the ones of art. 107, par. (1) reported to art. 32, par. (1) of Law no. 85/2006, determining that the Center of the Main Interest of the debtor RATHENRAW LIMITED (former MIVAN KIER JOINT VENTURE LIMITED) is in Romania.

Conclusions

Having in considerations all these issues it is demonstrated that the harmonization of the law is a desiderate fairly hard to reach, the Law UNCITRAL as also the (EC) Regulation no. 1346/2000 starting to gauge, at least on principle level, the regulations on cross-border insolvency.

Nevertheless, the uniform regulation of the procedure of cross-border insolvency should remain a constant preoccupation of the Romanian legislator, imposing a unitary practice at the level of the courts in order to remove this way the lacks of a non-unitary justice.

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SOME REFLECTIONS ON THE CONCEPT OF BASIC RULES OF THE CRIMINAL TRIAL

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Abstract

The article presents some considerations on the procedural provisions regarding the basic rules of the criminal trial, as they are regulated under the Criminal Procedure Code. The author critically analyses the provisions of the new Criminal Procedure Code, through which the fundamentals of the criminal procedure law are set up, reported to the provisions of the existing Criminal Procedure Code.

Keywords: *basic rules of the criminal trial, the new Criminal Procedure Code, the principles of the criminal procedure law.*

Introduction

The basic rules of the criminal case are criminal procedural norms acting as fundamental principles, which express, as judicial norms, the content of the conception and the criminal procedure policy principles, which set the basis of the existing Criminal Procedure Code and, at the same time, also represent main orientations in applying criminal procedure norms[1]. The fundamental principles of the criminal case represent the most general rules upon which the structure and the entire evolution of the criminal case are based[2], unlike other principles that represent a maximal generalization of legal norms[3].

Although reported to the source and the role fulfilled in the course of the criminal case, the basic rules appear normatively not only as fundamental principles, but also as irrefragable orientations, which do not admit any exception; however, the orientations included in the basic rules of the criminal case have a sort of relativity degree, because in certain situations[4], for prevalent arguments, the incidence of some basic rules had to be eliminated[5].

[1] See V. Dongoroz, *Regulile de bază şi acţiunile în procesul penal*, in "Explicaţii teoretice ale Codului de procedură penală. Partea generală" by V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. M. Stănoiu,, vol. I, "Academiei Române" Publishing House, Bucharest, 1975, p. 40.
[2] See G. Theodoru, *Tratat de Drept procesual penal*, 2nd Edition, "Hamangiu" Publishing House, Bucharest, 2008, p. 70.
[3] See G. Geamănu, *Principiile fundamentale ale dreptului internaţional contemporan*, "Didactică şi Pedagogică" Publishing House, Bucharest, 1967, p. 15.
[4] Such as if a legal extra-procedural act or fact would come up (amnesty, conciliation among parties, prescription).
[5] See V. Dongoroz, *Regulile de bază*, supra cit., p. 40.

1. Preliminary explanations

The Criminal Procedure Code of the United Romanian Participates from 1864[6] and The Criminal Procedure Code from 1936[7] did not include provisions on the basic rules of the criminal case.

The General Part of The Criminal Procedure Code from 1968[8], Title I "Basic rules and actions in the criminal trial", Cap. I, art. 1-8, provide for the first time "The purpose and basic rules of the criminal trial". The rules on the respecting of human dignity[9] and the presumption of innocence[10] were added to these basic rules.

The new Criminal Procedure Code[11] provides, under Title I (art. 1-13) of the General Part, the principles and limitations of the application of the criminal procedure law, without using the term "basic rules of the criminal trial", but accordingly, uses the term "criminal procedure principles".

The basic rules of the criminal case, before being legally established, have been explained by the Romanian doctrine[12]. From the character of public order and by the superior interest of the procedure rules, three fundamental principles were identified (reality principle[13], legality principle[14], compulsivity principle[15]), considered primary principles from which a series of fundamental principles, but secondary[16] ones, derive.

One opinion[17] proposed that basic rules should be dismissed from the Criminal Procedure Code, following the specialty literature be the one to fundament a wider system of guideline principles of the Romanian criminal trial. The proposal to take out from the Criminal Procedure Code the introductory chapter on the purpose and basic rules of the criminal case is supported, on the one hand, by the note that in the European criminal procedure codes such an approach[18] does not exist, and, on the other hand, by the idea that the

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[6] "Codice de Procedura Criminale", published in the Official Gazette on December 2nd 1864, come into force on December 2nd 1864.

[7] Code of Criminal Procedure Carol the Second, published in the Official Gazette no. 66 on March 19th 1936, come into force on January 1st 1937.

[8] Law no. 29/1968, published in the Official Gazette no. 145-146 on November 12th 1968, come into force on January 1st 1969, republished in the Official Gazette no. 58-59 on April 26th 1973 and in the Official Gazette of Romania no. 78 on April 30th 1996, subsequently amended and completed.

[9] Art. 5^1 was introduced by Law no. 32/1990, published in the Official Gazette of Romania no. 128 on November 17th 1990.

[10] Art. 5^2 was introduced by Law no. 281/2003, published in the Official Gazette of Romania no. 468 on July 1st 2003.

[11] Law no. 135 from July 1st 2010 on the Criminal Procedure Code, published in the Official Gazette of Romania no. 486 on July 15th 2010, will come into force on the date provided by the law enforcing this code.

[12] See V. Dongoroz, in I. Tanoviceanu, *Tratat de drept şi procedură penală*, 2nd edition, vol. IV, revised and completed by V. Dongoroz, C. Chiseliţă, Şt. Laday, E. C. Decusară, "Curierul Judiciar" Publishing House, Bucharest, 1927, p. 25-26.

[13] This fundamental principle requires knowing the truth, extracted from the reality of the facts (real truth), and not from their *a priori* assessment (formal or fictive truth), thus eliminating legal presumptions, fictions and transactions with which private law works. The consequence of reality principle the duty to find ex officio the real truth, and its corollary was oral principle, with the natural consequence – the contradictory character of the procedural system.

[14] The criminal trial shall be conducted in strict compliance with the criminal law, with the consequence of the nullity of the acts carried out in disagreement with or contrary to its norms.

[15] The criminal procedure norms are mandatory for the bodies called to dispense repressive justice, with the consequence of promoting ex officio the acts and formalities provided by the law.

[16] For details, see V. Dongoroz, in I. Tanoviceanu, *Tratat* vol. IV supra cit., p. 26-41.

[17] For details, see Gh. Stroe, *Regulile de bază ale procesului penal român în lumina exigenţelor europene*, Criminal Law Review no. 1/2000, p. 104-106.

[18] Still, the Criminal Procedure Code of Moldova regulates, under Title I "General provisions on the criminal case" of the General Part, basic principles (Chapter I) and general principles of the criminal case (Chapter II) (art. 7-28 Criminal Procedure Code of Moldova).

criminal procedural doctrine[19] is the one that should approach concepts, definitions, principles, and a code should comprise only the norms that regulate the criminal procedural activity.

In specialty literature[20], there have been expressed founded reservations towards such a proposal, motivating that, with the view to harmonize[21] the European criminal procedure legislations, the trend is to adopt in every country's codes guideline principles that should satisfy the requirements of a fair trial and a reasonable timeframe.

More, the criminal procedure laws of some states located on other continents, such as China, comprise provisions[22] on the fundamental principles[23] of the Criminal Procedure Code[24].

2. Systematization and the framework of the basic principles of the criminal case

Per se, the basic rules would be only the ones provided under art. 2-8 of the Criminal Procedure Code, but legally, they belong to the framework of the basic rules, fundamental principles, and the orientations derive from the purpose of the criminal case (art. 1, par. 1 and 2, CPC), because these orientations do not limit themselves, as the norms in the Criminal Code do, to indicate the spirit in which criminal procedure norms should be applied, but they directly reflect upon the evolution of the criminal case. This expansion of the basic rules framework also results from the name of Title I, General Part CPC. More than that, establishing the socio-judicial purpose of the criminal case (to notice completely and on time the facts that represent offences, so that any offender be punished according to his/her guilt and no innocent person be held criminally responsible) and its socio-political role (to defend rule of law, person, his/her rights and freedoms, to prevent offences, as well as to educate citizens to respect laws), the law-maker sets those guideline rules that ensure the provisions of art. 1 CPC, so that the criminal trial be fair and solved in due time.[25]

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[19] The Italian and German Criminal procedure codes do not contain explicit provisions on basic rules of the criminal case, but, in the doctrine, there are mentioned some criminal procedure principles (For details, see C. Roxin, *Strafverfahrensrecht*, 24. Auflage, Verlag C.H. Beck, München, 1995, p. 2 and the following; G. Conso, V. Grevi, *Profili del nuovo Codice di procedura penale*, quarta edizione, Cedam-Padova, 1996, p. XI-XIII).

[20] See G. Theodoru, *op. cit.*, p. 74. As arguments, there are also mentioned the opinions presented in the French specialty literature on the introduction in the French Criminal procedure code of a preliminary article, which contains a series of guidelines of the criminal case: the fair and contradictory character of the criminal procedure, the balance of the rights of the parties, presumption of innocence, victim's rights, right to defense (see S. Guinchard, J. Buisson, *Procédure pénale*, 2e édition, Litec, Paris, 2002, p. 278).

[21] The need of harmonization derives from the fact that national law systems can not contain provisions contrary to the completion of the European Union, as it was provided by constitutive treaties and their amending documents (see S. Popescu, *Câteva reflecţii privind armonizarea legislaţiei naţionale cu dreptul european*, Criminal law magazine no. 3/2009, p. 25).

[22] Art. 3-17 Criminal Procedure Code of China (adopted on July 1st 1979 at the 5th National Congress of the People, amended on March 17th 1996 at the 8th National Congress of the People), text available on http://www.procedurallaw.cn/english/law/200807/t20080724_40991.html (consulted on October 6th 2012).

[23] After the wide reform in 1996, the Chinese Criminal Procedure Code has contributed to the guarantee of human rights in the context specific to the Chinese state and, in this sense, regulates fundamental principles such as the right to defense, presumption of innocence, victim's rights, separation of judicial functions of public order bodies, popular prosecutor's office and popular court, the use of mother tongue in the criminal case and an interpreter, open judgment sittings, legality principle.

[24] For details, see Guang Zhong Chen, *La réforme du droit de la procédure pénale en Chine*, Revue de science criminelle et de droit pénal comparé, 1998, p. 1-10; Ping Sun, Haifeng Zhao, *Le rôle de l'avocat dans la politique criminelle chinoise*, Revue de science criminelle et de droit pénal comparé, 1999, p. 793 and the following; Guang Zhong Chen, Qiu Hong Xong, *Perspective de la réforme du droit de la procédure pénale en Chine*, Revue de science criminelle et de droit pénal comparé, 1995, p. 795ff.

[25] See G. Theodoru, *op. cit.*, p. 70.

The basic rules framework is limited[26] to the provisions under art. 1 - 8 CPC; nevertheless, the framework of the principles that derive from these basic rules is more comprehensive due to the fact that some of the fundamental principles provided under these basic rules imply some derived principles[27].

The French doctrine[28] considers that the fundamental principles system contains two categories of principles:

- guideline principles on criminal justice: separation of judicial functions, the double jurisdiction principle, the principle on the composition of criminal courts, finding out the truth principle, celerity principle, performance principle;
- principles on the parties on trial: the right to a fair trial, the presumption of innocence, the right to defense, the victims' rights[29].

The Romanian doctrine[30] proposed a three-layer system of guideline principles of the criminal case: *the structural-institutional layer*, regarding the judicial authorities involved in the criminal case and their obligations (the following fundamental principles can be included: the application of criminal penalties and other restriction orders represent an exclusive attribute of courts, as authorities composed of law obedient independent judges; free access to justice within criminal case; the control of legality and reliability of court decisions is realized through means of attack, under the law); *the criminal case evolution layer*, to achieve the purpose of the criminal case (legality and official character of the criminal case; finding out the truth; active role; the language of the Romanian criminal case; equality of the parties to criminal authorities and Romanian criminal law, the presumption of innocence and guarantee of the right to defense); *the layer of the observance of human rights and fundamental freedoms in the criminal case*, as they are well-mentioned in international bills and in domestic legislation (the guarantee of individual freedoms; respect of human dignity; the guarantee of intimate life through the inviolability of domicile and the secrecy of correspondence).

The order in which basic rules are provided under the Criminal Procedure Code, with the exception of the rules on the purpose of the criminal case, which are preeminent, does not imply a hierarchy of these rules and, intrinsically, of the fundamental principles they provide. When systemizing these rules, the incidence area that fundamental principles can have was taken into consideration, starting from the principles with a larger area to the ones with a more restricted incidence area, the contribution they have to the purpose of the criminal case, as well as the natural interference between these basic rules, giving priority to those that present a higher reflection level upon the other rules[31].

Basic rules represent an organized whole due to their connections and their coordination is necessary in order to accomplish the purpose of the criminal code. If the interference leads to a collision of principles, both the concrete situation that generated the

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[26] The doctrine considered as fundamental principles also other rules with general character, which were introduced in the system of fundamental principles of the Romanian criminal case. In this sense, see G. Theodoru, *op. cit.*, p. 71; N. Volonciu, *Tratat de procedură penală. Parte generală*, vol. I, 3rd Edition revised and amended, Paideia Publishing House, Bucharest, p. 77; I. Neagu, *Tratat de Procedură Penală. Partea Generală*, "Universul Juridic" Publishing House, Bucharest, 2008, p. 70.

[27] See Vintilă Dongoroz, *Regulile de bază* supra cit., p. 41.

[28] For details, see Fr. Debove, Fr. Falletti, Th. Janville, *Précis de droit pénal et de procédure pénale*, 3e édition, Presses Universitaires de France, 2010, p. 319-347.

[29] We believe that, after the French model, it would also be necessary to introduce into the Romanian criminal procedure law the regulation of victim's rights, as they are provided under the preliminary article of the French Criminal procedure code.

[30] For details, see G. Theodoru, *op. cit.*, pp. 73-74.

[31] For example, finding the truth and the active role influence the evolution of the criminal case, but without infringing the legality principle and respecting the right to defense.

collision shall be taken into account and the considerations that justify the pre-eminence of one of the principles with opposite effects[32].

3. The content of basic rules of the criminal trial

The basic rules of the criminal trial are the following[33]: the *official character* of the criminal trial, which implies the obligation of judicial bodies to fulfill *ex officio* the necessary documents for the trial, unless it is otherwise provided by the law; the *legality* of the criminal trial, according to which the procedural activity, in all trial phases, shall be conducted in strict compliance with the criminal law; *finding out the truth,* involving the fact that judicial bodies have to find the truth about the criminal case, managing and researching all the evidence relating to the offense which is the subject of criminal proceedings, to the existence or lack thereof, to the guilt or innocence of the defendant, and to the individual circumstances of the offense and the offender; *the active role of judicial bodies,* which refers to their obligation to show the parties the procedural rights and faculties that they have according to the law and the conditions under which can be exercised, as well as the obligation of judicial authorities to order, ex officio, gathering evidence and performing procedural or processual acts that are necessary to resolve the case; *guarantee of individual freedom,* according to which, during the criminal case, the legal dispositions on provisional freedom deprivation measures, detention and provisional arrest, the cases and circumstances in which they can be arranged, shall be strictly obeyed; *the respect for human dignity,* meaning to treat every person under criminal prosecution or judgment, with human dignity, while torture, cruelty, inhuman and degrading treatments are punished by law; *the presumption of innocence,* according to which any person is presumed innocent until proven guilty by a final criminal decision; *the guarantee of the right to defense,* according to which during the criminal case, all parties have all prerogatives, faculties and possibilities granted by law to defend themselves, to support and to prove disprove the validity of a charge or a claim, as well as the right to legal assistance; *the use of the Romanian language as official language of the criminal case,* Constitutional principle, expression of national sovereignty, according to which all criminal written and oral activity shall be conducted in Romanian language; mother tongue is used in court and for all parties and the other people summoned to court, but procedural documents shall be drawn up in Romanian language; *the use of the official language via an interpreter,* Constitutional principle acknowledged as basic rule, according to which the parties that do not speak or understand Romanian language and cannot express themselves are provided, free of charge, with the possibility to take cognizance of the case pieces, the right to speak, as well as the right to draw conclusions in Court via an interpreter.

4. Criminal procedural law principles in the design of the new Criminal Procedure Code

In the new Criminal Procedure Code, as the basic rules of trial of the existing Criminal Procedure Code, the principles of criminal procedural law are laid down: the legality of trial, judicial separation, the presumption of innocence, finding the truth, *ne bis in idem,* mandatory task to start and exercise prosecution, fairness and reasonable time of trial, the right to liberty and security, right to defense, respect for human dignity and privacy and the right to official language interpreter[34].

In the design of the new Criminal Procedure Code, some principles are formulated identical to some basic rules, but others differ or are newly introduced[35], as follows:

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[32] See V. Dongoroz, *Regulile de bază* supra cit., p. 41.

[33] See G. Antoniu, C. Bulai, *Dicţionar de drept penal şi procedură penală*, Hamangiu Publishing House, 2011, p. 806.

[34] *Ibidem*, p. 807.

[35] For example, the text on judicial separation can be considered redundant, because such a separation should not be declared, but shall result automatically from the existence of different judicial bodies conducting the criminal trial, each body exercising the specific functions for its role in criminal proceedings. Eventually such an

- the principle of juridical investigation is not regulated separately, but is rendered in stylized form in other principles (Article 3 paragraph 2 of the new Criminal Procedure Code - Judicial functions are exercised *ex officio*, unless by law is set otherwise; Art. 7 paragraph 1 of the new Criminal Procedure Code - the prosecutor is required to trigger and conduct criminal proceedings ex officio; Art. 8 of the new Criminal Procedure Code - judicial bodies have the obligation to realize criminal prosecution and judgment). Instead, it is inserted in Art. 7 paragraph 2 of the new Criminal Procedure Code the principle of opportunity in a confusing form[36], meaning that, in the cases and under the conditions provided by law, the prosecutor may waive prosecution if, in relation to specific elements of the case, there is no public interest in achieving its object. The principle of juridical investigation should be kept in the formulation of the code in force, because it can operate concurrently with the principle of opportunity, even when there is no public interest in pursuing the defendant. Naturally one can raise the question whether opportunity works only for public interests or what happens if there is a public interest, but this is trivial, irrelevant[37].

- The active role principle is lacking of the basic rules of trial[38]. Instead, the legislator inserted in Art. 5, paragraph 2 of the new Criminal Procedure Code, with marginal name: "Finding the truth", the provision in paragraph 1, last thesis of Art. 202 Criminal Procedure Code in force, with marginal name: "The active role of investigating authorities". Therefore, only the prosecution bodies have the obligation to play an active role. This way, the fundamental principle of the active role, with implications throughout the criminal proceedings, is transformed, as incidence area, in a common principle, which applies only to criminal procedural phase, although the provisions of Art. 5, paragraph 2 of the new Criminal Procedure Code are part, as systematization, of the General Part, Title I, "The principles and limits of criminal procedural law". Through this option, the Romanian legislator set the judge the role of arbitrator, of Anglo-Saxon inspiration, renouncing to his active role, of continental origin[39]. At this stage of development of Romanian society, we believe that such a solution is not appropriate and, consequently, it requires the reintroduction of this principle in our proceedings law.

- Basic rule of guaranteeing person's liberty is enshrined in Art. 9, as marginal "Right to liberty and security". Correctly, the doctrine[40] indicated that it was more appropriate for Art. 5 of procedural law in force to have been taken as it is, being clearer than the new regulation. Moreover, Art. 9, paragraph 3 of the new Criminal Procedure Code is closer to the issue than the right to defend individual freedom and, consequently, would be required by *de lege ferenda* to be passed in Art. 10 of the new Criminal Procedure Code.

- The basic rule of using the official language with interpreter is treated with the basic rule regarding the language of criminal proceedings, the new Criminal Procedure Code brings together the two principles in Art. 12 with the marginal name of "Official language and the right to an interpreter". In recent doctrine[41] were expressed reservations on merging in Art. 12

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anticipated statement is a matter of doctrine not of legislation. The text itself has no normative character, but is a summary of judicial functions, as defined and explained by other provisions of the code [For details, see G. Antoniu, *Observaţii la proiectul noului Cod de procedură penală (I)*, in Romanian Penal Law Review no. 4/2008, p. 15-16].

[36] As in Art. 7 paragraph 3 of the new Criminal Procedure Code, the legislator uses the phrase "in cases and under the conditions provided by law!". Instead of the term "express" was more appropriate to use the word "explicitly", because between these words are nuances that distinguish them deeply.

[37] See G. Antoniu, *op. cit.*, pp. 17-18.

[38] *Ibidem*, p. 18.

[39] In the Anglo-Saxon trial, judge's role of arbitrator between the parties in the trial requires him to overlook that parties' activity, namely those who managed to administer evidence, to be conducted according to the law, a fair judgment of the case depends on the submissions made by the parties to clarify the cause (see G. Theodoru, *op. cit.*, p. 86).

[40] See G. Antoniu, *op. cit.*, p. 17.

[41] *Ibidem*.

of the new Criminal Procedure Code the provisions of Art. 7 and Art. 8 of the Code of Criminal Procedure in force, which fully satisfies the needs in this area.

Conclusions and proposals *de lege ferenda*

In the concept of the new Criminal Procedure Code, the wording of some of the principles of criminal procedural law is the same as the corresponding basic rules, but in others it differs or the legislator introduces new principles. In our opinion, the criticized texts and the shortcomings highlighted above could be corrected in a future regulation, and the legislator can interfere even with the law implementing the new Code of Criminal Procedure[42].

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[42] The law implementing the new Code of Criminal Procedure and amending and supplementing certain acts that contain criminal procedure provisions is posted on the website of the Ministry of Justice and Citizens' Freedoms being subject to public debate (www.just.ro).

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THE PRINCIPLES OF TERRITORIAL APPLICATION OF THE ROMANIAN CRIMINAL LAW ACCORDING TO THE PROVISIONS OF THE NEW CRIMINAL CODE[1]

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Abstract

The article aims to analyze the changes introduced by the new Criminal Code in relation to the territorial application of the criminal law. From this perspective, we see that the matter of territoriality is supplemented with additional provisions for defining the notions of crime and territory. The principles of personality and reality have undergone some adjustments in the way that they can be effective and, without to charge unnecessarily the judicial authorities and the principle of universality has been reformulated for the purposes of being applied for only those cases for which the Romanian state has assumed obligations on the international level. It have been also introduced some new elements as legal instruments in the matter of international cooperation, like the handing over the persons to the authorities of another EU Member State or to an international criminal court. These changes appear to be justified in the light of international treaties to which Romania is a State party.

Keywords: *territoriality, personality, reality, universality, handing over, extradition.*

Introduction

The social and political reality of the nowadays Romanian society have entailed the provisions of the new Criminal Code relating to the principles of territorial application of the Romanian criminal law to be significantly different than the provisions currently into force, regulating the same matter. The fact that Romania is now a democratic country, a Member State of the European Union, a signatory State of the European Convention on Human Rights and of the Treaty of Rome establishing the International Criminal Court, are key issues that led to some important changes in what regarding the principles of territorial application of the Romanian criminal law.

The facts like the free movement of the Romanian citizens which led to a significant change of the ratio between internal and external crimes and made possible the cross-border crimes, as well as the requirements of the E.U. bodies and European courts for the harmonization of the Romanian criminal legislation, were the arguments to determine the Romanian legislator to make a substantial adjustment of the principles governing the territorial application of the criminal law. Below, we are going to analyze each of the particularities of this matter, especially those which underwent some changes to the current regulations.

[1] *The new Criminal Code of Romania*, was adopted by *"the Law no. 286/2009 on the Criminal Code"*, published in the Official Gazette of Romania, no. 510 of 24 July 2009 and this name is going to be further used in this paper, in order to differentiate between its provisions and those currently in force.

The principle of "territoriality"

According to the principle of "*territoriality*", the Romanian criminal law can be applied throughout all the Romanian territory, in what concerning all kind of offenses, not distinguish the people after their quality of Romanian citizens, foreign citizens or persons without citizenship and also regardless such persons are effectively living or not in Romania. The enforcement of the Romanian criminal law in what concern the crimes committed in the area in which the Romanian state exercises its sovereign prerogatives represents an exclusive and unconditional attribute of the Romanian authorities.

Regulating *the principle of territoriality*, the new Criminal Code shows novelty not only by rearranging the structure of the current text but also by bringing the articles that describe the concepts of "*territory*" and "*offense committed in Romania*" from the final title dedicated to "*the meaning of the words or the phrases of the Criminal Code*" to the section dedicated to this principle. There are also some other substantive changes were to supplement the provisions and to clarify the meaning of these concepts.

We appreciate that the shift to which we refer is beneficial because the above mentioned concepts are intrinsically linked to the principle of "*territoriality*" and their inclusion into the text of the Article 8, paragraph (2), (3) and (4) of the new Criminal Code is intended to facilitate the understanding of the principle.

The paragraph (2) of this article makes nothing more than a restatement in other words of the notion of "*territory*" but retains, in principle, the same elements we find in the content of the Article 142 of the current Criminal Code.

The paragraph (3) stating what it means "*an offense committed on the territory of Romania*", remains basically the same content as in the Article 143. paragraph (1) of the current regulation in the sense an offense shall be deemed as fallen under the Romanian authorities' jurisdiction, *ratione loci*, if it has been committed on the territory of Romania, on a Romanian ship or aircraft, with the mention that the regulations of the new Criminal Code have specified in addition that the vessel must be under the Romanian flag and the aircraft must be registered in Romania. These explanations are very useful because once they are established by the law they also remove the gaps, as well as the uneven or speculative interpretations of these concepts.

As we can see, the law does not distinguish as the Romanian vessels or aircrafts, the offenses are committed on, are situated in the moment of the crime commission within the territory of Romania, on a territory of a foreign State or a territory which is not under the jurisdiction of a State. The distinction was not meaningless because, if they are committed in our country or in an area not subject to the jurisdiction of a State, there is no doubt, the Romanian criminal law is fully applicable *ratione loci* but, if the offense is committed in the territorial sea, in some mooring or landing places of a foreign State, then will be applied the criminal law of that State. The Romanian criminal law might be applicable, in certain circumstances, but only under the principle of "*reality*" or "*personality*" of the Romanian criminal law, as we are going to show below.

There is no indication in this text of the new Criminal Code relating to the offenses committed outside of the ships or aircraft, but in their proximity. According to international customary law, the applicable law depends on what kind of ship or aircraft is under discussion: if it is a military one or one in the service of a government or a State, the so called "*law of the flag*" is applicable, that is, the jurisdiction *ratione loci* is of the State owning that ship or aircraft; if having a commercial, civil or any other else statute, the criminal law of the State on which territory the offense was committed, is that applicable[2]. In other words, the

[2] See, M. Făgăraş, *Aplicarea legii penale in spatiu. Propuneri de lege ferenda*, "Revista de drept penal" Review, no. 4/2008, p 99.

principle of *"territoriality"* is justified by the nature of the vessel or aircraft, but unfortunately, the new criminal law does not distinguish it. It is quite possible that the legislator did not consider a priority to make a detailed and excessive regulating of the *"territoriality"* principle in as much as to distinguish the situations when offenses are committed inside of the ships/aircrafts or near to them, mere because there are many international customary laws and international agreements which provide very detailed rules and procedures for such incidents.

In the other hand, we observe that there are some criminal doctrines that expand the scope of the principle of *"territoriality"* of criminal law to other situations than the new Romanian Criminal Code has provided. The French criminal law, for example, states that its provisions are applicable also to the crimes which are committed against the French military ships or aircrafts[3], wherever they could be situated in the moments the crimes are committed and in certain circumstances even to the crimes committed aboard the ships or aircrafts not registered in France[4]. What we observe thus, the scope of the concept of *"territoriality"* in the legal sense and not physically, is not yet uniformly defined in the criminal doctrines of the states.

There is also some criticism of the new Criminal Code because the Article 8 paragraph (3) does not include into the definition of *"territory"* the entities like *offshore platforms, artificial islands* and *installations* belonging to the Romanian State but outside of its geographical area[5]. In the criminal doctrine there are some opinions according to which, these entities have to be assimilated to the ships and consequently they should not be explicitly mentioned in the text of the law. We believe, however, that the degree of similarity between them is not very high and therefore, extending the meaning of the *"territory"* by including these entities under Romanian sovereignty would have been beneficial.

Within the paragraph (4) of the Article 8 of the new Criminal Code there are some provision mentioning the elements which make possible the application of *the principle of ubiquity*. According to this principle, an offense shall be deemed as committed entirely within the territory of a certain state, only if at least one element of the crime, as the criminal law expressly provided, has been materialized on territory of this state. In addition to what is already provided into the current Criminal Code, in the Article 143, paragraph (2), (i.e. an *act of execution* or *the result* of the offense) the mentioned above paragraph of the new Criminal Code introduces some novelty items, namely, *the incitement*, *the complicity* and *the partial result* of the offense.

These changes of the text law seem to be natural because according to the definition of the *crime commission*, both in the current Criminal Code (Article 144) and in the new Criminal Code (Article 174), *the incitement* and *the complicity* belong to this concept of *crime commission*, in its broader sense, together whit the notions of *perpetration (co-perpetration)* and *attempt* and therefore, we think, there is no reason to exclude them from the content of the law.

In what regarding the added provision *"part of the result of the offense"*, we also consider that it is beneficial as the judicial practice gives us countless examples of the offenses whose results are materialized in more than one place. The increasing freedom of movement of the Romanian citizens, since Romania became an EU country, beside its benefits in creating prosperity and comfort, entails also some negative effects if we take in

[3] See, Article 113-4 of the French Criminal Code.
[4] See, Article 113-11 of the French Criminal Code which provides that French criminal law applies to crimes or offenses committed on board or against aircraft not registered in France if the following conditions exist: the perpetrators or the victims are French citizens, the aircraft landed in France after the offense has been committed; the aircraft was rent, without a crew, to a person who has his seat or residence in France.
[5] See, M. Făgăraş, *supra note no. 2*, p. 99.

consideration at least the increased possibility of the criminals to evade the law enforcement or the expansion of the phenomenon of the transnational organized crime networks. Had we refer, for example, to the so called *continued offenses* or *custom offenses*, there is a major likelihood that only certain acts or only part of the results of the offenses to occur within one country and so being, not including the provision "*part of the result of the offense*" among the elements which allow *the ubiquity principle* to be applied, would increase the chances of the criminals to evade the investigations, prosecutions or the law enforcement.

In the literature, there is also some criticism in the sense that there are still insufficient elements in this algorithm which makes possible the application of *the ubiquity principle.* Thus, in the case of an offense committed by *omission*, it should be specified also the place where the offender had to act as well as in the case of an *attempt*, the place where the result of the crime commission was expected to take place, according to the offender's criminal decision[6]. Considering the fact that the Article 17 of the new Criminal Code innovatively provides the possibility of an offense be committed *by omission,* we are entitled to believe that these additional provisions were welcome. However, it cannot be said that in the absence of the provisions to which we referred above, *the principle of ubiquity* would be affected in a way, in the cases of the crimes committed *by omission.*

The principle of "personality"

Known, also, like the *"active nationality principle"*, this principle is complementary to the principle of *"territoriality"* and is designed to ensure the efficiency of the Romanian criminal law by enlarging its application to the persons who having Romanian citizenship and being outside of country have committed crimes. This principle is enshrined in the doctrines of the most European countries and is justified, firstly, for practical reasons, that is, to avoid the impunity of the citizens of a State who commit offenses on the territory of another State and, secondly, for the sake of the proper implementation of the criminal policy of the State, that is, to ensure the respect for the criminal law from its own citizens, even when they are abroad.

Within the provisions of the Article 4, in the current Criminal Code we don't identify any limitation of *the principle of personality*, in the sense, for example, to be applied only for certain kinds of offenses, if the offense is incriminated in the both States or taking into account any other else requirements. Unlike, the legislator considers that some limitations in this aspect in the new Criminal Code, as stated in Article 9 (1) - (3), shall be introduced. Thus, the unconditional application of the principle, according to the provisions of paragraph (1) shall be made only if the offense committed abroad is punishable with life imprisonment or imprisonment for more than 10 years or, under paragraph (2), last sentence, for crimes committed on a territory which is not the subject of a state's jurisdiction. For the small and medium gravity crimes, such as those punishable with imprisonment up to 10 years, the paragraph (2) of the same article states the condition of *double incrimination*, that is, the fact committed by the Romanian citizen to be considered as being a crime according to criminal law of the state where it was committed, irrespective of its nature and limits of the punishment. According to the opinion of the most Romanian specialists in criminal law, this modification was required since long time ago because it is a model supported by the most of the European doctrines. It is widely appreciated that not being these above mentioned limitations, would put the Romanian citizen in a position of inferiority to the citizens of the State where the offense has been committed, since the last mentioned people would not be held criminally liable while committing the same offense.

Another amendment, set out in paragraph (3) is justified by practical reasons, namely, to avoid unnecessary loading of the Romanian judicial authorities with criminal files which

[6] *Ibidem*, p. 98.

may never be solved. Specifically, it was provided like a condition for commence the prosecution, the preliminary authorization of the General Prosecutor of the Prosecutor's Office attached to that Court of Appeal which was first notified with the case, or, eventually, the preliminary authorization of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

We should mention, also, two changes introduced by the new Criminal Code, related to what kind of the subjects should be applied the provisions regarding *the principle of personality*. Firstly, we observe that a new kind of subjects, namely the *"Romanian legal persons"* appears into the text of the law and secondly, the fact another kind of subjects, *"stateless persons residing in Romania"* was removed from the content of the article. If on the first amendment, the opinions are unanimous in the sense that once brought the legal entity among the subjects which can bear criminal responsibility under the Romanian criminal law, it is natural that these entities to bear also the consequences of the principle of the Romanian criminal law's personality for the offenses committed abroad. In contrast, the second amendment is challenged by many authors as being contrary to the *principle of territoriality* and implicitly to the *principle of personality*, as stateless persons residing in the country are usually treated like the Romanian citizens, they enjoy almost the same rights and consequently, it would be natural to withstand the rigors of the Romanian criminal law, even if the offenses are committed outside of the country[7]. There is still no explanation given by the authors of the draft new Criminal Code regarding their reason to remove this kind of subjects but in fact, regulating in this manner, an old tradition which dates back to the adoption in 1936 of the Criminal Code of the king Charles the Second, was broken.

Another criticism that we can bring to the depicted above legal provision is the fact that the requirement of *double incrimination* only for certain offenses, i.e. those punishable by imprisonment for more than 10 years, creates a different and unequal treatment for the Romanian citizens and thus violates the constitutional principles currently in force. In the absence of an explanation from the authors of the draft new Criminal Code, we afford an assumption about the reason to regulate in this differentiated regime. An offense for which the criminal law foresees a maximum penalty of more than 10 years requires an act of very high gravity for the public order in Romania. The fact that the State on which territory the offense was committed by a Romanian citizen does not incriminate this act, would create the possibility that this crime remain unpunished and thus an eventual further presence of the author in Romania is deemed as a danger for the public order or to induce among the other citizens, a sense of inequity. It's also true that the most of the civilized States share relatively similar values regarding the social culture and principles of morality, and given these circumstances, the fact that an offense punishable with more than 10 years in prison according to the Romanian criminal law do not be incriminated in another country, is quite unlikely. Therefore, we are entitled to believe that a *double incrimination* will always be in these situations, even if for the Romanian criminal law this condition is not required in order to apply the *principle of personality*.

There is also some criticism because of the insufficiency of the areas the *principle of personality* of the new Criminal Code can be applied on, namely its application is limited only to the persons who are already Romanian citizens at the time the offense has been committed abroad. There are some European legislations providing that the *principle of personality* must be applied even to the people who have acquired the citizenship after the crime commission[8]. The reason for extending the application of the principle of personality for such persons should be to prevent the evasion of the prosecution of the foreigners or stateless persons who

[7] See, G. Antoniu, *Noul cod penal comentat*, C.H. Beck Publishing House, Bucharest, 2006, p. 110.

[8] See Article 113-6, paragraph (3) of the French Criminal Code which provides that "The French criminal law applies even when the offender has obtained French nationality after the fact was assigned to him/her".

committed crimes abroad and then fled to Romania and acquire the status of a Romanian citizen.

A final remark concerning the legislative changes regarding *the principle of personality* of the criminal law is related to the transition period when the problem is to decide what criminal law will be the most favorable. From this perspective, the new Criminal Code provisions are more favorable in two ways: if the offense is committed abroad (except in areas which are not subject to the jurisdiction of a state), the penalty provided by the law is a fine or imprisonment up to 10 years and the act is not incriminated by the criminal law of the foreign state; if there is no a preliminary authorization of the General Prosecutor of the Prosecutor's Office as it is provided in the Article 9 (3) of the new Criminal Code. As these conditions imposed by the new law, by their nature, restrict the area of the personality principle's application or impose some additional procedural requirements than the old law, they are obviously more beneficial and will be applied retroactively.

The principle of "reality"

Another principle established in order to achieve the purpose of Romanian criminal law is *the principle of reality* known also as the *"passive nationality principle"* which means that any foreign person who by an act committed outside of Romania affect one of the values protected by the Romanian criminal law and the passive subject is the Romanian State and a Romanian citizen, is going to bear the consequences of the Romanian criminal law. According to the regulation of the current Criminal Code, namely the Article 5, the Romanian criminal law is limited to the situations where the crimes committed by the foreign citizens affected the *"Romanian State security"*, created *"serious bodily injury"* or affected the *"health"* of a Romanian citizen.

As the nowadays jurisprudence shows, there are countless other kinds of criminal acts which exceed these above mentioned. So, they might affect the Romanian State or the Romanian citizens and not stipulating them among those *the reality principle* has incidence on, would be likely to create a major sense of injustice and therefore, the Romanian legislative decided to eliminate the current restrictions of the law. For these reasons, the provisions of the Article 10 of the new Criminal Code stipulate that the area of applicability of *the reality principle* extends to all offenses committed abroad against the Romanian state, the Romanian citizens and the Romanian legal entities.

In this way, it seeks to avoid the situations where the intervention of the Romanian criminal law would be required, but that's not possible because the offense does not belong to those covered by the provisions of the Article 5, of the current Criminal Code. The legislative took into account, in particular, the offenses belonging to the so called "organized criminality" which are committed abroad against a Romanian citizen or against the Romanian state, and whose consequences could be very serious, even if they don't affect the life, the physical integrity of the citizens or the national security.

The new regulation will not result in practice, as somebody might think, to an unjustified extension of the Romanian criminal law jurisdiction entailing the overload of the Romanian Prosecutor's offices and Courts with cases arising as a consequence of this principle's application. As long as the commence of the prosecution in such cases remains a subject to the preliminary authorization of the General Prosecutor, as provided for in both the old and the new Criminal Code, he will appreciate the opportunity to open the proceedings after analyzing, case by case, the situations.

It is also to mention that the new law has an additional condition for the principle within the content of the Article 10 paragraph (2), namely the crime committed by the foreign citizen *"do not be the subject to judicial proceedings in the State on which territory the crime was committed"*. This specification of the law is absolutely necessary, as long as there is a general principle of law, *"ne bis in idem"*, accepted by the most of the states, according to

which, no person should be responsible twice or more for committing the same act. The reason to implement *the principle of reality* of the Romanian criminal law is to prevent the impunity of foreigners who commit crimes against the Romanian state or Romanian citizens due to the lack of response or inefficiency of the judicial authorities of the State where the offense was committed. Otherwise, if the state in question has commenced the legal proceedings, is meaningless and lack of equity that the Romanian State to do likewise.

In another train of thoughts, it is to mention that, as in the case of *personality principle*, the *Romanian legal person* was introduced as a passive subject and the *stateless person living in Romania* was removed from the content of the article. As the situation is the same, these changes do not require additional comments to those made in the previous chapter.

In what regarding the transitional situations when into the question is the principle of *"the most favorable criminal law"*, we can see the following situations: when the provisions of the Article 10 (1) of the new Criminal Code are applicable, *"the most favorable criminal law"* will be the old law, namely the current Criminal Code because it limits the applicability of the principle; when it comes to applying the provisions of the Article 10 (2), *"the most favorable criminal law"* is the new law because it provides an additional condition, that is, the criminal act not be a subject to the judicial proceedings in the State on which territory, the crime was committed.

The principle of "universality"

In what regarding this principle governing the territorial application of the criminal law, we can state that it was set up as a tool of last resort, in order to punish the criminal acts of extreme gravity, affecting the universal values, recognized and protected by the whole international community[9] and which, for some reason were not prosecuted and punished by the states having a direct concern in these cases. The current regulation applies to the offenses committed by foreign citizens or stateless persons, outside of Romania, other than those covered by the reality principle, with two conditions: the double incrimination of the crime; the perpetrator to be willingly in a place considered as being a Romanian territory.

The text of the new law, regulating the matter, namely the Article 11 of the new Criminal Code, was completely reformulated. The legislator took into consideration the fact that the provision of the Criminal Code, currently in force, although it seems to give a very wide range of applicability of *the universality principle*, actually, it was not invoked in the practice over four decades since its entry into force. The new wording of *the principle of universality* has exactly circumscribed the area of the applicability of this principle, limiting, actually, the intervention of the Romanian criminal law only to the situations where it is necessary, in order to comply with the commitments made by the Romanian state to the international level. So, the Romanian criminal law, in applying the *principle of universal jurisdiction* will intervene only in two situations: when provided in Article 11, paragraph (1), letter a), for the offenses that Romanian authorities have committed themselves to suppress under an international convention; if, as provided in Article 11 paragraph (1) letter b), the Romanian state has refused the extradition of a person, then, according to the principle *"aut dedere aut judicare"* it is requested to investigate, prosecute and try this person.

We observe that some provisions of the current law, concerning the exceptions of the application of *the universality principle* have not been modified. Concretely, the text law specifies two situations: when according to the criminal law of that State where the offense was committed, there is a provision that prevents the commence of the legal proceeding or its

[9] In the matters of the International Public Law, in order to express the universal values whose protection is required from the international community and the national jurisdictions, the Latin expression "jus cogens" is often used. See, P. Malanczuc, *Akehurt's Modern Introduction to International Law*, The seventh Edition, Routledge, London, 2004, p 114.

continuation; the penalty has been executed or, according to the criminal law of that State, is deemed to be executed. If the penalty is executed only partially, this part shall be taken into account by the Romanian authorities, following the provisions of the Romanian law with regard to the recognition of the foreign judgments. These provisions are designed to make possible the application of the principle *"ne bis in idem"* in the sense of preventing the repeated or in excess punishment of a person for the same offense.

In what regard the possibility that in the future, the concrete application of this principle to be made more frequently than it has been done so far, we consider that there are not more favorable premises in this purpose. Firstly, it should be noted that the *principle of universality* of criminal law is an institution that still arouses controversy in the field of the bilateral relations between some states[10] and is not recognized by the criminal doctrines of the other states[11]. On the other hand, because this principle is related to some extremely grave crimes, which are subjects of international agreements, treaties and even of the jurisdiction of a supranational court, namely the International Criminal Court, the remedy is more likely to be found at this level than at the level of the jurisdiction of a State which, in principle, has no direct involvement in the case.

Other legal provisions concerning *the territorial application of the Romanian criminal law*

The legal provisions related to the above mentioned principles have also some exceptions in their application. It is natural because the application of these principles is designed in as manner as the State to settle the necessary legal instrument for each fact requiring criminal proceedings. However, there are situations where the principles of Romanian criminal law come into competition with those covered by the criminal law of another state as well as some situations when the Romanian authorities give up the enforcement of the criminal law for the sake of keeping cooperation and friendly relations with other states. It does not mean, in the last situation, an absolute impunity of the perpetrators but derogation from the Romanian criminal law enforcement. For these reasons, the latest articles in the chapter governing the territorial application of the criminal law provided some legal provisions establishing the following: the legal provisions of the international treaties to which Romania is a Member State, prevail over the Romanian criminal law; the diplomatic representatives of the foreign states have immunity from the Romanian criminal jurisdiction according the international standards and customary laws; the legal conditions under which, the Romanian State accepts the extradition of the persons to other states.

From this point of view, the new Criminal Code does not modify the essence of the provisions currently into force. The only issue with novelty is the introduction of the expression *"handing over a person"*. It is commonly used in relation with another Member State of the European Union or with the international criminal courts. When we talk about the

[10] The fact a Court in Belgium accepted, based on *the principle of universality* of the criminal law, to commence a criminal trial, on 18 June 2001, after a complaint of some survivors and relatives of the Palestinians victims killed by the Lebanese Phalangists Christian Militia, supported by the Israeli troops in the camps of Sabra and Shatila in 1982, where the main accused was the Israeli Prime Minister, Ariel Sharon, was likely to swell in such a way relations between the two countries, that Israel has threatened to break diplomatic relations with Belgium.
In another case, the fact that the Government of Chile vehemently protested against the decision of a court in London, in January 2000, to extradite the former Chilean president, gen. Augusto Pinochet on charges of murder and torture of thousands of Chileans, by an Appeals court in Spain, after the request of Judge Baltasar Gorzon, the Supreme Court of U.K., namely, The House of Lords, rejects, finally, with a very tightly vote, the request for extradition, more for political than legal considerations.

[11] The *Common Law* States, in general, do accept the application of *the principle of universality of the criminal law* only where the offenses to be applied, have violated the universal values, belonging to the so called *"jus cogens"*. See in this respect Peter Malanczuk, *supra note no. 9*, p. 112.

transfer of a person to another EU country, it must be specified that the goal set up by the most recent E.U. treaties to create a *European area of freedom, security and justice*[12] requires the replacement of the system of multilateral extradition built upon *the European Convention on Extradition of 13 December 1957*. The last mentioned system involved a rather complicated mechanism of bureaucratic procedure, implicitly time duration of legal proceedings and was made exclusively by the Member States acting unilaterally. It is why the E.U. Member States have unanimously decided in the European Council that this policy is easier to be achieved, under *"the principle of subsidiarity"*[13] to the E.U. level. Thus, the *Framework Decision 2002/584/JHA* of 13 June 2002 on the *European Arrest Warrant* has created a simplified system of *handing over of the sentenced or suspected persons between the Member States* which eliminates the previous complex procedure as well as the risk of delay which is quite inherent in the traditional extradition procedure.

In what concerning this procedure in relation with an international criminal court, we can see it differs fundamentally from the extradition as the handing over of a person is not granted following a request of another sovereign state, but at the request of an international tribunal, that is, a supranational organization with jurisdiction in criminal matters. Through the ratification of its status, the requested State is a party, with all rights and obligations and accordingly, there is an obligation to hand over the person. Romania through the *Law no. 111/2002*, ratified *the Rome Statute of the International Criminal Court.*

The essential achievement of the above mentioned procedure of the handing over the persons, whether it applies in relation with an international criminal court or with another E.U. Member State, is that it establishes *a system of free movement of judicial decisions in criminal matters*, be it prosecution or judgment proceedings or final sentences. In other words, the main effect of this new procedure is the fact it has removed the political decision of the Member States from this field of cooperation in criminal matters, which is a real achievement because in the past time, in many occasions, the extradition proceedings resulted in delayed or impaired performance of justice.

A final observation about these procedures introduced by the *Framework Decision 2002/584/JHA* is that, given the increased possibilities of the national judicial authorities to bring the perpetrators before the courts, no matter where they are located in EU, inevitably, it will significantly reduce the area of applicability of the *personality and reality principles* of the Romanian criminal law. Actually, we believe that their application will be mainly for the situations where the crimes have been committed on a territory outside of the E.U.

Conclusions

The changes of the criminal legislation introduced by the new Criminal Code relating to the territorial application of the Romanian criminal law have been expected since long time ago, either because the current Criminal Code was adopted under a different political regime and still contains some provisions which are not harmonized with the nowadays socio-political conditions and also do not meet the spirit of constitutional principles, or because of the international commitments that Romania has undertaken, which require such measures. If the legislature has managed to create or not a modern and efficient legal framework in the

[12] See the provisions of Article 61 of the Treaty on European Communities, reiterated by the current Article 67 of the Treaty of the European Union, according to the numbering introduced by the Lisbon Treaty, in force since 1 December 2009, which states that *the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and for different legal systems and legal traditions of the Member States.*

[13] Known also under the slogan *"as close to the people as possible"*, the *principle of subsidiarity* as set out in Article 5 paragraph (3) of the Treaty of the European Union states that "under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action can not be sufficiently achieved by the Member States either at central level or at regional and local level, but the scale and effects of the proposed action, be better achieved at Union level".

criminal matter to which we refer, it is too early to say. If the most of the provisions innovatory introduced by the legislator in the new Criminal Code appears to be justified, there are some changes that are not supported by a reasonable explanation. We can mention here the provision in which, the stateless persons residing in Romania have been removed among the active and passive subjects for whom the personality and reality principles of Romanian criminal law must be applied, according to the case. Not only that these amendments contravene to the criminal law tradition in Romania but in this way the new criminal law excludes the application of its provisions to a category of persons widely spread in the EU landscape. The resident person without citizenship, that is, the person who legally resides into a country but he is not a national of another country enjoy almost the same rights like the citizens of that country, excepts, as a rule, the right to vote and to be elected. If we refer only to the European Union, even these restrictions were significantly reduced as the resident persons are allowed nowadays to vote or to be elected into municipal and European elections. If these attributes that have been until recently seen as the purest expression of the notion of *citizenship* have undergone adjustments in the sense of being extended to the resident persons, it is hard to understand why, according to the case, the punitive or protective effect of the Romanian criminal law should not be applied to these kind of people outside of the country, especially when there are not other else legal remedies.

Finally, perhaps after the entry into force of the new Criminal Code, in conjunction with the new Code of Criminal Proceedings, some of its provisions will prove to be inadequate or inapplicable. There are not, however, some absolute impediments because their change is also possible and we think that in any case, not the theoretical commentaries on it but its concrete application in the practice is the true test for the new Criminal Code. We only hope that the fate of the new Romanian Criminal Code will be a different one than of that adopted in 2004 and not entered ever into force and also hope that its provisions widely acclaimed as beneficial to be as soon as possible applicable.

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THE INSTITUTION OF SUCCESSIONAL RESERVE IN THE NEW CIVIL CODE

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Abstract

The article hereby approaches the new regulations regarding the institution of successional reserve, pointing out the differences between the previous Civil Code and the New Civil Code, in force starting with 1 October 2011, the legal characters and the method through which the successional reserve for each category of forced heirs is calculated.

Keywords: *successional reserve, disposable portion, forced heir, New Romanian Civil Code.*

Introduction

As well as in the previous Civil Code, the institution of successional reserve is defined by the New Civil Code[1] *as a limitation of the right to dispose of the inheritance. The NCC brings some modifications to the institution of successional reserve, which is why it is necessary to outline the new regulations in the field, by analyzing the differences between them and the old regulations, as well as the methods for establishing the successional reserve according to the new regulations, for each category of fixed portion heirs.*

I. The Concept of Successional Reserve

As a new development, successional reserve is formally defined in Art. no. 1086 of the NCC, taking over the definition already established in literature[2]. Thus, successional reserve is that part of one person's property that cannot become the object of *ex gratia* awards or of disinheritance, and is reserved for certain individuals, called "fixed portion heirs". The

[1] Law No. 287/2009 of the Civil Code has been published in the Official Gazette of Romania No. 511/2009, modified through Law No. 7/2011 and republished in the Official Gazette of Romania No. 505/15.07.2011.
[2] M. Eliescu, *Moştenirea şi devoluţiunea ei în dreptul Republicii Socialiste România*, Academy of Socialist Republic of Romania Publishing House, Bucharest, 1966, 1966, p. 320; Fr. Deak, *Tratat de drept succesoral*, "Universul Juridic" Publishing House, Bucharest, 2002, p. 302; D. Chirică, *Drept civil. Succesiuni și testamente*, "Rosetti" Publishing House, Bucharest, 2003, p. 303; L. Stănciulescu, *Curs de drept civil. Succesiuni*, "Hamangiu" Publishing House, Bucharest, 2012, p. 151.

difference between it and the totality of succession goods is the disposable portion, which the *de cuius* can dispose of freely.

If the *de cuius* exceeds the disposable portion through gifts or breaks the reserve by leaving heirs less than their rightful shares, the fixed portion heirs can request, at the date when the succession is initiated, the implementation of the shares they are entitled to in the succession.

Successional reserve is an institution of public order that limits the absolute character of a person's property and their contractual freedom, in favor of maintaining the solidarity of the family, the equality of heirs (especially that of descendants), and, no less importantly, the protection of heirs against potential abuses by the *de cuius*[3].

II. The Concept of Disposable Portion

In accordance with the definition established in literature[4], the disposable portion is defined in Article no. 1089 of the NCC as that fraction of the succession which the *de cuius* can freely dispose of *ex gratia* through gifts (*donatio* or will), despite the existence of fixed portion heirs (etymologically, the term is derived from Medieval Latin: *disponibilis*, i.e. that which can be freely disposed of).

The NCC does not directly establish the quantum of the disposable portion, since it is obtained through a calculation of the difference between the calculated value of the estate (Art. no. 1091 of the NCC) and the value of the total reserve (namely the sum of the reserves for all the descendants that can and want to come to the succession of the *de cuius*).

III. The Legal Characters of the Successional Reserve

Successional reserve features the following legal characters: a) it is *part of the succession* – being directly individualized through the enforcement of Article no. 1088 NCC; the reserve is meant to preserve a part of the value of the estate for the rightful heirs, and not certain goods or a part of each category of goods; in order to be able to access the reserve, the fixed portion heirs have to actually come to the succession, and meet all the conditions stipulated by law; b) it has a *public order* character – the successional reserve is firmly established by law, but the law only imposes the right to access the reserve, and not the incumbency of accepting it; what is more, we should take into account that the right to access the reserve is a personal right, granted to the individual fixed portion heirs on the day when the succession is initiated, not a right acquired from or through the deceased; c) it is *individual* – even though it is indivisibly attributed to the fixed portion heirs, it is calculated based on each individual fixed portion heir that physically come to the succession; we do not consider this point of view justified, in the sense that, currently, the reserve is ascribed to the entitled heirs, in all cases, in a collective manner, being a portion of an universality, which is ascribed to a group of heirs and not to heirs individually, including such cases where there is only one heir[5]; d) it is *realized in nature* – only exceptionally can the reserve be ascribed/ unified as a money equivalent[6] (Art. no. 1097 NCC); e) it is unavailable – in the sense that the reserve cannot be altered through *donatio* or gifts by will[7] or by the testator leaving heirs less than their rightful shares, in the first two cases under the penalty of reduction of the excessive gifts.

The reserve is attributed with universal title, being a part of the estate, and its attribution implies the compulsory of repaying debts, as regulated under Art. no. 1114, para.

[3] M. Grimaldi, *Droit civil. Successions*, Litec Publishing House, Paris, pp. 275-284.
[4] M. Eliescu, *op. cit.*, p. 320; Fr. Deak, *op. cit.*, p. 302; L. Stănciulescu, *op. cit.*, p. 151.
[5] Ilioara Genoiu, *The succesional reserve in the New Civil Code`s regulation. Part I*, Journal of Legal Studies no. 1/2011, p. 163; I. Popa, *Rezerva succesorală și moștenitorii rezervatari în reglementarea noului Cod civil*, "Dreptul" Journal no. 6/2011, pp. 33-34.
[6] Fr. Deak, *op. cit.*, p. 305.
[7] M. Eliescu, *op. cit.*, p. 325.

(2) of the NCC, corroborated with Art. no. 1115 para. (1) of the NCC, corresponding to the change in vision of the NCC, in the sense that the universal heirs and those with universal title are held responsible for the successional passive only with the goods in the successional property, and only proportionately with the successional rightful legal share that each of them is entitled to.

IV. The Fixed Portion Heirs

As well as in the previous set of regulations, the NCC regulates that the quality of fixed portion heirs belongs to: a) the surviving spouse – that is, the individual who holds the position of spouse to the *de cuius* on the date of the initiation of the succession (according to Art. No. 970 of the NCC, it is necessary that on the date the succession is initiated, no definitive divorce ruling be in existence); b) successors – by which is meant the children of the *de cuius* and their direct descendants *ad infinitum*, from matrimony, outside matrimony, and from adoption [Art. No. 976 para. (1) NCC].

Given that the successional reserve is ascribed to heirs under the title of intestacy, in order to establish the entitlement of any fixed portion heirs, the rules of intestacy are applied.

V. The Scope of Successional Reserve. The Individual Character of the Reserve

As a new development from the prior regulations, Art. No. 1086 of the NCC directly regulates the concept of reserve, and at the same time establishes its quantum by referring to each fixed portion heir, and not by determining the value of the disposable portion in the case of existing fixed portion heirs. Thus, the value of the reserve is calculated as a fixed portion (half) of a variable portion, the latter being calculated as regulated by the laws of intestacy.

VI. The Reserve of the Surviving Spouse

The reserve of the surviving spouse is half of their rightful legal share according to the class of heirs it is faced against (Article No. 972 NCC), and this result in the following *legitima portionis*:

- 1/8 of the estate (1/2x1/4), if faced against the first generation of heirs (the class of direct descendants)
- 1/6 of the estate (1/2x1/3), if faced against the parents and the brothers and sisters and their sons and grandsons (or their issue to the fourth generation)
- 1/4 of the estate (1/2x1/2), if faced against *only* the parents or *only* against the brothers and sisters and their sons and grandsons (or their issue to the fourth generation)
- 3/8 of the estate (1/2x3/4), if faced against the third class of heirs (the class of ordinary ascendants), or with the fourth class of heirs (the class of ordinary collaterals)
- 1/2 of the estate, if there are no relatives of successional degree, or, despite their existence, they cannot (due to being unworthiness), or do not wish to (due to renunciation) come to the succession [Art. 971 para. (2) of the NCC].

VII. The Imputation of the Surviving Spouse's Reserve to the Succession

If the surviving spouse comes to the succession together with any of the classes of legal heirs, the portion that he or she is entitled to as fixed portion heir will be established with priority over the rightful legal shares or the *legitima portionis* of the competing classes of heirs.

As to the manner in which the reserve of the surviving spouse is imputed, the previous regulation featured differences of opinion, either in that the reserve of the surviving spouse would be imputed to the disposable portion[8], or in that it is imputed to the entire estate[9], the latter being more adequate, which is why it was taken over by the NCC. In the NCC, the imputation of the *legitima portio* of the surviving spouse over the entire estate[10] will have as

[8] M. Eliescu, *op. cit.*, p. 338.
[9] F. Deak, *op. cit.*, p. 318; D. Chirică, *op. cit.*, pp. 316-317.
[10] L. Stănciulescu, *op. cit.*, p. 158; The National Union of Notaries Public from Romania, *Codul civil al României. Îndrumar notarial*, Volume I, "Monitorul Oficial" Publishing House, Bucharest, 2011, p. 404.

affect the corresponding modification of the *legitima portionis* or the rightful legal shares of the heirs he or she is competing against. Both the priority access and the corresponding modification of the portions ascribed to the other classes have lost in terms of legal relevance under the new regulations of intestacy, because the rightful legal shares are determined for each individual class, and for the surviving spouse. We should also mention that the surviving spouse is a fixed portion heir only in what concerns the right to intestacy, and not in what concerns their homestead rights (Art. No. 973 of the NCC), or the special entitlement over furniture and household items (Article No. 974 of the NCC), of which the *de cuius* is entitled to dispose freely.

Compared to the regulations of Law No. 319/1944[11], Art. No. 1088 of the NCC does not bring further modifications to the quantum of the surviving spouse's reserve, but it clarifies any unclear aspects that might arise from the manner of imputing the *legitima portio* he or she is entitled to over the estate.

VIII. The Descendants' Reserve

The reserve of each descendant is half of their rightful legal share; this results in one descendant having a reserve of ½ of the succession, two descendants will have ¼ each, three descendants 1/6 each, four descendants 1/8 each, and so on; compared to the regulations of Article No. 841 of the previous Civil Code, Art. No. 1088 rules a diminishing of the descendants' reserve, beginning with the rightful reserve for two fixed portion heirs (according to the prior regulations, each of these had a reserve of 1/3 of the succession; in the case of three descendants, each had a reserve of 3/8, etc.).

If the *de cuius* had descendants who, on the date the succession is initiated, are deceased or unworthy, they are not taken into account when the reserve quantum is calculated, unless they themselves had descendants who are able and wish to come to the succession of the *de cuius*, either through mandate or in their own name. The renouncing descendants are not taken into account when the reserve is calculated, and if they had descendants of their own, these can only come to the succession in their own name.

When the descendants are not first generation descendants, the reserve is calculated based on whether they come to the succession by mandate or in their own name – thus, if they come by mandate, the reserve is calculated *per stirpes* and is correspondingly divided, and if they come in their own name, the reserve is established through devolution *per capita*. As to this last hypothesis, we believe that one can no longer accept the solution provided in literature under the auspice of previous regulations[12], in the sense of dividing the succession also *per stirpes*, although it remains just, because otherwise the children of the *de cuius* would be able to modify the quantum of the reserve through renunciation, considering the new individual character of reserve, and the impossibility of extending an effect of representation within an institution ruled by imperative regulations – what is more, the issue is also addressed by Art. No. 1091 para. (5) of the NCC.

In the event of competing descendants and the surviving spouse, his or her reserve will always be 1/8 of the succession, whereas the descendants' reserve will vary according to their number: one descendant – 3/8; two descendants – 3/16; three descendants – 1/8; four descendants – 3/32 etc. This calculation method of the reserve is also new from the old solution in literature which, in the absence of the enforcement guidelines of Law No. 319/1945, imputed the descendants' reserve to the rest of the succession, obtained after deducting the surviving spouse's reserve; currently, this method is no longer necessary, due to the direct determining of the reserve for each individual heir, as prescribed by Art. No. 1088.

[11] Law No. 319/1944 concerning the succession rights of the surviving spouse, published in the Official Gazette of Romania, no. 133/10.06.1944, is abated by Art. No. 230 j. of Law No. 7/2011 for the enforcement of Law No. 287/2009, published in the Official Gazette of Romania, no. 409/10.06.2011.

[12] Fr. Deak, *op. cit.*, pp. 311-312.

IX. The Parents' Reserve

The reserve of each parent is half of their rightful legal share. If, on the date of the demise of the *de cuius*, there are no descendants, or they do not wish or are unable to come to the succession, the law grants the parents' right to the reserve; this results in one parent having a rightful legal share of:

- 1/12 of the estate if he or she competes both with the surviving spouse, and with the brothers, sisters, and their sons of grandsons (or their issue to the fourth generation) (Art. no. 977, para. (1) of the NCC, in relation to Art. No. 978); for two parents, the rightful legal share for each of them would also be 1/12;
- 1/4 of the estate if he or she competes only with the surviving spouse (Art. no. 977, para. (2) of the NCC); for two parents, the rightful legal share for each of them would be 1/8;
-1/8 of the estate if he or she competes only with the brothers, sisters, and their sons of grandsons (or their issue to the fourth generation) (Art. no. 978 a. of the NCC); for two parents, the rightful legal share for each of them would also be 1/8;
-1/2 of the estate if he or she comes alone to the succession (Art. no. 979 of the NCC); for two parents, the rightful legal share for each of them would be of 1/4.

We should also mention that, in the event of successional entitlement to the succession of the *de cuius* of several parents (a maximum of four), the above-mentioned shares will be correspondingly midwife, following the enforcement guidelines of Arts. no. 976-80 of the NCC (e.g. for three parents, the rightful legal share for each of them would be 1/6; for three parents competing with the surviving spouse, the rightful legal share for each parent would be of 1/12).

We would also emphasize that, even though Art. no. 978 b. mentions a rightful legal share both parents are entitled to, the reserve granted to them must always be individual. Compared to the enforcement guidelines of Art. no. 843 of the previous Civil Code, Art. no. 1088 imposes a significant diminishing of the parents' reserve.

Conclusions

The institution of succesional reserve, as a limitation of the right to dispose of the succession, has been substantially modified by the NCC, both under the aspect of the definition of the concept, and of the concept of disposable portion, as well as under the aspect of the calculation method for the reserve, and under the aspect of the individual attribution of succesional reserve. It is clear that the modifications brought by the NCC to the method of establishing the successional reserve cause a significant diminishing of the descendants' and the parents' reserves, compared to the surviving spouse's reserve, which has not suffered modifications.

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THE PROTECTION OF NATIONAL MINORITIES IN THE EUROPEAN FRAMEWORK. ROMANIA, A MODEL OF EUROPEAN INTEGRATION

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Abstract

The protection of national minorities is a very important theme in European countries and in the European Union. Although there is not an universally accepted definition of the notion of national minority, and states can interpret the concept in their own way and adopt tools to achieve this protection, or not, the European Union promotes diversity and recommends states to adopt various measures and instruments in this field. This is obvious in the current context, when different collectivities, more or less ethnically homogeneous, increasingly demand more rights. Considering that European stability is reflected in the stability of states, which in turn comes from the policies of the Member States, the Union encourages the promotion and the protection of minorities 'rights. Romania has made significant progress in the protection of national minorities; however, some deficiencies still stand today.

Keywords: *national minorities, languages rights, autonomy, European Union, minority languages.*

Introduction

Democracy means accepting the fact that every citizen of the state has rights that can be exercised in the State of citizen of which he/she is, regardless of his/her national origin, and also the creation and the functioning of institutions to ensure this. The sequence of this fact is that having rights imply having obligations, and minorities, like the citizen belonging to the majority, cannot evade State sovereignty.

In many European countries, reality show that the people belonging to minorities can be good citizens of their state, and the state can enforce and protect their ethnic, cultural, linguistic and religious identity, and also their traditions and culture. This ultimately means social integration. The protection of the rights and identities of the persons belonging to minorities must be a factor of democracy, civilization and order. Democracy is thus a reason and a limit of the rights of the persons belonging to minorities[1].

1. Definition and recognition of national minorities.

The use of means designed to protect national minorities, and special measures, involves the recognition of the fact that certain groups have the status of national minorities. Their existence has been denied by some states. When ratifying the International Convention

[1] I. Diaconu, *Minorităţi în dreptul internaţional contemporan* (*Minorities in Contemporary International Law*), C.H. Beck Publishing House, Bucharest, 2009, p. 424.

on Civil and Political Rights, France declared that, in the light of art. 2 of the Constitution of the French Republic[2], art. 27 of the Convention[3] does not apply to the Republic.

Thus, before analyzing different minimum standards for the protection of the minorities' rights is necessary their recognition in the states and implicitly a definition of the notion of national minority.

The recognition of national minorities raises the problem of defining them. What is a national minority? What groups have this status?

Defining national minority is a difficult enough process, some would say impossible, that's because there is no definition of national minorities that has been universally accepted both by the doctrine and the jurisprudence, and also by the international instruments. The absence of a definition, widely recognized, may be an opportunity for some states to prevail of their unilateral interpretation in terms of the notion of national minority and thus give or avoid granting rights to certain minority groups on their territory.

However, in the Recommendation 1201 of the Council of Europe[4] there is a definition of national minority, this being a reference to the extent that the document was introduced in the treaties between Romania and Hungary, Romania and Ukraine, Hungary and Slovakia. As for these states, the Recommendation 1201 became part of the domestic law; they are obliged to accept, for their ethnocultural communities under their jurisdiction, at least the sense of the Recommendation 1201. The contract parties have agreed, however, that the Recommendation 1201 does not refer to collective rights and imposes no obligation for the parties to grant, to the mentioned persons, the right to a special status of territorial autonomy based on ethnic criteria.

The definition given to the minority by this recommendation in art. 1 is a follows: "National minority means a group of people who a) are resident in this state and are its citizens, b) maintains ethnic, long-lasting and firm ties with this state, c) present distinctive ethnic, cultural, religious or linguistic characteristics, d) are sufficiently representative but less numerous than the rest of the population of that state or of a region of this state, e) are motivated to preserve all of what constitutes common identity, especially culture, traditions, religion or their language"[5].

Thus, these minorities represent communities that are living in a state other that its homonym and whose members have the sense of belonging to a nation that is not the support nation of a state[6].

In the UNO, the Subcommittee on prevention of discrimination and protection of minorities, in 1950 proposed the following definition: "The term minority includes only those non-dominant groups of people, who have and want to preserve traditions or stable ethnic, religious or linguistic characteristics, obviously different from-those of the rest of the population. Such minorities should properly include a sufficient number of persons, in order

[2] Article 2 of the Constitution of France: "France is an indivisible, secular, democratic and social republic. It shall ensure the equality of all citizens before the law, regardless of origin, race of religion. All beliefs will be respected".

[3] Article 27 of the International Convention on Civil an Political Rights: "In those states in which there are ethnic, religious or linguistic minorities, to the persons belonging to such minorities shall not be denied the right to enjoy, in common with the order members of their group, their cultural life, to profess and practice their own religion or to use their own language".

[4] The resolution was to become a protocol to the European Convention on Human Rights, but this project was dropped.

[5] Art. 1 of the Additional Protocol 1201 to the European Convention on Human Rights, cited by D. C. Dănişor in "*Tratat de Drept constituţional şi instituţii politice"* (*Treaty Of Constitutional Law and Political Institutions*), Sitech Publishing House, Craiova, 2006, p. 340.

[6] Guy Heraud quoted by Mădălin Savu-Ticu, according to Yves Plasseraud, "*Les Minorités"*, Montchrestien, 1998, p. 44.

to develop these characteristics. Members of such minorities must be loyal to the state whose citizens they are"[7].

The Commission of democracy through law of the Council of Europe proposed in a project of Convention on minorities' issue, in 1993, the following definition for national minorities: "a group numerically smaller than the rest of the population of a state, whose members, who have the citizenship of this state, possess ethnic, religious or linguistic characteristics different from those of the rest of the population and are motivated by the will to keep their culture, traditions, religion or language"[8].

In a conception[9], defining national minorities should note, besides the objective characters, also the subjective criteria. Thus, a group is not minor unless, subjectively, is part of the nation, so it freely participates to the creation of a present time and of a common destiny with the minority. Thus, the key is the participation and not the separation, the unification rather than the break. In other words, the law doesn't have to give up to unify, doesn't have to become a juxtaposition of group treatments, but to protect the persons belonging to groups, but without helping group affirmation, but only that of the persons who compose it.

2. European minimum standards for the protection of the members of ethnic groups.

In the field of the protection of national minorities there have been crystallized two concepts.

An initial concept, based on the Enlightenment ideology, accused social and political inequalities within society, and seeks to protect the individual against them, making him a subject of law.

Both the basic premise and the purpose of this concept is the equality of men.

In the second concept, which is based on the German theory of "ethnic groups", promotes their collective rights. According to it, ethnicity is the ultimate criterion that justifies special treatment, collective rights and reconfiguration of Europe based on ethnocultural homogeneous regions. This theory promotes the independence of the ethnoregions towards the state, through language, culture, education, also wanting to establish sovereignty in the legislative, financial and judicial domains. In other words, there is promoted an orientation of separation of regions, based on ethnic criteria, towards the states in which they are formed.

Both theories may be criticized. Firstly, the Enlightenment theory doesn't define the notion of equality. This should not be a formal one, but one more before the law, but more an equality in law, a right to non-discrimination.

On the other hand, the German theory promotes the collective rights of ethnic groups in a unitary national framework, the unification doesn't mean denying the identity objectively determined of minorities, but only the refusal to grant the group the right to determine this identity, the persons that compose this group maintaining that power[10]. Thus, we can speak

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[7] The definition of minority proposed by Doc. E/CN. 4/358 of 30th of January 1950, as cited by I. Diaconu, "*Minorităţi în dreptul internaţional contemporan* (*Minorities in Contemporary International Law*), C.H. Beck Publishing House, Bucharest, 2009, p. 27.

[8] Doc. C.D.L. (91) adopted on February 8, 1991, as cited by I. Diaconu, "*Minorităţi în dreptul internaţional contemporan* (*Minorities in Contemporary International Law*), C.H. Beck Publishing House, Bucharest, 2009, p. 27.

[9] D. C. Dănişor, "*Tratat de Drept constituţional şi instituţii politice"* (*Treaty of Constitutional Law and Political Institutions*), Sitech Publishing House, Craiova, 2006, p. 343-354.

[10] M. Savu-Ticu, "*Cultul minorităţilor – spre o nouă paradigmă a avantajului de a fi minoritar*" (*The cult of minorities- to a new paradigm of the advantage of being a minority*), "Universul Juridic" Publishing House, Bucharest, 2010, p. 258.

only in terms of national and unified states, than of the existence of certain rights exercised collectively and not of collective rights[11].

The asserting of the group in itself, objectively making the affiliation to itself, commits minorities and the majority to fight for more rights, not for more Law, making the society to transform into a sum of competitive groups, each tending to acquire rights to the detriment of the others[12].

The Framework Convention of the Protection of National Minorities, adopted in 1994[13], stipulates the protection of minorities by guaranteeing the rights of individuals belonging to such groups. Thus, it does not include collective rights, but includes a number of principles concerning the rights of individuals belonging to national minorities, such as: the need of promoting equality, the prohibition of discrimination, the promotion and development of culture, religion, language and traditions, the possibility of using mother tongue in public and private space, as well as in relations with authorities, the freedom to create educational institutions, the prohibition of forced assimilation, etc.

The protection of minorities in the European Union belongs more to the policies of Member States, as they have different bodies, practices and legislation regarding minorities.

The concern of European Union towards the problems posed by the protection of minorities is quite recent. This can be noted, as the enlargement of the Union to former communist space. There have been many developments in these countries, former communist, in the development of legislation on national minorities, a fat realized by taking into account the international standards. Both the international community and states have made efforts to promote minorities' rights, establishing different tools to protect them.

The Article 27 of the International Convention on Civil and Political Rights stipulates that states are offered a measure of adaptability in deciding how to implement to objectives of the Convention at national level, taking into account the specific circumstances of their countries.

According to the Framework Convention of the Protection of National Minorities, parties oblige themselves to adopt, where necessary, appropriate measures to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority.

Thus, they will properly take into account, in this regard, specific conditions of the persons belonging to national minorities[14].

The Framework Convention for the Protection of National Minorities promotes the minorities' rights to culture, language, traditions, religion, and freedom of expression, freedom of association, without interferences from public authorities and regardless of frontiers.

According to Article 13 of the Convention for the Protection of rights of national minorities, states recognize the right of persons belonging to national minorities to establish and manage their own private institutions of education and training. Regarding this article, the Hungarian minority of Romania wanted to create a faculty with Hungarian language teaching, in the University of Medicine and Pharmacy of Târgu Mureş, project that did not materialize as the Government Decision concerning the establishing of the faculty in the Hungarian language was suspended by a decision of the Appeal Court of Târgu Mureş.

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[11] Ibidem.

[12] D. C. Dănişor, *"Tratat de Drept constituţional şi instituţii politice"* (*Treaty of Constitutional Law and Political Institutions*), Sitech Publishing House, Craiova, 2006, p. 345.

[13] The Framework Convention for the Protection of National Minorities was signed at Strasbourg on February 1, 1995. Romania has ratified the Convention through the Law no. 33 of April 29, 1995, the text of which was published in the Official Gazette no. 82 of May 4, 1995.

[14] The Article 4, paragraph 2, the Framework Convention for the protection of national minorities.

The Framework Convention recognized the possibility of creating educational and training institutions, belonging to a national minority, but, these institutions, as there is clearly stated in the Convention, must be private. However, the University of Medicine and Pharmacy of Târgu Mureş is a public institution of education, and therefore it is impossible to set up a faculty teaching in a minority language in a state institution. If there was accepted such a possibility of establishing a Hungarian faculty in a state university, basically a public institution, it would be inconsistent with the stipulations of the Romanian Constitution, according to which, the official language is the Romanian language, and the law does not provide that multicultural universities would be allowed to use another "official language" than the Romanian language.

The Constitution of Romania is strict about the use, in public life, of another language than the official language, about the regulations that create, in the matter of using minority languages, collective rights, or that connect the existence or the exercise of rights or fundamental freedoms to the position of citizens in the territory.

Granting linguistic rights on territorial bases also anticipates a division of the public power, incompatible with the concept of hegemony and sovereignty, dominant in the unitary national state. These represent even limits of the revision of the Constitution, and the constituent power cannot introduce constitutional dispositions that create restrictive consequences in terms of freedom for the other citizens by granting rights to use another language than the official one.

On the other hand, another important instrument concerning the rights of national minorities, besides the Framework Convention, is the European Convention for the protection of regional or minority languages. Among the states that have signed and ratified the European Convention for the protection of regional or minority languages there is also Romania.

The European Charter for the protection of regional or minority languages[15] provides, in Article 17 that in areas where these languages (minority or regional) are used, and depending on the situation of each language, the parties base their policies, legislation and practice on the following objectives and principles: the recognition of regional or minority languages as an expression of the cultural wealth; facilitating and/or encouragement of the use, orally or in writing, of regional or minority languages, in public or private life; establishment of appropriate forms and means for the teaching and learning regional or minority languages, at all appropriate levels; the promotion of studies and researches in the field of regional or minority languages at universities or equivalent institutions.

Although Romania is the country that theoretically protects the largest number of languages[16], through the ratification of the European Charter for the protection of regional or minority languages, does not mean, however, automatically, that it understood and it is ready to apply its stipulations, although such a behavior supposes a violation of the domestic law. Thus, according to Article 11, paragraph 1 of the Constitution, Romania pledges to fulfill as such and in good faith its obligations that come from the treaties to which it is a party. And paragraph 2 of the same article specifies that the treaties ratified by the Parliament are part of the domestic law. Or it follows that through ratification, the European Convention for the protection of regional or minority languages is part of the domestic law and the fulfillment of

[15] The European Charter of regional or minority languages was adopted by the Committee of Ministers on June 25, 1992, being opened for signature at Strasbourg on November 5, 1992, and became valid on March 1st 1998. Romania signed the Charter in 1995, ratified it in 2007 through the Law no. 282/2007, published in the Official Gazette no. 752 of November 6, 2007, and became valid on January 29, 2008.

[16] According to the Law no. 282/2007 for the ratification of the European Charter of regional or minority languages in Romania, the stipulations of the Charter apply to the following minority languages used in Romania: Albanian, Armenian, Bulgarian, Czech, Croatian, German, Greek, Italian, Yiddish, Macedonian, Hungarian, Polish, Romani, Russian, Ruthenian, Serbian, Slovak, Tatar, Turkish, and Ukrainian.

the obligations arising from it are subject to the control of the ordinary judge. This can get a certain connotation in terms of the Government Decision[17], which allowed the establishment of a Faculty of Medicine and Pharmacy with programs in Romanian, Hungarian and English at the University of Medicine and Pharmacy of Târgu Mureş.

Hasn't the Romanian state failed to fulfill its commitments and hasn't proceed to the "precise" accomplishment of its obligations, as they emerge from the European Convention for the protection of regional or minority languages or from the Framework Convention for the protection of national minorities when the Government adopted the decision of the establishment of a Hungarian faculty at the University of Medicine and Pharmacy of Târgu Mureş?

We conclude that the state has not violated its obligations assigned by the above-mentioned treaties, to which it is a party; moreover, it tried to promote the education in minority languages, in university framework. This decision was, however, suspended by the Appeal Court of Târgu Mureş. Although the decision was appealed by the Prime Minister of Romania at the time, the government that succeeded to him understood not to proceed to the appeal. We may ask ourselves in these circumstances, which were the defining elements that worked together to build a conception against the establishment of a faculty in minority language? The political declarations marched on notions as national state, official language, and the fact of creating an institution with the teaching in another language than the national language would lead to "separation", basically arriving at the eternal problem of ethnicity. Should be to blame nationalism and the unitary character of the Romanian state or other political factors much more consistent?

Although the European Charter of regional or minority languages was ratified by many states[18], there are also states that have not agreed to proceed in this way, referring more specially to the case of Belgium and France. Although France signed the Convention for the protection of regional or minority languages on May 7, 1999[19], not ratifying in until now, Belgium has not even signed the Carter until now.

The protection and the promotion of minority language, as essential element of the identity of national minority, is one of the factors that lead to certain stability in the state.

In Romania there were made real efforts for the support and the protection of national minorities. Along with constitutional provisions[20], the legislation on national minorities is very large. Laws and regulations that govern the domain of national minorities in Romania include rights to education, culture, keeping the national identity, rights concerning anti-discrimination, etc.

As institutional structure meant to protect the rights of international minorities, the Council of National Minorities[21] has several objectives, including: supports the activity of the organizations of the citizens belonging to national minorities; proposes to the Government, through the Department for Interethnic Relations, measures to improve the social and cultural life of citizens belonging to national minorities and the reflection, as exact as possible, of the

[17] The Government Decision no. 230 of March 27, 2012, concerning the establishment of the Faculty of Medicine and Pharmacy in the University of Medicine and Pharmacy of Târgu Mureş, published in the Official Gazette of Romania, no. 208 of March 29, 2012.

[18] States that have ratified the European Charter for the protection of regional or minority languages, on the site: http:/conventions.coe.int/Treeaty/Commun/ChercheSig.asp?NT=148&CM=&DF=&CL=ENG.

[19] According to the site of the Council of Europe. www.coe.int.

[20] Article 6 of the Romanian Constitution, paragraph 1 "The state recognizes and guarantees, to the persons belonging to national minorities, the right to keep, to develop and to express their ethnic, cultural, linguistic and religious identity and paragraph 2 stipulates that "Protective measures taken by the state for the preservation, the development and the expression of the identity of persons belonging to national minorities shall be according to the principles of equality and discrimination in relation to the other Romanian citizens."

[21] According to the site: http:/www.dri.gov.ro/index.html?page=consiliu_min.

issue of national minorities in the media; analyzes and proposes to the Government, through the Department for Interethnic Relations, the measures necessary to develop optimal conditions the education in the languages of national minorities; initiates and maintains cooperative ties with civil society and with international organisms with activity in the field of national minorities; submits proposals to the Department for Interethnic Relations, connected to the adoption of measures of administrative and financial character, in order to efficiently solve, under the law, the problems within its competence.

The Department for Interethnic Relations, mainly aims: the monitoring of the application of legal internal and international documents referring to the protection of national minorities; the preparation of the Report concerning the application by Romania of the Framework-Convention for the protection of national minorities of the Council of Europe, and also the preparation of the chapters referring to national minorities in Romania reports to other institutions and international organizations; the development of the dialogue majority-national minorities in order to improve the decision document and the implementation measures; the fight against discrimination and the prejudices by promoting the cultural, linguistic, religious diversity through activities based on projects; supports the scientific research in the field of interethnic relations, by maintaining contacts and collaboration with organizations, institutions and personalities in the field; promotes and organizes programs concerning the guarantee, the preservation, the promotion and the development of ethnic, cultural, linguistic and religious identity of the persons belonging to national minorities.

At European level, there is spoken also about the protection of other rights of national minorities. It is about the right to territorial, financial, cultural autonomy. More and more often, on the European scene it is considered that the autonomy granted on time is the most effective way to prevent ethnic conflicts. Thus, although the subject of autonomy contains a certain amount of political explosive, it is able to reduce certain potential social tensions.

Autonomy is defined as method of protection of ethnic groups that ensure maximum internal self-determination with a minim um of external determination from majority population, keeping the territorial integrity of the state. Thus, the purpose of autonomy is to protect the members of an ethnic group against the decision of the majority and to ensure basic freedoms and also human rights for minorities, all these without harming the territorial integrity of the states.

The European Charter of local autonomy[22] promotes the protection and the strengthening of local autonomy in European states, considering that it contributes to the building of Europe based on the principles of democracy and decentralization of power. But, among all forms of autonomy, we are especially interested in terms of national minorities, of territorial autonomy.

Conclusions

The territorial autonomy means a special status granted to a territorial area according to which its inhabitants can solve their problems by themselves, benefiting from their own systems of governance, administration, legislation and jurisdiction. But, this cannot imply certain claims of sovereignty, because the autonomous features are precisely defined in the legislation of the state.

The granting of territorial autonomy must take into account both the existence of the minority population and the majority population, so that none shall be deprived of their basic rights and of human rights generally recognized in different treaties and European conventions. There are different examples in Europe of regions that benefit from a special

[22] The European Charter of local autonomy was adopted at Strasbourg on October 15, 1985. Romania ratified the Charter by the Law no. 199/1997, published in the Official Gazette of Romania no. 331 of November 26, 1997.

status, being recognized their territorial autonomy. This is the case of Corsica in France, of South Tyrol in Italy, etc.

Although in Europe may be distinguished more and more requests from ethnic groups to benefit from territorial autonomy, this does not mean that international organizations believe that this is necessary or possible. Recently, leaders of the Hungarian minority have sent at UN report, which was also dismissed by UN officials. The document entitled Report on Székely autonomy", was about the so-called discrimination of Hungarians in Romania, and proposed a territorial of Hungarians in Transylvania. The UN Committee for the Elimination of Racial Discrimination said that Romania does no longer have issues on human rights and discrimination.

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French Constitution.

Romanian Constitution.

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THE ASSUMPTION OF LEGITIMACY OF THE LAWFUL STATE ACTIONS

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Abstract

A defining feature of the lawful state uttered by the specialty literature is the constitutional regime. It is not about any kind of constitutional regime or about a mere declarative constitution which institutes an elusory legitimacy, but about the constitutional consecration of several principles, such as: separation of powers, the difference between constituent power and constituted powers, representative government, the control of the constitutionality of the laws, this last one being determinant to secure the consecrate values in order to promote the constitutionalism to its full sense[1].

Keywords: *legal, governance, rule of law, opportunity.*

Introduction

The corollary of lawful state should be constituted of the consecration, indemnity and promotion of the human rights at the level of international standards, the achievement of the climate agreeable to the manifestation and capitalization of human beings in order to utter to what extent the state and law are virtually for man.

The assumption of legitimacy also called the assumption of compliance with law[2]*, implies the condition of acts and facts of the state authorities to correspond to the judicial norms written in the Constitution*[3] *but also in laws and in other judicial acts issued in pursuance of law*[4]*.*

The fundamental law that normalizes the principle of legitimacy as one of the essential elements of the lawful state and of its administration, that finally denotes the subordination of every public authority to the Constitution and to Law and represents a warranty of natural persons and legal persons of the civil society against the abuses and mistakes coming from the actions of the authorities. Therefore article 1 par. 5 of the Constitution of Romania, republished statutes as compulsory the abidance by Constitution, its supremacy and the law supremacy, while in article 16 par. 2 imperatively providing the principle according to which "nobody is above law".

In a generically form, to which we acquiesce, in the judicial literature consecrated the view according to which by the legitimacy of the state authorities activity with the laws

[1] M. Troper, *Pour une theorie juridique de l'Etat*, P.D.F., Paris, 1994, p. 203.
[2] J. Rivero, J. Waline, *Droit administratif*, Precis Publishing House, Paris, 2000, p. 107.
[3] As shown in doctrine The Pillar of Legitimacy is represented by The Constitution of every lawful state – A. R. Lazăr, *Legalitatea actului administrativ*, All Beck Publishing House, Bucharest, 2004, p. 53.
[4] I. Alexandru, M. Cărăuşan, S. Bucur, *Dreptul administrativ în Uniunea Europeană*, "Lumina Lex" Publishing House, Bucharest, 2007, p. 349; A. Iorgovan, *Tratat de drept administrativ*, vol. II, All Publishing House, Bucharest, 2005, p. 43.

adopted by the Parliament and with the other normative acts that bear a superior judicial force[5]. The reasoning is well-grounded in respect of the letter and spirit of the Constitution, of the European legislation, and of the exercise of the administrative court that allow the judge– either perceived as a representative of a court or of an administrative authority with jurisdictional responsibilities for solving a conflict- to assess and execute the eventual abuses and mistakes of the state authorities found in the law on which the affected judicial act is based.

The term "*law*" is an extremely ambiguous one which results from the fact that it bears a double meaning: ***largo sensu***, the concept of law comprises every normative acts and ***stricto sensu***, as a judicial act of the Parliament[6]. Specialty literature set down a larger meaning of the concept of law as: "*a hierarchical entireness of complex norms, either exterior to the administration, or adopted by it, in other words judicial acts with normative power belonging to the Parliament and implemented judicial acts seen as achievement judicial acts or implementation judicial acts that are subordinate to the superior normative acts and without which they cannot exist*"[7].

An issue that has been debated in the doctrinary writings, regarding the normative hierarchy of law regulations refers to "*who determines the place of the written laws in the normative hierarchy* (and by default of the system of judicial acts through which the public authorities act N/A)"[8]. The thesis to which we accede is the one according to which: in the case of states that bear a written Constitution, as the Romanian law is, the hierarchy of normative judicial acts is established by the Constitution and subsidiary related to the criteria of the authorities from which they derive, by their place established also by Constitution[9]. In the case of administrative judicial acts their judicial force is in the strictly hierarchical system of the public administration. Therefore, it has been proved[10] that the judicial acts bearing an inferior force must comply with the judicial acts bearing superior judicial force, lacking the possibility of issuance of acts in the circuit of action of the hierarchical inferior institution.

Corresponding to the above mentioned opinion, it may be asserted that within a system of public authorities where we do not find subordination relations (local public administration), superior judicial force of the administrative acts (decisions of Local and County Councils) imposes only their compliance to the inferior judicial force administrative acts (dispositions of the Mare or of the president of the County Council) but not their annulment, amendment or dissolution. Further on, taking into consideration the fact that the lawgiver established the competence[11] of each public authority, this legal competence may be completed by the addition of supplementary attributions through normative acts only if the law expressly allows this fact[12]. In regard of this fact there has been emphasized the practical

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[5] A. Iorgovan, op. cit., p. 43.

[6] D. C. Dănişor, I. Dogaru, Gh. Dănişor, *Theory.., op. cit.*, p. 131.

[7] M. C. Eremia, *Ierarhia actelor juridice cu putere normativă în sistemul de drept din România*, "Revista română de drept public" Review, no. 2/2001; See also Ana - Rozalia Lazăr, *Legalitatea actului administrativ*, All Publishing House, Bucharest, 2004, p. 52.

[8] A. R. Lazăr, *Legalitatea actului administrativ*, All Beck Publishing House, Bucharest, 2004, p. 52.

[9] Ibidem, *op. cit.*, p. 52.

[10] A. Trăilescu, *Unele consideraţii referitoare la raporturile dintre autorităţile administraţiei publice şi actele acestora*, in "Dreptul" Review, no. 10-11/1995; See also A. R. Lazăr, *The Legitimacy of the Administrative Act*, op. cit., p. 53.

[11] Competence understood as "that investitude that the author of an administrative act should have so that this one should be its lawful author", in O. Podaru, *În căutarea autorului actului administrativ (I) – eseu asupra competenţei organelor administrative*, "Revista română de drept public" Review, no. 2/2008, p. 12, For other definitions see: T. Drăganu, *Actele de drept administrativ*, "Ştiinţifică" Publishing House, Bucharest, 1959, p. 108; R. N. Petrescu, *Drept administrativ*, "Accent" Publishing House, Cluj-Napoca, 2004, p. 60.

[12] For exemplification, see, O. Podaru, *op. cit.*, p. 21: the competence of the Mare established by art. 63 Law no. 215/2001 (republished) can not be amended by normative acts as art. 63 par. 2 II Thesis clearly states: "... *the*

importance of the ascertainment, in the sense that: normative administrative acts that may establish attributions of the Mare would be illegal, therefore the Mare is not off to respect them. In the case of an eventual action of contentious administrative against a hypothetic "*ungrounded*" refuse to solve a petition, he can raise the exception of illegitimacy of this normative act[13].

The legitimacy, as a validity clause of the administrative act is approached differently in the Romanian doctrine.[14] According to one of the approaches, the vision of the representatives of the Law School from Cluj is that ***the legitimacy***[15] is qualified as a validity clause of the administrative acts next to ***the appropriateness***[16]. According to other authors, representatives of the Law School from Bucharest, ***the legitimacy*** is the corollary of the clauses of validity and ***the appropriateness*** is an imperative (extent) of the legitimacy.

Finally, without the necessity of pronouncing ourselves in favor or against, we refer to the opinion of Prof. **Tudor Drăganu** regarding the validity clauses of the administrative acts: "*these are not virtually but aspects of a single clause that is in fact the liability of these acts to be issued in accordance with the provisions of the laws in force*"[17].

An essential aspect that must be mentioned in the case of administrative acts, equally contingent in other law systems, directs to the form as a validity element of these acts. If in private law the form[18] represents nothing but by way of exception a clause of validity of the civil judicial act as a result of the principle of mutual consent[19], in the public law the form is essential, and needs a rigorous procedure whose non-observance leads to sanctions regarding that act. Therefore, it may be concluded that the form of the administrative act is governed by the principle of formalism which represents a dominant feature of the public law.

A confusion that must be taken into consideration refers to the difference between form and procedure although there is a trend in this sense[20]. By ***form*** we must consider the entireness of formal elements contained by an administrative act seen as an instrument (in other words, the ascertaining record or the material support that renders the manifestation of will A/N) and by procedure**,** the entireness of formal elements that law provides as being

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Mare also performs other attributions established by law", Instead, as regarding the Prefect, art. 24 par. 2 Law no. 340/2004 regarding the Institution of the Prefect, establishes the main attributions

[13] O. Podaru, *op. cit*., p. 21.

[14] See the two trends – Cluj School and Bucharest School, regarding the relation legitimacy – appropriateness in the writings of the following authors: I. Alexandru, M. Cărăuşan, S. Bucur, op. cit., 2007, p. 361-364; A. R. Lazăr, op. cit., 2004, p. 162-168; D. Apostol Tofan, *Administrative Law*, op. cit., vol. II, 2004, p. 26; V. Vedinaş, *Drept administrativ român, third edition, revised and updated*, "Universul Juridic" Publishing House, Bucharest, 2007, p. 86-86; A. Iorgovan, *op. cit*., vol. II, p. 41-52.

[15] V. Vedinaş, *op. cit*., 2007, p. 86.

[16] V. Vedinaş, *op. cit*., 2007, p. 86; I. Iovănaş, *Drept administrativ,* Servo-Sat Publihing House, Arad, 1997, p. 49 shows that "*by appropriateness we understand the forward achievement of the legal tasks and attributions, having minimum waste of material and spiritual resources but very efficient and the choice of the most appropriate means for the achievement of the aim of law"*.

[17] T. Drăganu, *Actele de drept administrativ,* "Ştiinţifică" Publishing House, Bucharest, 1959, p. 107.

[18] The form of the civil judicial act was mentioned as: "*that clause of the judicial act which general and extrinsical and sometimes essential or not and refers to the manner of displaying the will with the intent of producing judicial effects*". I. Dogaru, N. Popa, D. C. Dănişor, S. Cercel, *Bazele dreptului civil, vol. I. Teoria generală*, CH Beck Publishing House, Bucharest, 2008, p. 467, or "*that clause consisting of the manner of displaying the manifestations of will with the intent of amending or ending a specific civil judicial report*". Gh. Beleiu, *Drept civil român*, 10th edition, "Universul Juridic" Publishing House, Bucharest, 2005, p. 179. In respect of terminology, lato sensu, by the form of the judicial act defines three form requirements: 1) the form requested for the validity of the act - forma ad validitatem; 2) the form requested for the demonstration of the act - forma ad probationem; 3) the form requetsed for the opposability of the act for the third parties.

[19] See I. Dogaru, N. Popa, D. C. Dănişor, S. Cercel, *op. cit*., pp. 467-473.

[20] G. Dupuis, *La presentation de l'acte adminstratif, în G. Dupois (coord), Sur la forme et la procedure de l'acte administratif*, Economica, Paris, 1978, pp. 9-10.

necessary for the issue of an administrative act, but which are extrinsic to the instrument that contains the will of the administration[21].

In this sense, it has been demonstrated in a very well underlain manner[22], opinion that we sustain, that next to the procedure, the form aims to define the will of the administration, seen as a possible menace for the rights and freedoms of the administrations. Except for (ex. the issue provided by art. 38 par. 1 of the Government Decree no. 2/2001 regarding the regulation of the contraventions A/N[23]), the written form of the act is a condition/clause of yet its existence; conversely, the demonstration of the contravention is not possible[24]. **Therefore, the written form is more than an essential clause, is rather an existential one.** The structure of the act is completed by the signature, both of them forming a whole: as a principle we can talk about a virtual administrative act only when we have a signed writing. To this clause we can add the other formal aspects, the essential ones (*countersignature, motivation, etc.)* or unessential (*header, title, aspects related to the registration of the act etc.*). All of them should be ranged according to their importance as they condition the existence or effectiveness of the issued act or just the effectiveness of the administration.

The French doctrine, where ***the principle of legitimacy*** is synonymous to the lawful state[25], refers to the ***right of appraisal of the public administration*** in order to convey its action within a lawful frame. The concept of ***appropriateness*** is used for conveying a factual action of the public administration, in exceptional situations, action which is necessary (meaning appropriate) but contrary to law. Onwards, the authors of the thesis show that the *aim of public administration*, in other words the achievement of public interest, *is always an element of legitimacy*, while *the means for achieving this aim are aspects that account for appropriateness*[26].

French literature distinguishes within the identification and hierarchy of the sources of legitimacy between the *written norms* that do not rise from the administration frame (like Constitution, International Conventions, judicial acts of the European Union and laws), *judicial practice* and *general principles of the law*, norms that rise from the administration itself[27].

A virtual warranty of the legitimacy of the activity of French public administration is conferred by the State Council (***Conseil d`Etat***) which, as it has been established in the French doctrine[28], played the determinant role for the restriction of the powers of the executive, mainly by using the procedural means of the appeal for the excess of power.[29] The consideration of Romanian judicial literature referring to the State Council reveals a comparative and synthetic approach of this prestigious institution which, as it has been shown, during its activity undertakes a double function: ***jurisdictional*** and ***consultative***. The

[21] O. Podaru, *op.cit.*, p. 89. Ibidem, see the third note page 89 regarding other opinions in the doctrine and the critics of the above cited author.
[22] For a more complex approach O. Podaru, *op. cit.*, 2007, pp. 88-104
[23] O. Podaru, *op. cit.*, p. 91.
[24] M. Ursuţa, *Procedura contravenţională, 2nd edition revised and enlarged*, "Universul Juridic" Publishing House, Bucharest 2009, p. 129. This paper is already consecrate and we find it exhaustive in the approach of the cotravening procedure within the Romanian law.
[25] A. de Laubadere, J. C. Venezia, Y. Gaudement, *Traite de Droit Administratif*, Tome 1, 14 [ed], L.G.D.J., Paris, 2001, p. 593.
[26] G. Vedel, P. Devolve, *Droit administratif*, P.U.F., 10 [eme] ed., Paris, 1988, p. 442 quoted din A. Iorgovan, *op. cit.*, vol. II, 2005, p. 44.
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[28] J. Schwarze, *Droit administratif europeen*, Office des Publications officielles des communautes europeennes, Bruylant, 1994, pp. 224-225.
[29] A. R. Lazăr, *op. cit*., p. 52.

Council is the supreme administrative jurisdiction that annuls any act of the administration that is issued by the breach of the principle of legitimacy and statutes regarding its responsibility. The citizen is therefore, efficiently, protected against the excess of the executive power. Judge of the expeditious procedures, in emergency cases, it can order any necessary measure for the defense of the fundamental freedoms that a legal person might have prejudiced. Moreover, the State Council may easily compete with the Constitutional Council on its own field. Essentially, administrative law which is its creation, served as reference for this last one[30].

In Germany, as a federal state, the sources of legitimacy are found in the Constitution[31] and the national valid norms and we can add: the community law regulations, international treaties and decisions of the federal Constitutional Court, the principles of the international law and the Constitutions and the valid norms of the lands and also the norms of the local authorities.

The discretionary power of the administration was considered in the German doctrine when referring to the concept of appropriateness, Professor **Earnest Forsthoff** points[32] that ***discretionary power*** means the judicial order created by the compliance to the right of everything that shall by appropriately judged by the administration. Moreover, he points that in this approach administration conferred a certain freedom by means of which it may adopt the measures considered appropriate for the achievement of the tasks for the achievement of which that power was conferred.[33] The same author defines the concept of *"discretionary power*" as a judicial order created by the compliance to the right of everything that shall by appropriately judged by the administration, fact that, in our opinion credits to the legitimacy the main role in the activity of German public administration which is *"bound to act objectively and by respecting the law"*[34], principle that is established by the Constitution (art. 20 paragraph 3) and the other laws (as acts issued by the Parliament)[35].

Conclusions

The concept that centers the lawful state is that of *freedom*, and not the concept of *norm*. The fundamental rights are in the centre of this construction and preserve the benefits of the normative hierarchy of the jurisdictional control of respecting it but offers them a new purpose, requiring the law of the lawful state the qualities necessary for the surety bond of individual freedoms by the assurance of judicial security of the lawful subjects. *The law of the lawful state is not any type of law. First of all it must not be only hierarchically structured but also it has to be indubitable, fact that requires the public character of judicial norms, a certain lucidity of the prescriptions, their non-retroactivity and their permanence, in other words the predictability of eventual amendments, qualities that make the law able to ensure the judicial security of subjects and their legitimate trust in the continuity of the state actions.*

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[30] I. Alexandru, C. Gilia, I. V. Ivanoff, *Sisteme politico - administrative europene,* 2nd edition, revised and enlarged, "Hamangiu" Publishing House, Bucharest, 2008, pp. 261-262. Regarding the State Council see also I. Alexandru, M. Cărăuşan, I. Gorjan, I. V. Ivanoff, C. C. Manda, A. L. Nicu, C. Rădulescu, C. Săraru, *Dreptul administrativ în Uniunea Europeană*, "Lumina Lex" Publishing House, Bucharest, 2007, pp. 162-164; A. Iorgovan, *op. cit.*, p. 44-45; I. Alexandru, *Comparative Administrative Law*, "Lumina Lex" Publishing House, 2nd edition, Bucharest, 2003, pp. 284-292; I. Alexandru, *European Administrative Law,* "Universul Juridic" Publishing House, Bucharest, 2008, pp. 145-147.

[31]The German Administrative Law is a "*concretion of the constitutional law*" Fr. Werner, *Verwaltungs recht als konkretisirtes Verfasungrecht*, DVBI, 1959, p. 527, quoted din A. R. Lazăr, op. cit., p. 54.

[32] E. Forsthoff, *Traite de droit administratif allemand*, traduit par A. Fromont, Etablissements Emilie Bruylant, Bruxells, 1969, p. 156, nota 191. See also A. Iorgovan, *op. cit.*, p. 93.

[33] The Romanian doctrine criticizes the thesis of the German author regarding the fact that " *it does not separate the governance act from the discretionary administrative acts*". See A. Iorgovan, *op. cit*., vol. II, p. 93

[34] A. R. Lazăr, *op. cit*., p. 54.

[35] Ibidem.

Furthermore, the law should be based, in order to be present in a lawful state, on certain values inherent to human beings (dignity, freedom), inherent to democratic society (attendance, pluralism) and to liberal society (justice, respect for the rights and freedoms of persons, subsidiary and proportional state intercession). This axiological right subordinates state by content, the formal means being subordinate to the achievement of the values that underlies the judicial order.

In the current doctrine there is a series of conceptions that aim to get beyond, form a functional perspective[36], the classical difference between the legislative function and the executive function of the state, respectively between the function of determination of the content of the law and that of actual material achievement of law. Amongst these, some mistake the functions of the state with the character of the activities of the state institutions, therefore within the binary, dualist conceptions regarding the splitting of the functions of the state, the difference between legislative and executive is firstly transposed towards the difference between the political function and the administrative function of the state, difference complying to the law that becomes a framing principle establishing a general political orientation, the government acting in the interior of this frame. The political function and the administrative one are exercised by a plurality of institutions, Government, Parliament, Chief of State etc. and so the impediment that the same authority (Government) contributes to the exercise of both functions[37] does not exist.

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[36] L. Duguit, *Traité de droit constitutionnel*, Volume II, Paris, 1923, op. cit., vol.2, p. 136.

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THE LAWFUL STATE WITHIN THE MEMBER STATES OF THE EUROPEAN UNION

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Abstract

State is a reality; it is present within the quotidian life of the citizens and is framed by numerous domains of social activities. Nevertheless it is an abstract concept, a support of power and allows the establishment of the distinction between the governing and the governed.

*From a semantic point of view, the concept of state comes from the Latin word "statuo", which means "to put, to lay, to constitute". The collocation "Status civitas" referred in the Roman Empire to the manner of government of the city. Romans granted the word "status" a political significance by adding the determinant "res publica**Eroare! Marcaj în document nedefinit.**", in other words public matter. "Res publica" defined also the idea of leadership of the public life and of the state. Therefore, "status rei publicae" meant for the magistrates and for the Roman people "the state of the public matters" in other words, "the situation of leading the public life"[1]. Romans used two different concepts referring to state, meaning, "res publica" (for the period of the republic) and "imperium**Eroare! Marcaj în document nedefinit.**" for the period of the empire (dominate). For the same type of political organization of a human collectivity, Greek people used the term of "polis"[2].*

The modern features that define nowadays the state were not entirely reunited, not even in the Roman Empire, or in that of the break of Greek polis, and not even within the existing states during that period.

Keywords: *public administration, federalization, state, government.*

Introduction

Europe finds itself in the middle of reconstruction. This is a great hope that might come true if only history is taken into consideration: Europe without history would be orphan and unfortunate. Time is flying away and today is born from yesterday and tomorrow is the fruit of the past. A past that should not cripple the present but should help it become different. The efficiency and nature of the state cannot be understood without a previous research of the origin and its historical moulding.

An adequate picture for a historical and political assay is often spectral but the range may change or extend, as for example during a revolution. The change of great cultures, centers and void powers of the empires, universal religions, slaveries, the apocalyptical

[1] Henri Brun, Guy Tremblay, *Droit constitutionnel*, Les Editions Yvon Blais Inv. Quebec, 1990, p. 61.
[2] For a broad image regarding the organization and functions of the polus in Ancient Greece, see G. Glotz, *Cetatea greacă*, "Meridiane" Publishing House, Bucharest, 1992, pp.24-40; Pierre Carlier, *Secolul al IV-lea grec*, "Teora" Publishing House, Bucharest, 1998, pp.183-212; Edmond Levy, *Grecia în secolul al V-lea*, "Teora" Publishing House, Bucharest, 1998, pp.183-222.

thinking and the hiliastical solution are found over the historical process as elements of the frequently interrupted continuity.

The rest is the interchange between persistence and change, between relations and collapsed continuities as an innovating continuance of an existent full of reason but also the tensed relation between change and force: the important changes took place until now by force or unlocked the force as a result of internal circumstances (revolts, revolutions), or external ones (wars) and often after a more complex conjuncture: internal and external. Therefore, history does not let itself led into the so called bed of Procust of the "primate of external politics" or of the "primate of internal politics": internal and external factors are constantly bound and often, they cannot be separated by the historical reality because in many cases they are in their turn compound of internal and external sub-factors.

One of the most fascinating phenomena of history is the tension between continuity and discontinuity, for the default of which continuity might be misunderstood as a common identity: continuity is the transformation of the inherited factors and traditions. Any kind of change, particularly within the complex environments, is possible only by contacts and by give and take of methods and ideas. Such enterprises do not appear isolated and if they appear then they are reduced or hindered.

We must underline the essential unit of the historical process in respect of time and space, in spite of the overwhelming abundance and diversity of human activities and conducts. Numerous historical mechanisms are virtually everywhere and they are always available.[3]

State is an ancient human institution that dating for thousands of years, since the age of the first agricultural communities that came into existence in Mesopotamia. In Europe, the modern state disposing of numerous army forces, fiscal power and centralized bureaucracy and which may exercise a sovereign fiscal authority over an extended territory, is rather recent, dating for four or five hundred years, since the period of the consolidation of the French, Spanish and Swedish monarchies. The rise of these states, able to ensure order, security, law and the right to property potentiated the uprising of modern world.

As we have seen, states have various functions, either positive or negative: the same compulsory power that allows them to protect the right of property and to ensure public safety, also allows them to enforce the private property and to breach the rights of the citizens. The monopoly of legitimate power that states exercise allows the individuals to get rid of the fact that **Hobbes** called "*the war of everyone against everyone*".

It may be certainly asserted that in the 21st century, politics was influenced by the controversies regarding the adequate size and power for the states. The century began with a liberal world led by the main liberal state of the world: Great Britain. In proportion as year passed, the century was liable to wars, revolutions, economical crises, therefore this liberal order of the world dissolved and the minimalist liberal state was replaced, in several parts of the globe, with a more centralized and active state, a state that granted itself with increasing attributions.[4]

A certain flourishing trend led to what **Friedrich** and **Brzezinski** called in 1965 the "*Police State*" that attempted to abolish the whole of the civil society and to subordinate the individuals to their own political aims.[5] The size, functions and range of the state also

[3] See Imanuel Geiss, *Istoria Lumii din preistorie până în anul 2000*, "All Educaţional" Publishing House, 2002, p. 15 and next.
[4] Francis Fukuyama, *Construcţia statelor – Ordinea mondială a secolului XXI*, "Antet" Publishing House, 2004, p. 10 and next.
[5] Carl J. Friedrich şi Zbidniew Brzezinschi, *Totalitarian dictatorship and autocracy*, 2nd edition, Harvard University Press, Cambridge, Massachusetts, 1965.

developed in the non-totalitarian states. This development, accompanied by the caused inefficacy and fortuitous led to a counter-reaction under the form of "*Thatcherism*" and "*Reaganism*". The politics of the eighties and nineties was characterized by the return of the liberal ideas in many developed regions of the world once with the attempt to stop or to reverse the development of the state industry[6].

The decrease of the size of the state industry was the dominant subject of the end of the century, when the breakdown of the most extreme form of *statism*: Communism supplementary quickened the move of decrease of the proportion of the state within the non-communist states, fact that was foregone since 1956 by **Hayek**[7] or, as **Huntington**[8], started "*the third wave of democratization"*.

Max Weber[9] defined state as "*a human community that claims the monopoly over legitimate attributions of the physical force on a certain given territory*". Therefore it is reasoned to distinguish between the range of the state activities, which refer to the different functions and assumed aims of government and the force of the power of state or the possibility to plan and execute policies and to implement laws correctly and transparently-presently called the institutional ability of the state.

In regard of the functions of the state there is no general accepted hierarchy. The majority of the population agrees that there is a range of hierarchy: it is necessary that states secure public order and defense, before offering health insurances or free college education. The document entitled **World Development Report** from 1997 of the World Bank presents a plausible list of functions of the state, "*minimal functions*", "*intermediary functions*" and "*activist functions*". It is obvious that this list is not an exhaustive one. It presents a landmark regarding the range of the state.

Although we generally have many classification indicators of the world states, we cannot precisely position the states during different stages of development of their functions because the *ability of state varies from one administrative authority to another*. Hence, many countries, during the process of decrease of the range of the state, either weakened its force, or generated requirements for new types of abilities of the state, which were weak and inexistent. Though, there exist values that indicate that the force of the institutions of the state is more important, in a broad sense, than the range of the functions of the state. A good example is the experience of the development of Western Europe where the proportion of the functions of the state is wider than in the United States and there are also more powerful state institutions.

Within the development economy, there has always been a concernment for the force of the state that appears under different names including "*government*", "*state ability*" or "*institutional capacity*". Nowadays, the conventional wisdom is the one that asserts that the institutions represent the critical variable for development; they talk on a doctrinaire level, but not merely, about the issue of "*getting to Denmark*", Denmark being the model state, generically speaking, where the institutions function very well. Nevertheless, we cannot assert that there is an optimal set of institutions but institutions that aim to bring forward a set of values in the detriment of another one. Democracy, federalism, decentralization, the principle or attendance, social capital, culture, sex, ethnic character and ethnic conflicts, all of these

[6] Richard A. Posner, *The social costs of monopoly and regulation*, Journal of political economy, 83(4), 1975, 807-28.
[7] Friedrich A. Hayek brought forward since the middle of XXth century the link between the communist state and the modern state of social welfare, Friedrich A. Hayek, *The road to serfdom*, University of Chicago Press, Chicago, 1956.
[8] Samuel P. Huntington, *The third wave: Democratization in the late twentieth century*, University of Oklahoma Press, Oklahoma City, 1991.
[9] Max Weber, *Essay in Sociology*, Oxford University Press, New York, 1946.

joined the mixture of development as important ingredients for the final taste of the state composition.[10]

It is true that the governments of the developing countries are often too big and overextended for the range of the functions that they try to achieve. But the most urgent, for most of the developing countries, is the raise of the basic force of the state institutions in order to achieve those functions that are essential and which only their government is able to achieve. The issue of the manner of getting to Denmark is unfortunately irresolvable for most of the states. Therefore, we identify the intellective obstacle: we broadly know the difference between these countries and Denmark and how would a solution like Denmark look like. The problem is that we do not possess the political means to get there because of the insufficient local request for the reform.

In the case of these countries that have the perspective to partially cover the road to this Promised Land, we should closer concentrate on the dimensions of the statehood that may be manipulated and "*built*". This means ***concentration on the public administration and the components of the institutional project***. Moreover, it is necessary to concentrate on the mechanisms of transfer of the knowledge about these components in the countries with weak institutions. The deciders of the moment of development should at least take the oath of doctors "*to not harm"* and to initiate projects that undermine and emaciate the institutional capacity in the name of its building.[11]

Conclusions

The reformation of the EU institutions is in progress but it is necessary to continue until new solutions capable of adjusting the institutional structure and mechanisms to the new EU formula extended to 27 states. There existed and still exist a range of problems that should be solved in the context of widening and first of all the enlargement of the budget of EU was absolutely necessary in order to honor the supplementary engagements that emerged as a result of the adherence of the Central European and Eastern European countries.

The reformation of the EU institutions is a ***sine – qua - non*** condition for its extension to 27 states and inconsonant to the "open gates" policy it seems that it might continue, even if not for the very future. This is why the debates regarding the political and judicial issue that should be adopted in the event of the complete integration of the member states continues. The issue is – **is federalization a solution?**

Admittedly, the future of any kind of system cannot be certainly known. It is a truth that has been scientifically proved. And this very contingency regarding the future of EU led to the representation of several scenarios including the one that would solve the current EU contradiction namely the existence of a veritable "*economical federation*" and of a so called "*political quasi-confederation*"[12].

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[10] Jessica Einhorn, *The World Bank's mission creep*, 2001, Foreign Affairs, 80(5), pp. 22-35.
[11] F. Fukuyama, op. cit., pp. 49-50.
[12] I. Alexandru, *op. cit.*, p. 40.

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THE PHYSICAL AND/OR MENTAL ABILITY OF THE ONE REQUIRING HIRING - THE DETERMINING SPECIFIC CONDITION FOR VALID CONCLUSION OF THE INDIVIDUAL LABOR CONTRACT

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Abstract

The need to ensure the safety and health of the employee at work requires the obtaining of a medical certificate. This certificate testifies that the future employee is physically and / or mentally fit and it must become a decisive condition for the existence of an individual work, on the one hand, and an extremely important condition for the health and safety of the worker.

Keywords: *certificate, medical, fitness, conditions, employment, health.*

Introduction

For the legal and valid completion of an employment contract a number of conditions must be met. Some of these are common to the valid conclusion of any contract (capacity, object, consent and case), while others are specific to the individual employment contract. In this respect are to be mentioned conditions such as the existence of job, training of the future employees, their seniority in work and specialty, checking skills and professional knowledge, obtaining a medical certificate to ascertain that the person concerned is able to provide that work. Of the conditions listed above, the last will be analyzed, as it detaches through importance and specificity among other requirements imposed by law.

The medical certificate which finds that the one requiring employment is fit for performing the work to which he is committed by an individual labor contract.

Being a subject of a legal work relationship, in which the individual is obliged to carry out certain activities on behalf of the employer, involves not only the legal capacity, but also the ability to work in a biological sense. That means it requires the physical and mental ability to work of the one providing paid work. Thus, individuals may be employed only under a medical certificate confirming that their health allows them to perform the work they are entrusted (Article 27 Para. 1 reprinted Labor Code). Law no. 319/2006 on health and safety at work[1] establishes the obligation of the employer to employ only people who, after medical examination and verification of psychosocial skills, will correspond to the task to be executed. By Government Decision no. 355/2007[2] on workers' health surveillance the procedure for medical examination of workers was regulated, both in employment and during the execution of the individual employment contract. Article 9 Para. (1) defines being fit for work, saying

[1] Published in Official Gazette of Romania, part I, no. 646 din 26 iulie 2006.
[2] Published in Official Gazette of Romania, part I, no. 322 din 17 mai 2007.

that it is the medical ability of a worker to perform work in the profession / function for which the medical examination is requested.

Article 13 of the same Government Decision stipulates that the medical examination of workers in employment aims to establish their fitness/conditional suitability/permanent or temporary unfitness for work for the profession/job function and the place of work the employee is nominated to work on:

a) compatibility / incompatibility of any disease present at the time of the examination and future employment;

b) existence / non-existence of a condition that endangers the health and safety of other workers at the same workplace;

c) the existence / non-existence of any conditions which endanger the security of the unit and / or quality of products manufactured or services provided;

d) existence / non-existence of a risk to the health of the public to which they provide services.

The medical examination for employment is made at the request of the employer, and its purpose, in principle, is to establish the following:

- The applicant's ability to work for the respective profession and workplace;
- Compatibility between conditions presented on examination and future employment;
- The person concerned is not likely to present problems that would endanger the health and safety of other employees, of the unit and / or the quality of their products or services provided or a health risk for the population it serves.

A particularly interesting issue raised by the physical and/or mental ability of the child aged between 15 and 18. In this respect, international provisions regarding children who work become relevant. These are the provisions of the ILO Convention, 182/1999 on the Worst Forms of Child Labor and Immediate Action for their Elimination[3] as well as the Government Decision 867/2009 on the prohibition of hazardous work for children[4]. Regarding children, it is legally presumed that they lack the physical fitness / or mental state to perform hazardous work and, therefore, the occupational medicine doctor cannot issue a medical certificate to state any skill, but a certificate required to materialize a reality imposed by legislators themselves, the provisions of the Labor Code being mandatory on forbidding the provision of such labor by children[5].

Transposing the rules of the EU Law on equal treatment and the prohibition of discrimination, the Labor Code[6] also expressly prohibits the request for pregnancy tests on employment (Art. 27 para. 4). Subsequent to employment, pregnant women also benefit from special protection measures on maternal risk[7]. After medical examination adjustments of the job to the anatomical, physiological abilities and health of that person can be proposed. Conclusions of specialized medical examinations, differentiated by occupation-specific skills are embodied in the professional abilities work sheet prepared by the occupational physician.

In practice, however, this legal provision, which confers jurisdiction for concluding files of professional skills only to the occupational medicine specialist physician, creates disturbances, making the final exam often a mere formality. The small number of

[3] Ratified by Romania through Law no. 203/2000, published in Official Gazette of Romania, Part I, no. 577 in 17 November 2000.
[4] Published in Official Gazette of Romania, Part I, no. 568/14 August 2009.
[5] See, A. Drăghici, *Protecția copilului și a unor categorii speciale de persoane,* "Editura Universității din Pitești" Publishing House, Pitești 2010, p. 109.
[6] Republished in Official Gazette of Romania, Part I no. 345/18.05.2011.
[7] Government Emergency Ordinance no. 96/2003 on maternity protection at work, published Official Gazette of Romania, part I, no. 750/27 October 2003 approved with amendments by Law no. 25/2004, amended by Government Emergency Ordinance no. 158/2005 on leave and health insurance allowances, published in Official Gazette of Romania, part I, no. 1074/ 29 November 2005.

occupational medicine specialists, across the country, compared to the number of employees, cannot solve the special issue of employment medical examinations and during execution of individual work contacts. Therefore, it would be advisable that the two ministries, labor and health, should review the competence of occupational health physicians. Otherwise, the medical exam remains only an ineffective legal normative which does not achieve its legislative purpose.

The individual employment contract - null and void on its conclusion without a medical certificate - and its legal effects

Nullity is defined as civil sanction that comes as a result of non-legal rules that establish the conditions of valid conclusion of the legal act, depriving it of any effects. Since the individual labor contract is a contract with successive benefits, invalidity shall only apply for future employment contracts, the employment contract being terminated when finding amicable or judicial nullity.

The Labor Code provides in art. 27, paragraph (2) that the conclusion of an individual employment contract without medical examination shall be sanctioned with nullity of the contract. By Law 40/201[8] provision that the employment contract is valid by submitting a medical certificate to the employee after the conclusion of the legal act if, on reading the medical certificate follows that the one in question was fit for that work was repealed.

Nullity as a sanction is regulated in art. 57 of Law no. 53/2003, the legislature giving legal force to the opinions expressed in doctrine over time. These opinions refer to effects of the invalid individual employment contract. In the case of failure to observe the legal requirements for the valid conclusion of the individual labor contract, pending the entry into force of the current Labor Code, rules of civil law were applied, taking into account the specificities of legal work relationships.

Nullity is determined by a cause prior or concomitant to concluding the individual labor contract[9] and it sanctions violation of general provisions mandatory for the conclusion of the legal act and of their purpose. Theoretical assessments on the invalid individual employment contract had as main object the legal effect of invalidity, that is, termination of the individual employment contract, provided by art. 56, letter d) of the Labor Code republished. Legislative provisions govern the termination of the individual employment contract only as a result of its nullity, after the nullity was established by agreement or final judgment.

It is considered that termination of the individual labor contract is a result of the breach of the conditions required for the valid conclusion of the individual employment contract when these conditions are essential for the very existence of the legal act in question. This is the case of the lack of a medical certificate provided for in article 27, paragraph 1 of the Labor Code. This provides that a person may be employed only on the basis of a medical certificate, which establishes that the one in question is fit for that work. Although the penalty applicable for infringement of the requirement imposed by law is absolute nullity, affecting the legal act as a whole, it remains a remediable nullity, under Article 57. 3 of the Labor Code republished. This happens even if the express legal provision in art. 27 is repealed. This provision states that, presenting a medical certificate after the time of conclusion of the individual employment contract, certificate stating that the person concerned is fit to work, leads to retroactively validating the contract. Nullity of the individual employment contract, effective only for the future - *ex nunc*, not the past - *ex tunc*, due to the nature of the subsequent benefits contract, in which the parties return benefits, is objectively impossible[10].

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[8] Published in Official Gazette of Romania, part I no. 225 in 31.03.2011

[9] I. T. Ştefănescu,*Tratat de dreptul muncii*, "Wolters Kluwer" Publishing House, Bucharest, 2007, p. 253

[10] See L. Dima, *Comentariu la art. 57 în Codul muncii, comentariu pe articole*, vol. I, art. 1-101, de Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, op. cit., p. 314.

If there is no medical certificate, there is a total nullity, which affects the contract in its entirety, so that it will be terminated as the effect of the finding of invalidity.

A special issue, both at theoretical and practical level, is represented by the effects that the invalid individual employment contract produces on individual employee rights arising from individual employment contract execution. Thus, in principle, the right to obtain wages for work performed under a contract declared void remains, as well as other rights arising from being an employee, that is, seniority, length of service in the public pension insurance system, in social unemployment insurance and in health insurance. This conclusion is drawn from the practice of the Constitutional Court, which stated that "it is irrelevant whether nullity is absolute or relative because, in no event can benefits incurred by the parties be canceled (work performed, payment of wages and other rights and obligations) on the duration of the contract"[11].

Conclusions

The physical or mental ability of the one requiring employment, for performing the work that he is to be bound to by concluding the individual labor contract emerges as importance among the specific conditions of validity of the individual employment contract. It is very important in this respect that the employer provides a specific evaluation of occupational hazards of the future workplace of the one requiring employment, for their doctor to analyze the compatibility of physical and/or mental health of the employee with those risks. The medical certificate issued by the physician becomes a condition of validity of the individual employment contract and a legal instrument particularly important in the management of the occupational health of workers.

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THE RIGHTS OF RROMA WOMEN IN THE CONTEMPORARY PERIOD OF TIME

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Abstract

In this article I have approached the problems of discrimination and of Rroma woman in the contemporary period of time. It is possible to take actions for promoting and observing the rights of Rroma women and their families by: promoting the inclusion of Rroma women and their children into the social life with the help of the programs that include education, counseling with regard to the human rights, facilitating of access on the labor market, promoting Rroma women and their children through varied social and cultural activities, promoting a positive image of Rroma women in mass-media.

Keywords: *human rights, law, discrimination, Rroma women.*

Introduction

Romania demonstrated that the attention given to the minorities' rights, to the modalities of affirmation and protection of the ethnic and cultural identity, constitutes a way of stability, peaceful living and social development; our country possesses the institutional and legislative mechanisms through which the rights of the ethnic minorities are protected[1].

By promoting the equality of chances it becomes possible to contribute to the social cohesion, both in the developing areas and at the national level. The development of a culture of the equal opportunities lies in the direct implication of all the social actors, both from the public and private sector, but also of the civil society. The social protection and the social inclusion can be promoted through actions of fighting against discrimination, of promoting the equality of chances and the integration into the society of the vulnerable groups that face the risk of social marginalization[2].

According to paragraph 2, art. 1, from *Law no. 202/19.04.2002 the equality of chances and treatment between women and men*[3], it is defined the equality of chances and treatment between women and men; this means "taking into account the different capacities, needs and aspirations of males and females and their equal treatment".

In the provisions of art. 2, point b) and c) from the *Emergency Ordinance no. 67/27.06.2007*, the principle of equality of treatment is defined as representing "the lack of any discriminatory treatment, direct or indirect, on bases of sex, especially with reference to the civil or family condition". The discriminatory treatment lies in "any exclusion, restriction or difference of treatment, direct or indirect, between women and men[4].

[1] C. Jura (coord.), *Sistemul complementar de protecţie a drepturilor omului şi de combatere a discriminării din România*, "Editura Universităţii Transilvania" Publishing House, Braşov, 2004, p. 5.
[2] *Egalitatea de şanse şi nediscriminarea. Îndrumar*, p. 4.
www.inforegio.ro/user1/file/Egalitatea%20de%20sanse_tiparit.pdf.
[3] Republished in the Official Gazette of Romania, Part I, no. 150 from 01.03.2007.
[4] *Egalitatea de şanse şi nediscriminarea. Îndrumar*, p. 5.

The forms of discrimination[5]:

- *Direct discrimination* – a person benefits by a less favorable treatment than another person who is, was or could be in a comparable situation, based on any criterion of discrimination from the legislation in force.
- *The indirect discrimination* – a provision, a criterion, an apparently neutral practice that disadvantages certain people, based on the criteria from the legislation in force, excepting the cases when these provisions, criteria or practices are objectively justified by a legitimate purpose and the means for reaching this purpose are adequate and necessary. Also, the indirect discrimination represents every active or passive behavior that, through the effects that it generates, unjustified favors or disadvantages, subjects to an unjust or degrading treatment a person, a group of people or a community as confronted to other in equal situations.
- *The multiple discrimination* – a person or a group of people are treated differentially, in an equal situation, according to two or several criteria of discrimination, in a cumulative way.
- *Harassment* – any behavior that leads to the creation of an intimidating, hostile, degrading or offensive condition, on race, nationality, ethnicity, language, religion, social category, beliefs, gender, sexual orientation, belonging to a unflavored category, age, disability, refugee or asylum seeker, or any other criterion.
- *Victimization* – any adverse treatment seen as a reaction to a complaint or suing, regarding the infringement of the equal and indiscriminately treatment. The disposition for discrimination (the order to discriminate) – is also considered a form of discrimination and represents an order received by a person or a group of people from another person or group of people to discriminate.

Examples[6]:

- Giving a smaller wage to a woman than to men, although they develop the same type of activity and in the same conditions, breaking the principle of "equal work, equal wage";
- The refuse of employing a woman because she is pregnant or takes care of a baby;
- The impossibility of a wheelchair person to enter a building because there are not any appropriate spaces for the access of the disabled people (for example: stairs with safety elements, platforms, doors that facilitate the access of the rolling chair, for easy handling that are placed to an accessible height, devices and shifting equipment);
- The interdiction, applied to all Rroma people, of filling position or entering in certain public spaces: schools, hospital, churches etc.

Rroma women must know and exercise their rights. At the national level many NGOs have projects through which Rroma women are informed about their rights and the access to the labor market.

According to the public opinion from Romania, the image of Rroma women is represented by mass-media, is one full of prejudices, stereotypes, being often subjected to marginalization, racial discrimination and social exclusion because of these negative discriminations. The education of Rroma women is limited, being motivated by the economic component, but also by marriage. Among the problems that Rroma people face are: family violence, prostitution, traffic of people, precarious education, multiple discrimination on the labor market, and marriage at early ages[7].

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www.inforegio.ro/user1/file/Egalitatea%20de%20sanse_tiparit.pdf.

[5] http://www.cncd.org.ro/new/formele_disciminarii/?language=en.

[6] *Ibidem*, p. 6.

[7] Ana Maria Preoteasa, S. Cace, G. Duminică (coord.), *Strategia națională de îmbunătățire a situației romilor: vocea comunităților*, "Împreună" Agency of Community Development, "Expert" Publishing House, Bucharest 2009, p. 63.

The Romanian Government strategy to improve Rroma people condition[8] is the main document of public policy regarding the social inclusion of Rroma people and treats the problems of the Rroma minority.

According to The Plan of Measures from The Strategy, at the health field it is mentioned the growth of the access to the health services, accentuating Rroma women and children health problems. Among the measures that indirectly refer to Rroma women is the increasing in number of the health mediators (*for the job of health mediator were employed only women, most of them Rroma*), training trainers in the health mediation and the instruction of the health mediators regarding the fighting against discrimination towards Rroma people. These measures concern rather the development of a local structure competence, but they also encourage the growing of health mediators that are Rroma women[9].

The early age to which the marriages take place at Rroma people is a very controversial problem. Teachers, the representatives of the local authorities, mass-media use this social behavior as an argument for blaming "the culture" and "the mentality" of Rroma people for their vulnerability in front of their serious socio-economic problems. Actually, marriage at a young age is not always an assumed tradition. Each marriage is defined as being a part of "the tradition" and is cherished especially among the wealthier communities of Gabors, coppersmiths and tent-dwellers, where the arranged endogamous marriages have the social function of administrating the family fortune and heritage. Yet, there are few such rich households – observation also sustained by the data from the investigations that refer to the income and to the possession of durable consumption goods. In other cases, the family strategy of resorting to an early marriage is not motivated by a recognized "tradition". In these cases, the early marriage can be the result of the lack of an attractive opportunity for the future. The young people follow the way of the community in their family life, without defining this "tradition", because the lack of the alternative routes. For example, in the Miniu community from Ploieşti, the girls from the secondary school see love and marriage as a possibility of escaping from the extreme poverty in which they live, of going away from the crowded households in which they have to take care of their younger brothers and sisters, their cousins and to make their own families, where they hope they work less (as they confess to the researcher who is also the Romani teacher from the neighboring school). In this context, of lack of alternatives, the immediate solution of marriage (starting from zero and settling to their own house) proves to be, finally, a trap: the social mobility is low, the precariousness is perpetuated, the young people and their children having very few alternatives. Non-Rroma people who live in poverty conditions in the segregated areas with a large density of Rroma population, in ghettos or in poor rural areas have a similar matrimonial/family planning behavior. Talking to few Romanians with a modest economic situation, I was astonished to find that they marry at the same age. V.I., 56 years old, brought up without a father in a family with huge financial problems, married at 16 years old and her son at 18. I realized that these early marriages are not specific only for the Rroma people from Curtici, but also for the Romanians, and that this early age could represent an indicator of the class not of the ethnicity. The fact that very small ages for marriage are practiced among the rich Rroma people seems, in my opinion, to underline the idea that the local tradition and certain features of the cultural identity are changing slower than the economic situation (Curtici, Goina, M 2007). The qualitative data indicate the fact that in certain Rroma communities, the family pattern suffers a changing process: the age for the first marriage is growing and the number of children is decreasing once with the facilitation of the access to information that refers to the family planning. The same thing also happens in case of some

[8] Government Decision no. 430, from the 25th of April 2001, published in the Official Gazette of Romania no 252, 16th of May 2001.

[9] Ana Maria Preoteasa, S. Cace, G. Duminică, (coord.), *op. cit.*, p. 64.

similar studied groups (young families of non-Rroma people with low social mobility and few opportunities) that do not live in the same poor rural areas or in poor urban enclaves[10].

The Rroma families are made at the early ages of the partners, representing a "barrier in the way of school attending and the finishing of the superior education classes (high-school, faculty etc.). The lower level of education places Rroma people, obviously, on lower positions on the labor market. In this context, the situation of Rroma women is worse than that of men: 35% of the married women started their couple life at less than 16 years and 31% during the period of 17-18. It results that two thirds from the Rroma women marry legally or not until 18 year old, having no chance to gain the necessary training for a modern profession/job, that is high-school or vocational school"[11]. The number of Rroma housewives is 4 times bigger that the share of women at the national level, demonstrating the weak participation of women on the labor market[12].

Another field in which Rroma women can be found is the child protection, education and cults, where is identified the necessity for evaluating the participation of Rroma women to programs of child protection, defense and education. Because it is approached the theme of discrimination in schools, the introduction of some disciplines for the prevention and for the fighting against discrimination in the school curriculum, is a beneficial measure for Rroma women[13].

Beneficial effects are also felt in the fields of re-education and communication, both in the establishment of inter-institutional relations: church, school, penitentiaries, health facilities or social assistance or counseling services, and of relations between generations: children, parents, grandparents, with positive consequences on future generations[14].

Rroma Women Association from Romania is a non-governmental organization that carries out its activity in the protection of the human rights and social inclusion. RWAR has as objectives the improvement of the access on the labor market of the Rroma women, the facilitation of access to quality education, the assuring of education for health and for reproductive health for women, the assuring of social assistance, the protection of Rroma women and children[15].

Among the projects and the programs that are developing by RWAR can be mentioned[16]:

1. Literacy courses for the traditional Rroma women -Financier: World Bank – SOROS Foundation;
2. Program of information regarding the contraception and family planning in the communities of traditional Rroma people – Financier: SOROS Foundation;
3. The training of 20 young Rroma people, boys and girls, as mediators – Financer: Save the Children and MSF;
4. Newsletter "Femina" for informing – USA Embassy at Bucharest; Mama Cash Foundation; East – West, NY, New York USA;
5. "Femeile Rome Pot Reusi" (Rroma Women Can Succeed) – project financed through The Stability Pact in the South-East of Europe in partnership with the Otto Beneke Foundation – Germany;

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[10] G. Fleck, C. Rughinis, *Vino mai aproape. Incluziunea şi excluziunea romilor în societatea românească de azi.* Human Dynamics, Bucharest, 2008, p. 31.

[11] G. Duminică, M. Preda, *Accesul romilor pe piaţa muncii*, "Editura Cărţii de Agribusiness ECA" Publishing House, Bucharest, 2003, p.25.

[12] *Ibidem*, p.26.

[13] Ana Maria Preoteasa, S. Cace, G. Duminica (coord.), *op. cit*., p. 64-65.

[14] Elena-Ana Nechita, *Religion and its impact on criminal investigation*, in AGORA International Journal of Juridical Sciences, No.2/2011, Agora University Press, p. 408-409.

[15] http://www.incluziuneafemeilorrome.ro/despre_afrr.

[16] *Idem.*

6. The creation of the first network of Rroma Women in the South East of Europe NGOs - Financer: SOROS Foundation;
7. The Creation of the first web site of this network of Rroma Women NGOs.

During April 2011, in Braşov and in the western and south-western regions from Oltenia, was developed a project to help Rroma women to find a working place. During the "Barrabarripen project – an inter-regional model of inclusion for Rroma women", are chosen 120 Rroma women, between 18 and 46 years old that do not have a main qualification or have a qualification, but it is not solicited on the labor market. In the project, 12 companies participate and offer practice classes. "The employing companies receive subventions for each Rroma woman that they hire. Altogether, in Braşov, 12 company managers will attend inter-cultural courses, having as purpose the change of the employers' mentality regarding Rroma people", said Radu Colţ, the local coordinator of the project[17].

Conclusions

Even though they have the same school education, Rroma women remain at home in order to take care of their family, unlike the men who get employed.

Usually, Rroma men find work easier than the women. In the actual period of time, because of the economic crisis, unemployment has grown in Romania.

The economic problems have affected more Rroma people than others because the competition for a working place has increased, a job being occupied by people who are very well prepared in that area.

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Egalitatea de şanse şi nediscriminarea. Îndrumar, www.inforegio.ro/user1/file/**Egalitatea**%20de%20**sanse**_tiparit.pdf

Law no. 202/19.04.2002 the equality of chances and treatment between women and men

http://www.incluziuneafemeilorrome.ro/despre_afrr

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[17] Cf. http://www.ziare.com/brasov/angajati/120-de-femei-de-etnie-rroma-vor-fi-ajutate-sa-isi-gaseasca-un-loc-munca-2102621.

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CURRENT ASPECTS REGARDING INTERNATIONAL AND NATIONAL LIABILITY FOR ACTS THAT AFFECT THE RIGHT TO A HEALTHY ENVIRONMENT

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Abstract

Even if in the remote past, international right manifested itself quite reluctant in accepting and, in materializing the international state liability, for damages brought to the environment, in the second half of the 20th century, in this domain several legal international universal or regional instruments were adopted, implying a general or special character, the problem of environment protection becoming one of the major preoccupations of the international community, which was faced with the catastrophic effects of some events which had a devastating result upon the environment, such as: the accidents of the Torry Canyon tanker vessels in the year 1967, Exxon Valdez in the year 1992, Prestige in the year 2002, the accident from the Sandoz plants in Switzerland and, not least, the nuclear accident at Chernobyl (Ukraine) since 1986.

Key-words: *international liability, environment right, environmental pollution, environment international law, protection.*

Introduction

The prolonged pollution of the natural environment determined the accumulation of contemporary ecological problems, which manifest by disharmony between the created and the natural environment, producing not only the destruction of ecological balance, but also an adverse reaction, of the type of a boomerang, the environment becoming less favorable for achieving the social and economic activities, for the human life, which can no longer be considered the biosphere center. For that reason, the states need to collaborate in order to establish, at an international level, the most adequate measures meant to ensure protection and improvement of the environment which implies not only material and organizational efforts, but also the development of certain scientific conceptions meant to determine a new attitude towards the environment, based on the reconciliation of humans with nature.

Basic principles regarding international liability for facts that affect the environment

In the domain of environment law, the international liability has a reduced impact and presents numerous particularities, the major objective being the prevention of degradation, as ecological damages, are regularly irreversible or difficult to control and evaluate[1], and the cost

[1] For example, the nuclear accident in Cernobyl (Ukraine, 130 km NW of Kiev), from the date of 26th April 1986, when reactor no. 4 of the energy-nuclear powerplant from Cernobyl exploded during tests and whose effects were devastating. Another accident, from a more recent date (March 2011), is from the nuclear Japan powerplant in Fukushima that experts in the domain consider more serious that the one in Cernobyl as it lasted

of restoring the affected environment (if it is possible) becomes exorbitant and does not present a complete and effective compensation. Moreover, legal regulations do not impose absolute prohibition to pollute in certain domains, actually authorizing a reasonable manner of polluting.

In establishing sanctions for acts that affect the environment the same principle will be applied, in conformity with which the infringement of an international legal norm engages liability of the guilty subject of international law[2].

The liability for acts that affect the environment may be civil (for ecological damages produced), criminal or conventional[3] (for acts that breach the environment protection regime), or may generate actions in contentious matters regarding environment administrative authorizations.

At an international level a oscillation between public international law procedures (consecrated in treaties) and the use of private law mechanisms (especially admitted in states practice), which offer a profile different from the international liabilities for environment damages.

The central problem – determining certain crimes that are specific to environment damage, which would globally repress the ecological illicit – has not yet reached a concrete solution, thus the effects of control and sanctions in this domain do not yet have complete efficiency.

The liability in environment law is based on the principle "the polluter pays"[4], which was sustained for the first time by the Organization for Cooperation and Economic Development in a series of recommendations[5], beginning with the years 1970.

This principle shows that the polluter should suffer the costs for establishing prevention measures and pollution control, for the environment to present itself in an acceptable state; in conformity with the Recommendation of the Organization for Cooperation and Economic Development C (74)223, the cost of these measures should be reflected in the costs of goods and services which cause pollution during production and/or consumption

Subsequently, it has been considered that the polluter must also suffer the cost *ex post factum*, meaning the cost of repaying measures; for example, in the C (81)32 Recommendation of the Organization for Cooperation and Economic Development, it is shown that the polluter is also liable for "the reasonable repair actions", in case of spilling the oil into the sea.

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longer and implies multiple reactors. The Japan agency for nuclear security classified the accident from Fukushima of 5th grade on the INES scale.
(http://www.euractiv.ro/uniunea-europeana/articles%7CdisplayArticle/articleID_22452/Expert-rus-Accidentul-de-la-Fukushima-este-mai-grav-decat-cel-de-la-Cernobil.html accessed in 20.09.2011).
We appreciate that, involving a fortuitous event, the nuclear damages are produced by natural causes? (earthquake), in this situation not debating the liability issue in conformity with the Convention regarding civil liability for nuclear damages, adopted in Vienna, on the 21st of May 1963, entered in force on the 12th of November 1977, to which Romania adhered in conformity with the Law no 106/3 October 1992, in the Official Gazette of Romania no. 225/15.10.1992.

[2] The first time liability principles were applied in the domain of environmental law is related to the Foundries business in Trial, from June 1941, in litigation between Canada and the United States of America, in the domain of atmospheric pollution.

[3] Penal and contravention liability constitute a "veritable repressive environment law", its main function being of protecting natural values acknowledged as being important for society.

[4] The notion of "polluter" was defined by the Recommendation of the European Union Council from the 7th of November 1974, as being the person which, in a direct or indirect manner, causes damage to the environment or which creates the conditions that lead to this prejudice.

[5] See the Recommendation C(72)128 from 1972 regarding guiding principles concerning international economic aspects of environmental policies, the Recommendation C(74)223 from 1974 concerning the implementation of the principle "*the polluter pays*", the Recommendation C(89)88 from 1988 regarding the implementation of the principle "*the polluter pays, for accidental pollutions"*.

The liability institution in environment international law is based on the principle of state liability for ecological damages, which was consecrated in the Rio Declaration of Principles, from the year 1992 (principle 21)[6].

The main obligation of the states, in conformity with the written law and customs, is to act as not to harm the laws of other states, this principle being also stipulated in the international jurisprudence regarding environment law.

In the domain of environment international law, the liability for prejudices caused by an illicit activity *per se* tend to be more and more channeled to the person who detains a decisive economic power upon the activity that harmed the environment, situation firstly consecrated in the conventions of the nuclear domain[7].

The orientation of liability to a person was also subsequently achieved by means of conventions from the liability domain for damages caused by pollution with hydrocarbons, and then from other activities dangerous for the environment.

In the conditions of incertitude regarding international state liability, the solution advanced in practice, including in international conventions, for damage compensation, consists in the transfer of this matter to an individual level, as an issue of private international law, which is resolved within the framework of domestic jurisdiction. In this particular situation, repairing the damage is primarily the liability of the person at fault for breaching the environment norms, and the state has a subsidiary liability.

The arbitral jurisprudence and the jurisprudence of the International Court of Justice contributed, by the decisions pronounced in the issue, to the establishment of the principle of state liability in issues of cross-border pollution[8].

Regardless of the activity developed, the states are liable to ensure states compliance with environmental laws or of areas which are not related to a national jurisdiction, in conformity with the requirements of the international environment law. The new perspectives of sciences and technological development must be taken into consideration in the context of necessity for conciliation of economic development in environment protection[9].

A unique issue which arises in the international environment law is international liability for damages brought to the *common heritage*, to the "areas beyond the limits of national jurisdiction". The necessity of liability for the prejudices brought to the environment in certain common areas (seabed and ocean floor from outside the national jurisdiction, the

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[6] Together with states, liability may also incumbent on intergovernmental international organizations, movements/ populations that fight for national liberation, as well as on Vatican in the domain of public international law.

[7] See the Conference in Paris from 1960 regarding the liability towards the third parties in the domain of nuclear energy, entered in force in 1.04.1968, supplemented by the Conference in Brussels from 1962, entered in force in 1974; the Conference in Vienna from 1963 regarding civil liability for nuclear damage, entered in force on the 12th of November 1977, amended by the Protocol in Vienna from 1977; The common Protocol referring to the application of the Conference in Paris, adopted in 1988; The Protocol regarding additional compensation for nuclear damage, adopted in 1977 at Vienna, the Convention from Brussels from 1962, regarding the liability of nuclear vessels.

[8] See, for example, Arbitrary Sentence from the 11th of March 1941, regarding the Trail Foundry case (United States of America vs. Canada), according to which it is considered that, based on the principles of international law and the one from the United States law, no state is entitled to use its territory or permit its usage in the sense that smoke will produce damage on the territory of another state or to the properties of persons from its framework, if there are serious consequences and if the prejudice is proven by clear and convincing evidence. The intervention of international jurisdiction in the domain of environment law is limited by the quasi-existence of coercive means, being also subordinated to the sovereign will of states.

[9] If the existent international law, regarding the protection and monitoring of environment does not particularly prohibit the use of nuclear weapons, it however brings forward important considerations of an ecological order which must be taken into consideration adequately, in the framework of regulating principles and applicable law regulations in case of armed conflicts (International Court of Justice, 20 December 1974, The Nuclear Experiments Case, New Zeeland against France).

extra-atmospheric space, Antarctica) is stipulated in the dispositions of certain international treaties[10], treaties which frequently embody flexible procedures of amendment and plans of action which imply complementary measures. Likewise, some international conventions[11] which target environment protection recommend states to adopt, at a national level, regulations which will protect the environment in the domains that are the subject of conventions and that sanction the acts which lead to affecting them.

Adapting to the international requests of Romanian legislation regarding environment protection

An increasingly evident characteristic of the international law is reflected in its unifying role of environmental law at state level, which by their richness and diversity of issues approached, doubled by the natural environmental unity, offer the national legislators a common source of inspiration and a unique point of reference by which the premises of a common, uniform and universal environmental law will be created.

In order to become effective, international environmental law must be integrated at the level of domestic legal order of states. The ways of acceptance vary, but the fundamental rule is the one that international law is mandatory for states, which determines the assimilation and application procedure of norms within the domestic internal order.

The Romanian Constitution from 1991, reviewed in the year 2003, consecrates the fundamental right "of any individual to a healthy environment and which is ecologically balanced" (art. 35). From formulating the text, we infer that this right is known by both natural and legal persons, individually speaking.

In accordance with the international requirements, which recommend states to elaborate measures and sanctions for ensuring the environment protection[12], with the regulations of the European Union, as well as the international practice, our country regulates legal liability for not complying to the environment legal laws, by the Emergency Government Ordinance no. 68/2007 regarding environment liability, referring to preventing and restoring the damages upon the environment.

[10] The treaty regarding the prohibition concerning nuclear weapons in the atmosphere, the cosmic space and underwater, adopted in 1963; the Treaty concerning principles that govern state activity in the exploitation and usage of extra-atmospheric space, including the Moon and the celestial bodies, adopted in 1967; the Treaty from Washington referring to Antarctica, concluded in 1959 and which entered in force in 1961 (Romania adhered to the Treaty regarding Antarctica by the Decree no 255 from 21 July 1971).

[11] The Convention of the United Nations upon the marine law, concluded in Montego Bay (Jamaica), on the 10th of December 1982; the Convention in Vienna regarding the protection of the ozone layer, concluded on the 22th of March 1985; the International Convention regarding the preparation, response and cooperation in case of Hydocarburs pollution, adopted in London, on the 30th of November 1990; the Convention regarding the transboundary effects of industrial accidents, concluded at Helsinki, on the 17th of March 1992; the Convention-framework of the United States regarding climate changes, signed at Rio de Janeiro, on the 9th of May 1992; the Convention of the United Nations for preventing desertification in the countries which are confronted with intense draught and/or with desertification, especially in Africa, adopted in Paris, on the 17th of June 1994; the Convention regarding access to information, public participation to decision making and access to justice concerning environment issues, adopted at Aarhus in the year 1998; the European Convention regarding landscapes, adopted on the 20th of October 2000, in Florence; the Convention regarding persistent organic polluters, concluded in Stockholm, on the 23th of May 2001, etc.

[12] The International Declaration from (1992) presents the necessity of a national legislation regarding liability for pollution and other damages brought to the environment by international offenses, which is elaborated by the states; they will perform ways of action in front of their courts, for the restoration actions of these losses or damages.

The costs of prevention and restoration activities are suffered by the perpetrator[13], and restoration of the damage concerns the deteriorations caused to the species and natural protected habitats, upon the waters and soil[14], and is achieved by reducing them to their initial stage, by a primary restoration[15], complementary[16] or compensatory[17].

Together with the tort liability, which aims to restore the damages produced by illicit acts upon the environment, the law also regulates the *contraventional* liability specific to this domain.

Thus, the Emergency Government Ordinance no. 195/2005, with the subsequent amendments and additions[18], establishes numerous categories of contraventions within the liability of the central and local public administrative authorities, of natural or legal persons, for not complying with the liabilities which refers to: regulatory procedure regime, dangerous substances and preparations, waste, chemical fertilizers, etc.

In conformity with art. 96 from the Emergency Government Ordinance 95/2005 the environment contraventions are sanctioned a fine of 6500 lei to 7000 lei for natural persons and from 25000 lei to 30000 lei for legal persons.

Similarly, contraventions are established for acts that damage the environment in: Water law, Law concerning atmospheric protection Law on the safe deployment, regulation, Authorization and control of nuclear activities, the Forestry Code, Law of hunting and hunting protection, veterinary law, etc.

As in other countries, taking into consideration international regulations in our country, dangerous acts for the environment were incriminated, thus creating the category of "ecological offenses" which are sanctioned with penal crimes[19].

The Romanian penal code in force sanctions certain acts by which the environment is being affected, such as:

- performing any operations of importing waste or residues of any nature or other dangerous goods for the population health and for the environment, as well as introducing in any manner or transiting them on the country's territory, without respecting the legal dispositions (art.302);

- polluting, by all means, the *water sources or networks,* if it becomes dangerous for the people's or plants' health (art.311);

- Production, production, possession or any other operation on the movement of products or toxic substances or drugs, cultivation of plants for processing containing such substances or toxic substances and products testing, all these without any right (art. 312) etc.

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[13] Transposing Directive no. 2004/35/CE, the Emergency Government Ordinance no. 68/2007 establishes that the operators are compelled to adopt measures and apply practices in order to minimize the risks of damages or take measures of restoration, necessary in case of producing the prejudice.

[14] Art. 2 § 13 from the Emergency Government Ordinance no. 68/2007.

[15] "Primary" restoration supposes any measure of remedy which restores the natural resources or services to the initial state or to a close state relating to the later.

[16] "Complementary" restoration supposes any measure of remedy which compensates for the fact that primary restoration did not lead to the complete recovery of the natural sources or services prejudiced.

[17] "Compensatory" restoration implies any measure meant to compensate the natural resources and services lost which took place between the date of producing the prejudice and the moment in which primary restoration was fully achieved.

[18]The Emergency Government Ordinance no. 195/ 2005 was published in the Official Gazette no. 1196/2005, was approved with amendments by the Law no. 265/2006, then amended and completed by the Emergency Government Ordinance no. 57/2007, the Emergency Government Ordinance no. 114/2007 and the Emergency Government Ordinance no. 164/2008.

[19] The issue of environment offenses has been debated for many years within certain European and international forums. For example, in the year 1998, the European Council adopted the Convention regarding the protection of the environment by measures of penal law, and in the year 1999, at the reunion from Tampere, a union of efforts was demanded, in order to agree upon the definitions, offenses and common sanctions, referring to a limited number of criminal sectors, including the environment criminality.

Moreover, the Emergency Government Ordinance no. 195/2005 regarding environment protection sanctions certain acts which are considered offenses, when they tend to endanger the human life and health, animal or vegetal[20].

Conclusions

Accelerated globalization of environmental problems and the aggravation of some of these, such as climate changes, require a new approach, in which the major objective is preserving and ensuring the survival of the species, which implies a globalization tendency of the environmental law.

This must establish long-term objectives – except for government periods and electoral calendars – meant to promote a development in moderate terms, which would lead to socio-human issues reconciliation with the maintenance requirements and the perpetuation of a balanced, ecological and quality environment.

At a legal level, some evident tendencies may be observed: the extension and generalization of the constitutional environment law, the acknowledgement and consecration of the fundamental right to a healthy and ecologically balanced environment, but also of some principles (as the concept of precaution), increased procedural safeguards, diversification of economic and fiscal instruments and their increased use of environmental action, increasing the role of civil society and the public in achieving regulatory environment, establishing a proper system of liability, including through the adoption of specific sanctions as environmental law.

Thus, in the domain of environment protection the establishment of sanctions is imposed, by international instruments, against private polluters or guilty states, in the situation in which acts constitute major implications upon the environment.

Likewise, we consider that extremely grave acts, which produce veritable catastrophes upon the environment, should be included in the category of international crimes *stricto sensu*, thus the guilty one that produced them will be punished by the International Criminal Court.

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[20] Offenses which result in *the degradation and destruction of the environment*; offenses which endanger *the life or health of people, fauna or flora*, etc.

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"WHITE COLLAR" CRIME – PSYCHO-SOCIOLOGICAL PERSPECTIVE

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Abstract

Generally speaking, deviance and its specific genre, delinquency, are associated with a lower social status, to the individuals which are under the poverty line. Expression as "he is stealing because he has nothing to eat", "he took a piece of bread to feed his children", are used to provide mitigating circumstances for behaviors contrary to social norms. But in practice, not just those from disadvantaged social classes (lower class) commit criminal acts, but also representatives of social groups which, socially speaking, are over the average. They are part of the upper class. Then who are these criminals and why they are called "white collar"? The answer to these questions will be the subject of this paper, with which we'll try to identify potential perpetrators of such crimes and to find out what characterizes and distinguishes them from other types of criminals.

Keywords: *"white-collar", criminality, social structure, psychological traits, offence.*

Introduction

Starting from the most succinct definition of the deviance – as "a difference negatively perceived"[1]*, we can expand the discourse on the subjects like the appearance of deviance, its nature and the factors influencing the manifestation of this phenomenon.*

Sociological point of view will be described, relying on the theories developed by Durkheim and many other authors, analyzing the social status of deviance and placing it on the normal- pathological axis.

The psychological perspective on deviance will be presented in parallel and compared to the sociological one, trying to determine the point of intersection of the two sciences, in this field of deviance. From the psychological point of view, the specific features of 'white collar' deviants, will be analyzed in terms of behavior and attitudes.

In order to talk about deviance, as a specific difference, it is necessary to have an object of comparison. What is this for the deviance? What we have in mind, when we claim that someone "deviates"? Durkheim argues that "the object of any science of life, whether

[1] M. Cousson, Raymond Boudon, (coord.), *Tratat de sociologie*, Humanitas Publishing House, Bucharest, 1997.

individual or social, is to define and explain the normal state, as antithetical to its opposite[2]" called in our case, deviance. The dichotomy normal - deviant, give rise to another, the one between normal - pathological, that is because we can talk about normality, even speaking about deviance. Some of the offences and their impact on society are perceived as being the result of the behavior from a person which is out of the mental state. We are talking about the violent, cruel crimes, the rape, crimes that harm minors and children in particular.

The main criterion to determine normal or pathological character of a social fact is its generality. The more a fact is considered frequent, it is perceived as normal, but it must be linked to a particular time and the social context. This is the point where the cultural differences emergence, in acceptance or rejection of certain social facts. What is to blame in a certain society is absolutely normal to another (e.g. the marriage arranged by relatives, between minors). Also the facts convicted by society, in a certain moment of its evolution, are now accepted as normal (cohabitation of young people before marriage or "trial marriage"). Society is therefore governing the appearance and disappearance of deviance. Some forms of deviance are impossible to occur without a certain degree of development and standardization of social reality. For example, the "white collar crime" or crime of the respectable and respected individuals occurs only when the subjects suitable to commit this type of crime are in auspicious areas, such as business, real estate, railroads, insurance, weapons, banks, public facilities, oil industry, politics etc.

The term "white collar crime" was introduced by E. Sutherland and refers to crimes committed by the rich. The delinquent activity specific to this notion, refers to tax fraud, illegal sale, securities fraud and property, embezzlement, manufacture and sale of dangerous and illegal products, environmental pollution, theft. The same author proposes, as a way to learn about the occupations involving the possibility to commit this type of offense, the exercise of answering the question: "What are the unfair practices in your profession / occupation?"[3]

That way is made the distinction between two categories of delinquency: the white collar, which involves the use of position and the employment status and whose authors are in the middle class, or practicing a specific profession and the powerful delinquency, involving the authority conferred by holding a social position (e.g. the acceptance of bribe to favor a decision). Compared to the crimes of subsistence, committed by the poor, whose motivations are related to the satisfaction of primary needs, according to Maslow's hierarchy of needs, at first sight "white collar" crime lacks the motivation. This is where the status of who commits crime occurs! While acts of deviance, related to subsistence needs are sometimes committed spontaneously, civil offenses come as an assumed risk, when accepting an employment status. A person who relates to the members of his employing organization, may be the subjected to the pressure of engaging in some specific and sensitive professional activities: because, sometime, other members of the organization are involved in such acts, it becomes mandatory that all resort to a certain type of antisocial practice, other reasons may be the effort to maintain a favorable status, which was hardly touched, or the desire to grow professionally, even if this means a rupture in terms of social norms. Talking about status and comparing the two types of deviants, located at opposite poles, while the crimes of subsistence implies that the poor steal from those who have resources and are often caught and punished, in the case of the "white collar" crime, the passive subjects of crime are generally poor people, who could not fight back. A representative example is the one of the pharmaceutical industry, which by its direct effects on the population is more dangerous than a robbery, or a trivial theft. The example is not talking about a single person who commits an offense, the responsibility is dissipated and moral author it is actually a group of people, who often have

[2] E. Durkheim, *Regulile metodei sociologice*, "Antet" Publishing House, Bucharest, 2004.
[3] E.H. Sutherland, D.R. Cressey, *Principles of Criminology*, J.B. Lippincot Co., Philadelphia, 1966.

led the negative effects through their decisions and not doing anything specifically. In such a situation, even if someone would like to make justice, it would only be a fight with a "system" without ever been able to "see" the perpetrators. In this category we may also include the "corporate homicide", which consists of: accidents that occur at the workplace, due to unsafe practices, the illegal working conditions or lack of job security.

Another differentiator aspect is the violence and aggression involved in committing the offense. While some of the behaviors "universally repressed by society"[4], such as murder and theft, are committed by offenders from the disadvantaged classes and involve violence, at a first glance the "white collar" crimes are "clean". But if we consider the degree of risk and the social risk involved in this kind of offenses, in many cases, the latter are much more serious, speaking in terms of the materials involved and the effects propagated, on medium and long-term. Regarding the effects, Sutherland argues that "financial losses caused by white collar crime, no matter how large, are less important than the harmful effects on social relations. White collar crime violates the social trust and generates distrust by affecting social morals and causing widespread disruption. Other types of crime have a relatively small effect on institutions and social organization"[5].

Also from the sociological perspective we are discussing about the administrative segregation of the criminals. The theories say that the intervention of the law enforcement is determined by the social position of the person concerned. While the subsistence crime authors are involved in the judicial inquiries and most often the retention is proposed as a solution of rehabilitation for the one who committed the crime, in case of the white-collar crimes, although it was found that they are more dangerous to society, the primary means of investigation is the administrative inquiry and the solutions are represented mostly, by fines or administrative penalties.

From the psychological perspective analysis of criminal behavior should be judged by its conditionality. The human subject internalize the surrounding reality, and in the same time the social reality, correlating it to previous personal experiences, inclinations and skills gained in the ontogenesis course. According to the genetic theory the criminal behavior is learned, like the most of human behaviors, and it is learned by imitation, in the interaction with other human individuals. In the process of "shaping", becoming and transformation of the human in a social individual, the most important factors are:[6] the family, the pair groups, the school and the media. The importance of family is evident and it is manifested in what our folk culture calls "the seven years spent at home". School has his main educational role in "forming the character". About the media influence, its way and direction of occurrence, and the positive-negative aspects, it is much to discuss but the present context is not favorable to the development of such a topic.

The "pair group" factor was intentionally left the last, because recent studies promoted by psychologist Judith Rich Harris[7], argue that it is even more important than the family influence to the individual. Affiliation groups are composed of people from the same age category or with similar ages, who share common interests and similar concerns. These may be groups of students who practice sports, "the gang" from the block etc. What is important is that individuals of the same age, especially in the case of teenagers as members of specific groups, do not feel pressure from the parents or the persons representing authority, so learning and imitating behaviors is easy and very attainable.

Discussing the specific human subjectivity, another issue that deserves attention, is that of understanding and mastering rules imposed by society. In this case, the most important

[4] M. Cusson, Raymond Boudon, (coord), *Tratat de sociologie*, Humanitas Publishing House, Bucharest, 1997.
[5] E.H. Sutherland, D.R. Cressey, *Principles of Criminology*, J.B. Lippincot Co, Philadelphia, 1966.
[6] I. Mihăilescu, *Sociologie generală*, Polirom Publishing House, Iaşi, 2003.
[7] Judith Rich Harris, *The Nurture Assumption*, Touchstone, New York, 1998.

role in psychological terms is the role of the language, as reflection of language acquisition. They say the justice is blind and all individuals are equal in front of the law. Pleading the ignorance of the law or the rule, it is not permitted. The question is: what does each individual understands from the rule and how is it internalized, in order to respect it? How is a person relating to the norm? The answer was already provided: "by correlating it to previous personal experiences, inclinations and skills".

Speaking about "white-collar", as any other behavior, even the criminal one is learned. "A social group can be organized in order to promote criminal behavior or against this type of behavior [...] The fact that an individual is criminal or not, is determined by the frequency and intensity of contacts that the individual has with the two types of behavior"[8] and the forms of the individual criminal offenders and specific activity is determined by the affiliation to a certain social group (family, education level, occupation, income, housing), etc.

Regarding the attitude, in the case of "white collar" there is a specific type of pressure constantly exercised on the individuals: "the social competition"[9], or the dream to succeed, which require the evidence of consistent attitude from those involved. While the plan of subsistence crime lies in the necessity to satisfy primary needs, "white collar" crimes are committed for the power, the social status, thereby accomplishing the Social ego's necessities. In the American psychological literature the term "character", which means stable personality traits, was assimilated to the term attitude. It is said that only "attitude counts" and that the achievements and failures in the personal and professional life are due to the individual's attitude. Attitude is regarded as a resolution strategy, as a resource which if it's properly used, can bring you everything you want and also the desired social status. What is the specific set of attitudes for "white collar"? How do these individuals appear to others? We treat separately the attitude towards self and the attitude toward others. In terms of attitudes towards his self, the "white collar" offenders are using their mental resources to "hypnotize themselves" and to make them suggestible to success. Regarding the attitude towards others, it is important to consider the way the delinquent relates to his victims. But in the given circumstances of the crimes of power, the uneven nature of the relationship between victim and offender is easy to imagine. It is clear that "white-collar" offenders have problems in this relational area.

From personality point of view, to succeed, it is necessary and required that subjects from "white collar" category to show: organization, "cold blood", risk taking behaviors, perseverance, persuasion, openness to others, in order to establish social contacts, an intelligence above average, developed language skills in order to work with people, motivation, willpower and also features enhanced in the negative: lack of empathy, lack of emotional arousal, lack of personal involvement, schizoid traits (detachment, coldness in the relations with others). All these features are part of the offender's "personality profile", must be strongly manifested, so that success to be guaranteed.

Returning to normal - pathological dichotomy, the psychology of personality disorders recorded as an independent disorder, the antisocial disorder whose symptoms are the following: "not conforming to social norms, observing laws and committing illegal acts constantly, constantly lying, intimidating and using deception for the benefit of impulsivity, failure to future plan implementation, irritability and aggressiveness indicated by repeated physical attacks, disregard for safety of other individuals, irresponsibility indicated by repeated failure to sustain a job or their meet financial obligations, lack of remorse shown by the indifference to acts of violence, theft or verbal abuse towards other individuals. Symptoms tend to reach maximum expression at 20 years and around 40 years get better"[10]. With the exception of fewer listed above, related to aggression and social engagement, the rest can be

[8] E.H. Sutherland, D.R. Cressey, *Principles of Criminology*, J.B. Lippincot Co, Philadelphia, 1966.
[9] R.K. Merton, *Social structure and anomie*, in Social Theory and Social Structure, Free Press, New York, 1957.
[10] Simona Stiuriuc, *Tulburarea de personalitate antisociala*, http://www.la-psiholog.ro.

easily identified as specific symptoms in the antisocial behavior exhibited by "white collars". All this bring to attention the following question: where does white-collar behavior lies, in the normal or the pathological area of crime?

Conclusions

1. Criminal behavior exhibited by "white collar" is learned and adapted to a specific purpose: obtaining the power.

2. The social danger involved in this type of crime is higher in influence and in the effects it has on society, but in this case the punishment of criminal behavior has administrative implication.

3. Studying this group of subjects, although useful and interesting is almost impossible because "white collar" crimes, by their specific and the social actors involved, can be regarded as "hidden deviance".

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ASPECTS REGARDING THE THEORY OF UNPREDICTABILITY IN THE NEW CIVIL CODE

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Abstract:
The legislator's intentions regarding the new Civil Code stemmed from the necessity of an all-encompassing regulation of civil law. On the basis of these changes, the unpredictability appeared as a socio-economic reality determined by the drastic and unpredictable changes of the parameters under which a contract is executed, in comparison to those taken into account by the parties when signing the contract. It thus appears that the theory of unpredictability is the doctrine's and jurisprudence's answer to the fate of the contract's execution.

Keywords: unpredictability, contract, execution, fault, event

Introduction

For contracts regarding monetary obligations for which the execution is not simultaneous to the forming of the contract, but rather implies an ongoing process, contracts such as those implying successive execution or suspensive contracts, the possibility of an unbalance appearing in the detriment of one of the parties (usually the debtor) exists, as a consequence of events occurring after the conclusion of the contract. In a situation like this, the debtor will no longer be able to comply with its contractual obligation, not because it would be impossible, but because it would lead to serious damages of the economic-financial situation of the debtor. As a consequence, we'd be dealing with an over onerously obligation of the debtor, situation that did not exist at the moment of the forming of the contract.

It is called unpredictability the contractual disposition that allows the modifying of the content of a contract when, during the performing of the contract, certain events occur that effect the contractual balance, substantially changing the elements and information the parties took into account when concluding the contract, creating for one of the parties such onerous consequences, that it would be unjust for him to have to bare with them alone[1]*. It is essential that these events do not occur by the fault of any of the parties – the cause of the unbalance being a situation beyond the person and it's will – and could not have been foreseen when the contract was signed.*

The origins of the theory of unpredictability lie in Roman law where it is said that *omnis conventio intelligitur rebus sic standibus*, expressing that all conventions are considered to be valid if the circumstances in which they were signed remain unchanged. However, the perspective from which the theory is currently approached leads to the

[1] Simona Petrina Gavrilă, *Teoria impreviziunii*, "Dunărea de Jos" University, Galaţi, http://www.scribd.com/doc/54319505/TEORIA-IMPREVIZIUNII.

conclusion that, actually, the theory of unpredictability appeared relatively recently in administrative law, being later on adopted by civil law in the background of World War I, and that it reappeared in our law after 1989, due to the changes in the juridical system. By analyzing the periods in which the theory of unpredictability had its outmost success, we can observe that the crisis caused by the currency depreciation had a powerful impact over the regulation of the theory. The crisis naturally had consequences towards a galloping inflation, which determined the necessity of revising contracts so as to prevent bankruptcy and to once more have a balanced and secure contract. Due to the aforementioned elements, as far as the notion of unpredictability is regarded, most authors agree that it is a matter of economy and finances (the benefit offered to the creditor no longer corresponds to the real value of the counter-benefit, unpredictability being closely linked to the currency).

A discussion regarding the character of unpredictability raises the issue of whether the event itself needs to have been unpredictable or only its effects on the economic balance of the contract (the event appears as predictable, but its consequences have exceeded the forecasts of the parties), but also whether the unpredictability needs to be analyzed objectively or subjectively (depending on the party)[2].

J. Ghestin claims that the theory of unpredictability is founded on an inexact postulate: it puts the emphasis on the cause of a phenomena, whilst the effect it has on the contract's balance should necessarily be considered as the objective unbalance between the two benefits raises the issue of maintaining the contract as it is or revising it, and not the occurrence of new and unpredictable circumstances. Consequently, there is unpredictability if the price of a good or of a service established in a convention no longer corresponds to its value, as objectively analyzed by the judge from the point of view of the moment when the contract will be performed[3].

Despite the fact that the theory of unpredictability is explicitly included in the legislations of several Member States of the European Union, as is the case for Italy[4], Greece[5] or Portuguese[6], this institution has not, until recently, been regulated uniformly in Romanian law; only special normative acts authorizing the judge to revise an on-going contract exist[7], or that foresee the possibility of updating damages[8].

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[2] Gabriel Anton, *Teoria impreviziunii în dreptul român şi în dreptul comparat*, "Dreptul" Review no. 7/2000, p. 25

[3] J. Ghestin apud Gabriel Anton, *op. cit.*, p. 25.

[4] Art. 1467 and art. 1468 of the Italian Civil Code: *in the case of contracts with successive or periodical execution, as well as those with differed execution, if the benefit of one of the parties became excessively onerous as a consequence of extraordinary and unpredictable events, the party can demand the resolution of the contract as well as its effects mentioned by art. 1468 (reducing the benefit or modifying the methods of performing the contract, thus permitting the continuation of the performing of the contract in the spirit of equity). The resolution of the contract cannot be demanded if the new duties are included in the normal risk of the contract. The party against which resolution is asked for can avoid it by offering to accept the equitable modification of the contract's conditions.*

[5] The Greek code, at its art. 338, imposes the termination or revisal of the contract as a consequence of changed circumstances, according to the principle of good faith.

[6] The Portuguese Civil Code of 1966, art. 437.

[7] Law no. 8/1996 on author rights and connected rights, at art. 43. paragraph3 stipulates that "in case of an obvious disproportion between the author's remuneration and the benefits of the person who has been granted patrimonial author rights, the author can demand the juridical bodies to revise the contract or a convenient raise of the remuneration".

[8] Law no. 112/1995 on the regulation of the juridical regime of certain nationalized real estate destined as homes (art. 13 paragraph1); Law no. 10/2001 regarding the juridical regime of certain real estate abusively nationalized from 6 March 1945 to 22 December 1989 (art. 10 paragraph2 and art. 12 § 2, art. 19 paragraph 1, art. 32 paragraph 4 and art. 44 paragraph 2 and 4); Emergency Government Ordinance no. 184/2002 to modify and complete Law no. 10/2001 regarding the juridical regime of certain real estate abusively nationalized from 6 March 1945 to 22 December 1989, as well as to establish measures to accelerate its application and that of the

The United Nations Convention on contracts for international sale of goods also includes such dispositions: *"A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences. If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: he is exempt under the preceding paragraph; and the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him. The exemption provided by this article has effect for the period during which the impediment exists. The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt. Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention"*.

For a long time, the legislation, jurisprudence and doctrine remained faithful to the concept of contract stability, even in situations when from the date of forming the contract to its execution, unforeseen economical conditions intervened which broke the balance of reciprocal benefits that had been taken initially into account, situation expressed by *pacta sunt servanda.*

The changes that occurred after the two World Wars however imposed that certain contracts, especially those requiring successive executions, could be revised, which led to the adage *rebus sic standibus*, which complies with the contractual dynamics.

It has been said that the binding force of contracts opposes it's revising. However, throughout time, it seems that this binding force has attenuated through the recognition of revision clauses in some contracts, by establishing various legal dispositions regarding contracts revision and by admitting, in certain circumstances, the juridical revision of contracts (*rebus sic standibus*).

Applying the theory of unpredictability requires the intervention of the judge to restore the broken balance of the contract due to circumstances that were not foreseen by the parties when the contract was formed, circumstances that were also unpredictable at that time, unless express contractual clauses or legal dispositions enable the parties to revise the contract.

Theories regarding unpredictability, before the New Civil Code

The Romanian doctrine from before 1989 has rejected the theory of unpredictability on the basis of the growing phenomena of inflation, situation which was however irrelevant as there had been no official acknowledgement of the phenomena. Starting with 1990, inflation imposed itself as a permanent economic reality and it has become a more and more mentioned concept lately, on the background of the current financial crisis, leading to a come-back in current debates of the subject of the theory of unpredictability.

To justify unpredictability, some authors claim that any time the execution of a synallagmatic contract became too onerous for one of the parties, the revision of the contract's effects was admissible, so as to restore the value balance of contract duties, as the parties obliged themselves under economic conditions existent at the moment of the forming of the contract and thus if these conditions changed subsequently, it was necessary for the contract to be adapted to the new economic background.

Other advocates of the theory of unpredictability justified it using either an extensive interpretation of the concept of binding force, assimilating the hypothesis of absolute

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Emergency Government Ordinance no. 94/2000 regarding the retrocession of real estate that belonged to religious cults in Romania, approved with modifications and additions by Law no. 501/2002 (art. I paragraph 1, Title II).

impossibility to execute the contract with the hypothesis in which the execution would be very difficult, due to the clauses which have in the meanwhile became too onerous, either basing their arguments on unjust enrichment or on the idea of equity combined with good faith in executing contracts.[9]

Before the regulation the theory of unpredictability in the New Civil Code, stipulations about it already existed such as art. 43, paragraph 3, Law no. 8/1996[10] according to which "*in case of an obvious disproportion between the author's remuneration and the benefits of the person who has been granted patrimonial author rights, the author can demand the juridical bodies to revise the contract or a convenient raise of the remuneration*".

Another legal application of the theory of unpredictability can be found in art. 54 of the Emergency Ordinance no. 54/2006[11] that stipulates that "*the contractual relation between the concession provider and the concessionaire relies on the principle of financial balance of the concession, a balance between the rights given to the concessionaire and the obligations that are imposed to him. Consequently, the concessionaire will not be forced to bear the increase of duties regarding the execution of his obligation, if this increase results from a) a measure taken by a public authority; b) a force majeure or unforeseen circumstances"*.

Despite the lack of an explicit juridical consecration of unpredictability in Romanian legislation, its necessity has been emphasized by numerous doctrinaires who attempted to support the concept by creating several theories.[12]

The rebus sic standibus theory: the main argument is based on the interpretation of the parties' will, estimating that they have agreed to the implied condition of a certain stability of the economic situation.

A certain economic stability is thus presumed to exist when the contract is formed, presumption that is valid throughout the entire length of execution of the contract. This presumption consists of an implied condition, of an implied clause on which the parties based their will to form the contract. This clause is known as a rebus sic standibus clause (clause of unchanged realities).[13]

Good faith theory: obligations executed in good faith and according to equity (art. 970 Civil Code). He who demands the other party to execute an obligation that became disproportionately big due to unpredictable circumstances that were beyond his control will not be presumed to have acted in good faith.

The unjust enrichment theory refers to obligation the other party to execute an obligation that became excessively onerous, thus leading to the first party's unjust enrichment.

The cause theory applies when because the balance of the contract has been broken after the forming of the contract, one of the obligations no longer has a cause as the benefit is no longer equivalent.

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[9] One must remember that, if the parties have stipulated through a contractual clause that the effects of the contract are to be revised in the case of the circumstances taken into account at the moment of the forming of the contract changing, we are no longer in the presence of an exception from the principle *pacta sunt servanda*, but in that of an aspect of the principle of the freedom of juridical acts. However, in a decision of the Supreme Court, it was decided that unpredictability clauses are inadmissible, as they would contravene the former art. 1085 of the old Civil Code, article according to which "the debtor is only responsible for damages that were foreseen or foreseeable at the moment of the forming of the contract, when the nonperformance of the contract is not due to his fault" – Decision no. 591/1994, Supreme Court of Justice, Commercial department.

[10] Law no. 8/1996 on author rights and connected rights, modified by Law no. 285 from June 23rd 2004.

[11] Emergency Ordinance regarding the regime of contracts of concession of public property goods, modified by Law no. 22/2007.

[12] Simona Petrina Gavrilă, *Teoria impreviziunii,* "Dunărea de Jos" University, Galaţi, http://www.scribd.com/doc/54319505/TEORIA-IMPREVIZIUNII.

[13] R. I. Motica, E. Lupan, *Teoria generală a obligaţiilor civile*, "Lumina Lex" Publishing House, Bucharest, 2005, p. 74.

The theory of abusive exercise of rights: although a party has the right to demand the execution of the contract according to the initially stipulated conditions, she is considered to be abusively exercise her right if by doing so she bankrupts her contractor.

The theory of force majeure refers to those circumstances that determine the severe unbalance between the two benefits, factual situations that are objective, unpredictable, and unavoidable and that are not a consequence of the parties' will, so that they can be considered to be cases of force majeure. In this case, the force majeure can lead to the cease of the contract due to impossibility of execution of one of the party's obligation.

The unpredictability theory according to the New Civil Code

Considered to be an exception from the *pacta sunt servanda* theory, the theory of unpredictability represents the revision of the effects of the legal act as a consequence of the contract's unbalance due to a change of the circumstances that the parties took into account when forming the contract, as otherwise the effects of the legal act would be different than the ones that the parties decided to bind themselves to[14].

If there was no explicit consecration of the theory of unpredictability in previous regulations, the new Civil Code that took effect on October 1st 2011 as stipulated by the Law of implementation no. 71/2011, explicitly regulates unpredictability at art. 1271:

(1) Parties are obliged to execute their contractual obligation, even if the obligation became more onerous, both in the case of an increase in the cost of one's own execution and in that of a decrease of the value of the other party's benefit.

(2) However, if the execution of the contract became excessively onerous due to an exceptional change of circumstances that would clearly make it unjust to force the debtor to execute his obligation, the judge can enforce:

a. The adaptation of the contract so as to equally distribute among the parties the losses and benefits that result from the change of circumstances;

b. The cease of the contract at a moment and under conditions that he will determine;

(3) The dispositions of paragraph (2) are only applicable if:

a. The change of circumstances occurred after the forming of the contract;

b. The change of the circumstances as well as their extent have not and couldn't have been reasonably taken into account by the debtor, when signing the contract;

c. The debtor did not assume the risk of the change of circumstances and it couldn't reasonably be presumed that he had;

d. The debtor attempted in a reasonable term and with good faith negotiates the reasonable and equitable adaptation of the contract.

Art. 1271 of the New Civil Code thus introduces a new institution, consecrating a rule and an exception for the execution of a contract when the circumstances that the parties took into account when signing the contract changed and lead to an excessive duty for one of the parties.

In its first paragraph, art. 1271 stipulates the rule according to which even when for one of the parties the obligation became more onerous than it seemed to be at the moment of the conclusion of contract, the debtor still has to execute his obligation according to the contract's clauses. The exception from this rule is regulated by the second paragraph which stipulates that if the contract includes a renegotiating clause or if the execution of the obligation of one of parties has become excessively onerous due to a change in the circumstances that the parties took into account when signing the contract, the possibility of a judge's intervention exists.

[14] Gabriel Boroi, *Drept civil. Partea Generală. Persoanele,* All Beck Publishing House, Bucharest, 2001, p. 156.

According to art. 107 of the Law of implementation no. 71/2001, the dispositions regarding unpredictability will only be applicable to contracts concluded after the new Civil Code takes effect.

The Romanian legislator has not indicated the scope of application of unpredictability, meaning the types of contracts in the case of which the contractual balance can be broken. We can however consider that suspensive contracts and those implying successive executions will be included in this category, as only the execution of these contracts can be affected by unforeseen circumstances that could have not been predicted by the parties when signing the contract and that would affect the value of benefits to which the parties obliged themselves to[15]. This argument is supported by the demands of the law according to which the change in circumstances must occur after the conclusion of the contract and the disadvantaged party should not have to bare the risk[16].

Since the pre-contract is also a contract, more precisely a convention through which the parties establish the main conditions of the contract, obliging to conclude it at a later date, we believe a pre-contract can also be included in the scope of application of unpredictability.

The dispositions regarding unpredictability will not be applied in cases when the parties included an indexation clause in their contract (correlating the economic value of an obligation with another economic value so as to maintain through time the real value of the contractual obligation), clause which will make the price vary according to the evolution of an indicator that the parties chose. Inserting such clauses means the parties predicted the possibility of revising the contract under certain circumstances and the judge called to rule on such a contract will merely apply the dispositions of the contract, thus respecting its binding effect.

Not any change of circumstances can call for the intervention of the judge. The respect of several conditions simultaneously is required.

The first condition: *the execution of the contract has become excessively onerous*, as an effect of the change of circumstances.

The Civil Code does not stipulate any criteria that would serve to determine the level of "excessively onerous obligation". To do so, the judge will use the criteria proposed by the doctrine. As a subjective criterion, the debtor's ruin was suggested; this was only marginally used, not having a wide range of applications, as it was considered to be too excessive, subjective, source of inequality of treatment between the two debtors and not differentiating according to the entire economic activity of the debtor. To appreciate an excessively onerous obligation, the judge can take into consideration some of the objective criteria suggested by the doctrine:

a. The doubling of the value of the benefit to which the debtor is obliged;
b. The unmade profit of the debtor;
c. The increase of the debtor's obligation value with 50% or the reduction of the value of the counter benefit with the same profit.

The criteria of appreciating the extent to which an obligation is excessively onerous must result from a uniform practice of analysis of every contract *in concreto*. For this analysis, the entire frame of the contract binding the debtor and the creditor needs to be taken into consideration, in case this consists of several successive benefits of the same type.

[15] For example, a purveyor who obliges himself by a contract implying successive executions to deliver determined quantities of products in the exchange of a fixed price per quantity to be paid upon delivery will see his obligation increase in value if the prices become higher as a consequence of inflation, without being able to demand his contractor the extra difference of price.

[16] Simona Petrina Gavrilă, *Teoria impreviziunii*, "Dunărea de Jos" University, Galaţi, http://www.scribd.com/doc/54319505/TEORIA-IMPREVIZIUNII.

The second condition: *the moment when the change of circumstances occurs* needs to be subsequent to the conclusion of the contract. Two moments require attention when it comes to contractual unpredictability:

- the first one refers to the occurrence of the unpredictable event or of its effect on the contract;
- the second moments refers to the noticing of the economic perturbation of the contract and to the application of the mechanism of the unpredictability theory, by revising or adapting the contract.

The temporal aspect is considered to be, from case to case, the unpredictable event (such as for example an armed conflict) or the consequences it produced (monetary devaluation).

The third condition: *the change of circumstances must not have been predictable when the contract was signed.* Another aspect that is added to the definition of the notion of unpredictability is the criterion according to which it is decided that a particular event or its effect are characterized or not by this attribute. From a technical-juridical point of view, the matter of risks, though closely linked to unpredictability, supposes however the resolving of different problems, referring to the source of the nature of the risk that derives from the unpredictable circumstance. The close link between unpredictability and the theory of risks is emphasized by the argument that the real problem to be solved is that of the distribution of risks between the contractual partners.

As far as the importance of the created unbalance is concerned, we note that it is necessary for the economic circumstances to create an unbalance of a certain gravity which can be appreciated *in concreto* by the judge who will decide whether the execution is that of an excessively onerous obligation. These economic circumstances need to place the debtor in a very difficult economic position, even bankruptcy; however, we do not consider bankruptcy to be the only situation in which the theory of unpredictability could be applied.

Naturally, the parties of the contract are the first ones to be called upon to modify the contract so as to maintain its objectives and the economic and social atmosphere or to establish the cease of the contract. Paragraph 2 of art. 1271 shows the parties have an obligation of diligence, an obligation to negotiate and the potential failure of negotiations or the negotiations not being finished within “a reasonable time” determine the possibility of calling for the intervention of a judge.

If the parties do not reach an agreement within a reasonable time, be it because they have opposing points of view or because the negotiations are taking too long, the debtor of the obligation that became excessively onerous, as the one interested, may refer to the competent judge, demanding either for the contract to be adapted in such a way that the losses and benefits that result from the change in circumstances are equitably distributed between the parties or for the cease of contract. Once the suit is under course, he will have to prove having attempted to solve the dispute amiably by inviting the other party to negotiations.

According to paragraph 3 of the same article, the judge can rule either the contract’s adaptation so as to equitably distribute the losses and benefits resulting from the change in circumstances among the parties or the cease of the contract at a time and under conditions established by him. The cease of the contract can thus only be decided if the modification of the contract is not possible or when both parties oppose it.

It is suggested that the judge can alternatively rule either of the two actions, only having to respect the principle of availability. We consider however that as a result of the principle of juridical stability, the judge will be able to decide for the cease of the contract only when the modification of the contract is not possible or when both parties oppose the modification. The modification of the contract ruled by the judge will have to take into

account the necessity to equitably distribute the losses and benefits resulting from the change of circumstances[17].

If the judge decides for the cease of the contract, depending on the nature of the obligations, he can rule for the damage to be repaired and the benefits to be returned according to the dispositions of art. 1323, in reference to art. 1639 and following ones of the Civil Code.

Conclusions

The regulation of unpredictability in the New Civil Code is surely one of the biggest challenges that the legislator brought to the civil legislation in Romania. Through this explicit consecration, the theory of unpredictability becomes juridical from the point of view of the *sede materiae*, whilst staying contractual through its scope of application and keeping its praetorian characteristic by referring to various unregulated aspects (scope of application, the criteria based on which the obligation is excessively onerous and that of determining the unpredictability). It thus results that the role of the judge becomes preponderant, not in the sense of the admissibility of the unpredictability as a principle, but an *in concreto* admissibility, based on the appreciation of the respect of the conditions imposed for the mechanism of the theory of unpredictability in the concrete situation he is presented with. The role of contractual unpredictability lies with the reestablishment of the interest towards the execution of the contract, under new circumstances, by adapting it. If the objective for which the contract was formed can no longer be achieved, the contract can be dissolved through an equitable distribution of risks between the parties.

These is also the basis on which the Romanian legislator regulated the theory of unpredictability through a generally applicable text, mentioning that such an exception from the *pacta sunt servanta* principle was not completely unknown to the national legislative system, as unpredictability was explicitly accepted in various domains.

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G. Anton, *Teoria impreviziunii în dreptul român și în dreptul comparat*, "Dreptul" Review no. 7/2000.

[17] For example, in the case of devaluation of the payment currency, its exchange rate in comparison to a stable currency at the moment of the conclusion of the contract could be taken into account. If the contractual unbalance was due to an excessive increase of the price of the working material, the price of the final product should include this increase. If it is the cost of the good delivered that varied greatly, the index of the increase should be taken into account as a division between the medium price on the market at the moment of the conclusion of the contract and that at the moment of the resolution of the dispute.

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JUDICIAL CONTROL OF PUBLIC ADMINISTRATION IN EUROPEEAN UNION COUNTRIES

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Abstract

The European Union Member States governments are subject the following forms of control: internal control over government, judicial review and external review our jurisdictional nature.

In other EU countries, we also speak of duality of jurisdiction: the Supreme Court does not have jurisdiction to review decisions of certain courts with special competence in administrative matters.

Meanwhile, civil liability law has expanded government and judicial review provisions of the Government. Jurisprudence of the State insists on legal personality and its civil liability provisions against its officials. In a number of states, special jurisdictions are responsible for checking accounts.

In all European countries, ordinary courts also have wider powers or less extended in contentious relations with the government.

Comparative analysis of the institution of administrative courts in different states of the European Union concluded that the most important issues: accessibility, speed and effectiveness of judicial review.

Say that work is confined only a few EU countries because it is still the states that will affect casting the future "United Europe" until the new democracies will consolidate and secondly, the actual difficulties of documentation, even if sporadic information may be obtained on these states.

In these Member States whose institutions I referred to, are not always clear that information can be found on the situation in all that was done a comparative analysis and that an institution or another has become over time in a state or another, it usually it is given due attention. Thus, if we say, traditional constitutional monarchy, Britain thought leads us to say whether the Ombudsman, Sweden comes to mind, and if we say contentious Administrative whole doctrine is unanimous in its origin in the French model.

Keywords: *EU countries, duality of jurisdiction, special jurisdictions, jurisdictional control, administrative jurisdictions.*

Introduction

The mechanisms of administrative control differ from a country to another. Nowadays, there is a wide control range which is common to all Occidental European countries but with different forms from a country to another.

In the European Union Member States, the administrations obey, as shown at the beginning of the previous chapter, the following control forms: internal control over administration, jurisdictional control and non-jurisdictional external control.

Regarding the jurisdictional control, the French doctrine states that the obedience of the administration to the control performed by courts of law is not necessarily subordinated to the existence of an administrative jurisdiction. On the contrary, the obedience of the administration to the control of ordinary courts of law is not necessarily a good guarantee for citizens.

Except for Great Britain and Ireland, most European countries were influenced by the French pattern for a long time, pattern that, in the end of the 20th century, had reached an outstanding perfection level for that age. This pattern is defined by setting up some judgment formations right within the executive power, which have acquired through time certain independence, established a pretty refined procedure and created a general protocol.

In France, administrative jurisdiction was born out of the historical circumstances, but it survived due to practical reasons. Regarding the jurisdictional control system of administration, we have to identify several problems: the existence of a general administrative jurisdiction different from the ordinary jurisdictions; the existence of some specialized administrative courts; the obedience of the administrations to the control, of ordinary courts.

The jurisdictional control, due to its characteristic features, differs from the administrative control through a series of elements, such as: while administrative control is performed by administrative authorities, jurisdictional control is entrusted to judges, and the judge can only decide on a dispute as a result of an appeal, while an administrative authority can act ex officio, too; the judge can only decide de jure, while the administrative authority can proceed to evaluating the opportunity of administrative decisions; jurisdictional control ends by making a decision having the authority of judged issue, not allowing him/her to get back over the decision pronounced, unlike administrative decisions which are subject to revocation, with a few exceptions only.

The institution evolved through years, mainly due to its judicial practice; the ideas passed into doctrine, which doctrine was the basis of different legal regulations. It is a historical fact that the evolution of administrative contentious, especially in the continental Europe, owes very much to the French State Council.

The Constitutions of Occidental Europe adopted after the second world war often include a constitutional establishment of the administrative contentious principle itself, such as, for example, the Italian Constitution in art. 113, or the German Constitution in art. 19. More recent constitutions, such the Spain's or the Portugal's ones, include such a constitutional establishment.

The organization of administrative justice within a State depends beforehand on its conception on administration: either it was considered equal with the private individuals and it is believed that a similar statute attracts the intervention of a single common jurisdiction, where there is a unity of jurisdiction or monism; or the specificity of administration is emphasized to justify the competence of a different judge, and there is here a duality of jurisdiction or dualism.

1. Plurality of jurisdictions in EU countries

Germany has a three-level administrative jurisdiction system: *the Lander courts* whose organization and operation are similar; there are the *administrative courts* whose decisions are subject in appeal to some *Higher Administrative Courts of such Land. In the top, there is* the *Federal Administrative Court* (residing in Berlin).

The *administrative jurisdiction* is thus described as one of the five branches of judicial power: ordinary jurisdiction (in the top there is the *Federal Justice Court* from Karlsruhe); *labor jurisdiction* (in the top there is the *Federal Labor Court* from Kassel); *social jurisdiction* (the *Federal Social Contentious Court* from Kassel); *fiscal jurisdiction* – a two-

level jurisdiction whose *Finance Federal Court* competent for fiscal contentious is in Munich, and *administrative jurisdiction*, previously mentioned.

In Austria, another federal state, there are two types of jurisdictions: *ordinary courts*, divided into civil and criminal courts, and *the public law jurisdictions – the Administrative Court and the Constitutional Court*, controlling and guaranteeing the lawfulness of public administration, the compliance with fundamental rights, respectively. This organization dates back the monarchy time, the Law regarding the creation of Administrative Court being adopted since 1875[1].

The Austrian administrative jurisdiction is centralized, implying one court, and is limited only to the control of lawfulness. The *Administrative Court* is made up of several chambers, usually composed of five members each, with independent and irrevocable judges.

It is to be mentioned that in Austria some institutions of criminal law are enforced by administrative authorities. For these matters, mainly belonging to *the administrative criminal law*, they created independent courts whose decisions could become the object of an appeal in front of public law jurisdictions. Such courts are called *Independent Administrative Chambers*.

In France, *administrative courts* are no longer mere formations of judgment within the executive power, but they represent a distinct jurisdiction, to which the *Constitutional Council* protects their independence and competence. It is a three-level competence: *33 administrative courts* created as a result of the great reform of administrative contentious in 1953 by changing the old *prefecture councils*, whose decisions are subject to appeal in *seven (*initially five*) appeal administrative courts*, established on January 1st by the Law of December 31st 1987, and which are under the control of the State *Council*, in their turn. It is a genuine jurisdiction order, parallel to ordinary courts, as long as the State Council shall play the role of Supreme Court for all administrative jurisdictions, with general and special competence.

The two jurisdictions, the administrative and the common law one, have a plenary autonomy and are described by lack of any mutual control, none of them being subordinated to the other. That is why, in France, in order to settle such conflicts of competence between the two jurisdiction orders, they can appeal only to a specially organized court, called the *Court of Conflicts*, a parity court made up of judges from the Court of Cassation and of Councilors from the State Council.

Greece, after hesitating between the *jurisdiction dualism*, 1830 – 1844, and the *unity of jurisdiction*, 1844 – 1928 (such dates representing the removal and then the re-establishment of the State Council), established the dualism in the 1975 Constitution. The administrative jurisdiction is made up of *30 first instance administrative courts* (with 1 or 3 members), *5 Appeal administrative courts* (with 3 members) and *the State Council* (composed of 6 sections, with 5 or 7 members and a Plenum)[2].

In Finland, the courts divide in judicial and administrative courts. Regarding the administrative contentious, there are two jurisdictional levels: *the regional administrative courts*, created in 1955, and *the Supreme Administrative Court*, created in 1919.

Sweden, in its turn, besides the ordinary judicial system, has an administrative justice system, also organized as a two-level jurisdiction: *first instance courts* and *appeal administrative courts*. At present, there are 23 district administrative courts having competence to settle the actions filed against administrative decisions. Their solutions can be controlled by means of appeals by 4 appeal administrative courts. The administrative justice

[1]J. Schwarze, *Droit administratif européen*, 2nd Volume, Office des publications officielles des Communautés européennes, Bruylant, Brussels, 2004, p. 53ff.

[2] P. Spiliotopoulos, A. Makrydemtres, *Public Administration in Greece*, Helenic Institute of Administrative Sciences, Ant. N. Sakkoulas Publishers, Athens - Komotini, 2009, p. 122.

also has a supreme court, the *Administrative Supreme Court*, residing in Stockholm, composed of 14 magistrates[3].

In other European Union countries, we can equally speak about *duality of jurisdiction*: *the Supreme Court* has no competence to control the decisions of certain courts having a special competence in administrative matter.

In The Netherlands, *the State Council*, endowed with certain very specialized contentious competences, obtained a general competence to cancel administrative decisions in 1975.

In Belgium, a *State Council* endowed with the competence to cancel the administrative acts of state authorities was established in 1946.

Thus, the section of administrative contentious of the Belgian State Council exerts its competence in the field of *second appeal for abuse of power*, canceling illegal administrative acts, coming either from local communities or from government or administrative authorities, organized at federal, community or regional level.

2. Countries with unity of jurisdictions

The unity of jurisdictions has different forms. After being in minority for a while, limited to the British Isles and to Scandinavian countries, the system tends to extend.

It is not incompatible with the existence of specialized administrative courts.

Thus, in the Great Britain, they estimate about 2000 administrative jurisdictions, special or with a specific competence. They were created by law especially due to the weakness of the control performed by ordinary courts. The decisions of administrative courts are still subject to the control of the latter ones, by second appeal, also used against the decisions of the administration itself. The Chamber of Lords is competent for all cases as a last resort.

The judicial organization of Ireland is quite similar to the one in the United Kingdom, but the country is much smaller and the administrative courts are less (less than a dozen).

Regarding the judicial control of the Government's acts, the Constitution is not very clear. First, the judicial control of lawfulness of the public administration acts had been very well established in the Irish system since 1937. Although its name had been changed in time into Judicial review and its application sphere and efficiency had been extended, it is still a common-law institution, strengthened by the judicial control of the constitutionality of laws performed by the High Court (playing the role of Constitutional Court) and by the Supreme Court, the latter one named after the American system[4].

The judicial organization of Denmark is much similar to the one usually found on the continent, with a pyramid structure. The ordinary judge under the sub-control of the Supreme Court is competent to control the administration, without a specialized chamber.

The specificity of Spanish jurisdictions consists in the particular administrative structure of this country and in the fact that the constitutional law imposes the principle of unity of the jurisdictional function. The constitutional principle of unity of jurisdiction makes that administrative justice, at all levels, be achieved within some special sections. Thus, Spain combines the principle of unity of jurisdiction with the principle of specialization of judges. In Spain, there are, at all levels of jurisdiction, administrative sections within ordinary jurisdictions. In this regard, there are municipal courts ("juzgados") composed of administrative contentious judges judging in the first instance; their decisions are subject in appeal to the administrative sections of "Audiences provinciales", then to the administrative sections of "Audience Nacionale". The higher courts of justice are competent for the acts of

[3] I. Leş, *Organizarea sistemului judiciar în dreptul comparat*, All Beck Publishing House, "Studii juridice" Collection, Bucharest, 2005, p. 176ff.

[4] Françoise Dreyfus, *Les fondements philosophiques et politiques des systèmes de fonction publique. Le cas français et britannique*, in "Revue du droit public", no. 1/2008, pp. 57-74, p. 241.

autonomous communities. On the top, there is the Administrative Section of the Supreme Court.

In a certain number of states, some specialized jurisdictions are in charge of the control of accounts. Thus, there is a Court of Accounts in Belgium, Greece, Spain, France, Italy and Portugal. On the contrary, in Germany, the Federal Court of Accounts is not a jurisdiction, despite its name; it is rather a pseudo-jurisdiction, like in The Netherlands.

In France, the Court of Accounts was established in 1807, having administrative (control) and jurisdictional responsibilities. The jurisdictional activity is controlled by the State Council by second appeal of cassation[5].

In Austria, the Court of Accounts is a federal body subject to the National Council (one of the two Chambers of the Representative Assembly together with the Federal Council – A/N) and it controls the management of the budgets of the Federation, the Lands, the communes and of the other bodies established by law, such as the companies in which the State or the communes have at least 50% of the registered capital. Some Lands created their own Courts of Accounts, leading to a double control of the administration. The Federal Court of Accounts is independent in regard to all the other administrative authorities.

3. Procedure (competence) in matter of administrative contentious

The access to the administrative contentious has known a remarkable evolution since the XIXth century as it has extended, but it is still dominated by a major difficulty previous to the commitment of the contentious, that of the rules dividing the disputes between the two categories of jurisdiction.

In all European countries, the ordinary courts also have extended or less extended competences in matter of contentious of the relationships with the administration. Even in France, where the competence of the administrative contentious courts is larger, *the judicial courts* are competent in at least three situations, as follows: when the administration uses means of private law (management of private assets, labor agreements); in case of clerks who committed offences, and when the administration jeopardizes the individual liberties, exceeding its competences.

Germany has modern and detailed regulations regarding the organization of the administrative jurisdiction. There is the *Code of administrative jurisdiction* adopted in 1991, establishing since the beginning the independence of administrative courts exerting an administrative jurisdiction, different from the administrative authority. The *administrative courts*, 52 at present, are composed of several chambers judging in the first instance, with a panel made up of three judges and two councilors, and only one judge for the cases with no principle-related or special issues. The second echelon is composed of the *Higher Administrative Courts*, i.e.16, in some lands called *Administrative Courts*, made up of several sections judging in appeal. The ordinary way of appeal can be performed based on a low from 1991 only if it is authorized by the higher court. The Federal Administrative Court, found on the top of the pyramid, has several sections and decides usually in a panel made up of five judges. Its main competence is to judge the requests of revision filed against the judgments pronounced by the Higher Administrative Courts.

In Austria, a federal state, there is a distinction between the *acts of authority of the administration,* issued based on the classical royal rights, subject to the control of the independent Administrative Chambers, Federal Administrative Court and to the Constitutional Court, and the *acts of management,* issued by applying the civil law regulations, subject to the control of ordinary courts. The Austrian *independent Administrative Chambers* have the competence to issue enforceable decisions, subject to the control of lawfulness of the *Administrative Court* and of the *Constitutional Court*. Moreover,

[5] V. Prisăcaru, *Contenciosul administrativ român, 2nd revision, revised and completed by author,* All Beck Publishing House, Juridica collection, Bucharest, 2008, p. 9ff.

they enjoy a functional independence (its members are subject to no control) and an organic one (there is a statutory guarantee, such the irrevocable character of the warrant). This independence is strengthened by a peer-related organization: the decisions are usually made in a panel of three members, with some exceptions, such as the *second appeal for abuse of power*.

In Belgium, the State Council and the other administrative jurisdictions do not have the monopoly of the contentious of the administration acts. In a monist system, the judicial power is mainly competent to settle the conflicts arising at the administration level. Thus, the responsibility for the exercise of public power and of its agents or for the validity of administrative agreements comes to the State Council by law. The contentious of public service, education, territory development and city planning comes to the administrative section of the State Council[6].

In the Netherlands, there is a control system for the administrative acts, having three features, as follows: the important role of administrative second appeals; the large number of administrative jurisdictions, and the special role of the judicial judge. According to the Dutch doctrine, regarding independence and procedure, the administrative jurisdictions (examining the decisions of public bodies) has some characteristics. The citizen dissatisfied with such a decision should first file a second administrative appeal to the issuing authority or to a higher authority, and then he/she could file a jurisdictional second appeal to the *Administrative Chamber of the Superior Court*. For the social security cases, he/she can then file to a specialized court in this matter, and for the other administrative cases, the appeal should be filed to the *administrative procedure section of the State Council*. Regarding the latter body, its independence has many times been questioned, the members of the State Council being also part of the legislative section setting out notifications on proposals of law[7].

In Spain, the institution of the administrative contentious appears as an objective need for the Spanish lawmaker in order to legally control the material activities and the inactivity of the administration, and to promptly enforce its own judicial decisions and to adopt preventive measures so as to ensure the efficiency of the process[8].

In Finland, most of the second appeals settled by the *Supreme Administrative Court* concerns the decisions pronounced by *administrative courts* and *prefecture councils*. The Court also judges the second appeals against the decisions of the Council of Ministers, of ministries, of central departments, as well as second appeals against the judgments pronounced by the *water courts* and by the turnover tax court. The judges from the administrative contentious courts, including those of the *Supreme Administrative Court*, are not proper magistrates, but administrative clerks with jurisdictional responsibilities.

Conclusions

From the comparative analysis of the institution of administrative contentious in different European Union member states, they reached the conclusion that the most important issues concern: the accessibility, rapidity and efficiency of the jurisdictional control system.

Regarding the accessibility of such control, the two main elements are: notifying the possibility to complain and the costs of the procedures.

In the countries where *the non-contentious administrative procedure* is coded, one of the main principles is the obligation of the administration to designate the ways for second appeal. Germany and Spain are more advanced in this regard, compared to other countries. Regarding the efficiency of control, there is a very clear tendency to develop the *suspensive*

[6] M. Guibal, *De la proportionnalité, în L'Actualité juridique, Droit administratif,* no. 5/2008, pp. 477-487.
[7] Jean Marie Auby, Robert Ducos Ader, *Droit administratif,* 8th *edition, Dalloz, Paris, 2006,* p. 300ff.
8 L. Vişan, The necessity of coding the administrative procedure rules, in the Public Law Magazine no. 2/2010, p. 65.

effect of the second appeal directed against the decisions of administration and *of the emergency procedures*, due to equality between parties.

Finally, the decision-making power of the administrative judge tends to extend, more and more he/she does not limit only to the cancellation of the contested decision. But the efficiency of control remains very difficult to evaluate.

The comparison is very difficult to achieve as the culture of the administered ones differ from a country to another due to a series of reasons. While the contentious regarding clerk recruiting is extremely developed in many countries on the continent, especially in France or Italy, it is almost unknown in Ireland, the Netherlands and the Great Britain.

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CONSTITUTIONALISATION OF CIVIL LAW: THE RIGHT TO RESPECT FOR PRIVATE LIFE AND HUMAN DIGNITY

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Abstract

Personality rights are fundamental rights and also subjective rights, enjoying double protection at constitutional and civil law level. The legal nature, the content, the limits and interferences to these rights are regulated by the Constitution, international conventions on human rights Romania is a party to and the new civil code.

Keywords: *constitutionalisation, private life, human dignity, limits, interference*

Introduction

The new Civil code[1] *provides new rights called personality rights or right of publicity in common law system, such as: right to life, to safety, to physical and moral integrity, rights to respect for private life and human dignity, right to one's own image, the right to name and domicile, right over one's own body and other rights recognized by law. In most civil law jurisdictions these rights are provided by civil codes and are generally inheritable. In common law jurisdictions these rights are generally judge-made law, non-inheritable, not clearly distinguished.*

In Romania these rights were first provided by the Constitution[2]*, then some of them being introduced in civil code through the phenomenon of constitutionalisation under the form of dispersion of norms.*

1. Legal features

Personality rights are the rights inherent to human beings, endowed with ratio and conscience, they are fundamental rights provided in the supreme law of a state. The features of fundamental rights suppose they are subjective rights, essential for the citizen's life, liberty and dignity, requisite for the development of human personality, provided and guaranteed by the constitution and laws.

These rights are included into the first generation of rights, the criterion for determining a generation being their evolution. In order to include a right into one or other generation of rights it is important to determine the nature of the right, the owner of the right, the action of the owner. The first generation of human rights is based on the principles of individualism and non – interference of the state power, being designated as "negative" rights.

[1] Published in the Official Gazette of Romania no. 505 of 15 July 2011; it entered into force on 1st October 2011; the personality rights are regulated in chart I, title II, chapter II of the Civil code. It is of great interest to take also into consideration the Law no. 71/2011 for the enforceability of Law no. 287/2009 of civil code, published in the Official Gazette of Romania no. 409 of 10 June 2011.

[2] Revised in 2003 and published in the Official Gazette of Romania no. 767 of 31 October 2003. The rights are provided by articles 1 par. (3), 22, 26, 30 par. (6).

They have developed under a strong mistrust in the government and have evolved since then into what are now known as civil or political rights. Any humankind shall dispose of these rights since genesis and anyone shall exercise them anytime. The aim of the state power shall be limited to the general protection of the rights through a set of guarantees.

Personality rights are established into declarations of rights, such as Universal Declaration of Human Rights (article 1, 3, 6, 12) and European Convention of Human Rights (article 2, 5 par. 1, 8).

According to articles 11 and 20 of the Romanian Constitution, international conventions, treaties and covenants on fundamental human rights Romania is a party to shall have priority over the national legislation, except the case the Constitution or national laws comprise more favorable provisions. The principle of priority of application of international provisions with the exception of *mitior lex* is established; in other words, the national legislation remains into force, but it is not applicable to a certain case. Thus, international regulations are directly invoked before national jurisdictions, particularly when they are given supremacy over ordinary domestic provisions.

The configuration of rights of European Convention is structured as follows: the scope of application of a given right, the derogatory clause, if any, the positive or negative obligations for the states, the balance between the protection of human rights and the states' margin of appreciation.

One may conclude that, in Romania, the level of protection of personality rights is higher than of other subjective rights, given the constitutional protection and the direct applicability of the Constitution.

Due to the process of constitutionalisation[3] of civil law, personality rights were included into article 58 (general provisions), article 71 (right to respect for private life), article 72 (right to human dignity), article 75 and article 76 (limits) of the new Civil code. Thus, a process of soaking of civil law with directly applicable constitutional norms takes place, all public authorities and individuals being kept to obey. Even in the Constitution personality rights are clearly enumerated, the civil code uses a non-extensive and exemplificative manner of expression, the sphere of the personality rights seen as subjective rights being larger than of personality rights seen as fundamental rights.

From the civil law point of view, personality rights are personal un-patrimonial, non-inheritable, unceasible, intangible, indefeasible, directly exercised and not by representation, opposable *erga omnes* rights, as any absolute right.

2. The right to respect for private life

European Court of Human Rights (ECHR) acknowledged the nature of the interest within the case-law on art. 8 of European Convention, given that the article is drafted in a general manner: "private life", includes "activities of a professional or business nature"[4], the "right to establish and develop relationships with other human beings and the outside world"[5], "a zone of interaction of a person with others, even in a public context"[6], the "physical and psychological integrity of a person"[7], the "right to…personal development"[8], and "the right to

[3] For the forms of constitutionalisation see I. Muraru, Elena Simina Tanasescu, *Drept constitutional si institutii politice*, All Beck Publishing House, Bucharest, 2005, p. 81, A. Varga, *Constitutionalizarea dreptului*, "Revista Transilvană de Ştiinţe Administrative" Review, no. 9/2003, p. 103-115.

[4] ECHR, Rotaru vs. Romania App. No.28341/95, judgment of May 4, 2000; Peck v. United Kingdom, App.No. 44647/98, judgment of January 28, 2003; Niemietz v. Germany, App. No.13710/88, judgment of December 16, 1992; Amann v. Switzerland, App. No.27798/95, judgment of February 16, 2000.

[5] Rotaru v. Romania, Amann v. Switzerland, cited.

[6] Peck v. United Kingdom, cited; von Hannover v. Germany, App.No. 59320/00, judgment of June 24,2004.

[7] Pretty v. United Kingdom, App. No. 2346/02, and judgment of April 29, 2002.

[8] Peck v. United Kingdom, cited.

establish details of their identity as individual human beings"[9]. Interests as diverse as the right to live as a gypsy, the right to change one's name and the right to be free from environmental pollution, as well as more traditional "privacy" rights, such as protection against dissemination of personal information and images, fall within the framework of article 8.

Giving the broaden case-law of the Court on this article, some authors[10] tried to identify sub-categories of private interest such as: three "freedoms from" - the right to be free *from* interference with physical and psychological integrity, *from* unwanted access to and collection of information, and *from* serious environmental pollution – and two "freedoms to"- the right to be free *to* develop one's identity and *to* live one's life in the manner of one's choosing.

National courts will have to take into consideration the developing jurisprudence of ECHR in order to avoid liability in Strasbourg and to give priority to the most favorable level of protection, the state being held not to overcome the given margin of appreciation. The case-law of ECHR and the European Convention is directly applicable in the Romanian system of law according to article 20 par. (1) of the Constitution.

The right to respect for private life is regulated by article 26 of Constitution (intimate, family and private life) which states: "(1) The public authorities shall respect and protect the intimate, family and private life. (2) 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". As well, article 27 provides the inviolability of the domicile and residence.

This right is a complex one and it constitutes a character of human being personality, set forth by article 1 of Constitution as a supreme value. Public authorities shall undertake all possible and reasonable measures to protect intimate, family and private life of a person; no one could infringe the limits established by law, except the case the person expressly assents.

The right of the person to dispose over his own body represents one of the most natural, unassignable and indefeasible rights. Once deniable, this complex right has two limits: only the person may dispose over his own body, physical integrity and liberty; and the person exercising this right shall not infringe others' rights, public order or the morals.

Article 71 and 73 of the civil code define the private life in a restricted manner, as included: family life, intimate life, the life in domicile, the domicile itself, the residence, the correspondence, the manuscripts, other personal documents and the information regarding private life and the aspects implicitly regulated as restraints to private life by the article 74. Correlatively to this right, the code institutes an obligation for the authorities and individuals to abstain from any interference in someone's business or intimacy.

But the extent of the right of private life differs from person to person; the ECHR decided that the observance of private life is restricted when a person puts together his/her private and public life, as in case of politicians[11].

Unlike an absolute right, after establishing the content of private life right, article 75 of civil code contains the limits of this right in order to assure a balance between the observance of private life and the right to information of citizens. The limits shall be read in accordance with art. 8 par. (2) of the European Convention and with art. 27 of the Constitution.

The civil code regulates separately the right to one's own image in art.73, as an aspect of private life, defining the content of the right in par. (2): the physical image and the voice. The right to image has a double nature: an un-patrimonial personality right and a patrimonial right in case of celebrities, in the last case being included in their patrimony.

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[9] Goodwin v. United Kingdom, App. No.28957/95, judgment of July 11, 2002; Pretty v. United Kingdom, cited; Copland v. United Kingdom, App. No. 62617/00, judgment of April 3, 2007.

[10] Nicole A. Moreham, *The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination*, European Human Rights Law Review no.1/2008, p. 44-79.

[11] Bruggeman and Schueten v. Germany, App. No. 6959/1975, judgment of July 12, 1977.

It results a close relation between the right for respect to private life, the right to one's own image and the right to dignity, all constitute the content of the right to private life and establishing boundaries between them is difficult to be assessed.

3. The right to human dignity

Human dignity is an important part of the transnational vocabulary of constitutionalism and human rights, being consecrate in several primary documents of human rights: United Nations Chart[12], Universal Declaration of Human Rights[13], The American Declaration of the Rights and Duties of Man[14], the two covenants, Charter of Fundamentals Rights of the European Union[15], in some constitutional laws[16], such Germany[17], Puerto Rico, Romania, Israel, South Africa, Greece, Portugal, Poland, Russian Federation and in the case law of the constitutional courts such United State, France, Canada. In some constitutions human dignity is entrenched as an individual right[18]. Sometimes, dignity is invoked as the basis of other human rights or as a guide to their interpretation, it is often referred to in conjunction with the values of freedom (or the free development of the person), equality and solidarity[19]. Sometimes, it is also related to the concept of the social state, or used to ground the right to social assistance and security.

It results that dignity is a concept with different meanings given by theoreticians and by the court judgments using different cultural values. The fact that "dignity" is an important yet slippery concept has become commonplace[20].

Firstly, in its most universal and open sense, dignity focuses on the inherent worth of each individual (intrinsic dignity). Such dignity exists merely by virtue of a person's humanity and does not depend on intelligence, morality, or social status. It is a presumption of human equality that each person has the same quantum of dignity by virtue of his humanity (whatever the grounding of such humanity maybe). As such, it applies universally across all cultures and peoples. Inherent human dignity is not measured by an external goal of what counts as being dignified or worthy of respect. Rather, such dignity inheres in all individuals and expresses a universal quality of people everywhere.

Secondly, dignity can express and serve as the grounds for enforcing various substantive values (substantive forms of dignity) which require *living in a certain way*. Dignity may require the observance of certain social norms. Communities often adopt policies to further a particular sort of dignity—to protect what are thought to be valuable forms of human behavior and morality. This type of dignity depends on conformity to social norms

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[12] The Preamble of the Chart expresses belief in the dignity and the worth of the human person.

[13] The Preamble and article 1 which states: All human beings are born free and equal in dignity and rights.

[14] The first line of the Preamble states: All men are born free and equal, in dignity and in rights.

[15] The preamble states that "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity". It is also invoked within the context of socio-economic rights, grounding the notion that the state is obliged to ensure conditions which are consistent with basic human dignity.

[16] See for details Henk Botha, *Human dignity in comparative perspective*, http://www.mymaties.com/portal/page/portal/law/index.english/files/human%20dignity%20in%20comparative%20perspective.pdf.

[17] Article I, Section 1 states: The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority. See for more information Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, Montana Law Review 2004, vol. 65, p. 14-40.

[18] Namibia, Ethiopia, Colombia, Poland, Switzerland.

[19] A. L. Bendor, M. Sachs, *Human dignity as a constitutional concept in Germany and in Israel*, Israel Law Review vol. 44, 2011, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1743439.

[20] Neomi Rao, *Three concepts of dignity in constitutional law*, Notre Dame Law Review 2011, vol. 86, p. 183-271, http://www.nd.edu/~ndlrev/archive_public/86ndlr1/Rao.pdf; Anne Mette Maria Lebech, *The Constitution of Human Dignity*, http://eprints.nuim.ie/27/2/CONSTtom.pdf, A. Mihut, *The respect for Human Dignity throughout Life as reflected in the New Civil Code*, Society and Politics no 1/2011, vol. 5, p. 68-88.

that will vary over time and in different communities[21]. Another aspect of substantive dignity emphasizes the material conditions required for living with dignity. A number of modern constitutions[22] explicitly protect dignity and associate this value with social and economic rights, such as rights to housing, healthcare, education, and a minimum standard of living.

Substantive views of dignity, however, may constrain choices and thereby it fails to respect the individual agency of those who have a different view of the good.

Finally, constitutional courts often associate dignity with recognition and respect. This dignity is rooted in a conception of the self as constituted by the broader community—a person's identity and worth depend on his relationship to society. Accordingly, respect for a person's dignity requires recognizing and validating individuals *in their particularity*. This dignity stands for modern demands that go beyond first-generation civil liberties and even second-generation social-welfare rights to require a certain attitude by the state and by other people. This desire to be recognized, to have the political and social community acknowledge and respect one's personality and dignity, derives from the idea that individuals are constituted by their communities and therefore their self-conception depends on their relationship to the greater social whole. Dignity as recognition focuses on ideals of self-realization as well as third-generation "solidarity rights."

These three concepts of dignity reflect different ways of thinking about what dignity constitutes as a legal matter. But the boundaries between these types of dignity are not impermeable, and constitutional courts will often use "dignity" in overlapping ways.

Constitution of Romania[23] invoked dignity as a supreme value, an interpretive *Leitmotiv*, a basis for the limitation of rights and freedoms, and a guide to the principled resolution of constitutional value conflicts.

Unlike Constitution, article 72 of civil code provides that every person has the right to the observance of his dignity. Any interference to one person's honor and reputation without her consent or the observance of the limits provided by article 75 is forbidden.

This right is not defined, the legislator limiting to consecrate the existence of the right to dignity, offering protection to all individuals, irrespective of their social statute or others criteria. It is not a fundamental right, but a subjective one with protection at constitutional level. Concerning the content of the right, it is narrower than the value protected by the constitutional law, being restricted to honor and reputation. These two concepts should be regarded in a tight interdependence, the honor being innate and the reputation being gained. The interferences to this right are provided by par. (2) of the article, having the form of insult or calumny. In order to constitute interference it is necessary that the fact shall be committed with intent to offend someone. The law regulates the facts which are not interferences to right to dignity: the consent of the person and the limits established by article 75.

Article 74 establishes a series of facts which constitute civil delicts, common to all three rights: right to private life, right to dignity, right to one's own image. The drafters of the civil code used the case law of ECHR and of other states when regulating these delicts. One can summarize[24] the civil delicts as follows: breaching of the inviolability of home, the

[21] See the cases of banning the burqa in France (full veil and headscarves), the choice of a degrading profession as prostitution or pornography, abortion, the self representation for the individuals with reduced mental capacity, euthanasia, bioethics, assisted suicide.

[22] South Africa, Hungary, India, Italy, Sweden.

[23] Article 1 par. 3 provides: Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed. Article 30 par. 6 provides: Freedom of expression shall not be prejudicial to the dignity, honor, privacy of a person, and to the right to one's own image.

[24] For details see F. Baias, E. Chelaru, Rodica Constantinovici, I. Macovei, *Noul Cod civil, comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2012.

interception of private conversations, breaching of one's own image, broadcasting of images from a private space, keeping the private life under scrutiny, breaching of intimate, private and family life, broadcasting of information about the safety of the person, interferences to the right to a name and the right to one's own image, using personal documents and data.

4. Limits

After enumerating the delicts, article 75 establishes the limits to these rights, seen as restrictions of their exercise in order to observe general interest. These limits may be imposed by authorities only in conditions allowed by laws, international human rights covenants and conventions Romania is a party to. The person himself may consent for the breach of his rights, article 76 regulating even the presumption of consent.

Limits on personality rights are provided as well by article 21, par. (2) from Universal Declaration of Human Rights, article 8, par. (2) and article 10, par. (2) from European Convention of Human Rights.

Other limits are established by article 75, par. (2) and they result from the exercise of other people's rights which shall accomplish the following conditions: the exercise should be on good faith and with the observance of conventions and covenants Romania is a party to. If these conditions lack, there is abuse of law.

5. Consequences for non-observance of personality rights

Similar to France, in Romania the process of constitutionalisation is mainly determined by the direct access of an individual to the constitutional justice and the activity of interpretation made by the constitutional judge. Unlike the above mentioned states, in Spain and in Portugal this process is augmented by the individual recourse to the Constitutional Tribunal, named *amparo* recourse.

Consequently, direct applicability of constitutional norms contains two elements: judicial review within the citizens exercise *a posteriori* control and the activity of constitutional courts which realize *a priori* and *a posteriori* control. Non-observance of constitutional norms is sanctioned by an independent authority with exclusive competence to ascertain the unconstitutionality of laws. Thus, the values contained by constitution benefit from the protection offered to constitutional norms, the control of constitutionality realized by constitutional courts or habitual courts, depending of the chosen model.

The activity of constitutional justice influences different legal relations, contributing to the efficiency of guarantees of human rights of the citizens. So, rights such as of intimate, family and private life, inviolability of domicile, right to life, physical and moral integrity, principle of equality etc. constitute a set of principles for the reconsideration of the whole legislation and the orientation of judicial and administrative case law. Constitutional norms enter into the whole system of law enjoying the supremacy over the norms from other branches of law. Thus, the norms with double legal nature are protected both at constitutional and public/private law level.

As well, the non-observance of constitutional norms regarding human rights can entail the protection of European Convention or other international conventions regarding human rights. Thus, an individual, whose rights were infringed without obtaining satisfaction within the internal system of law for this breach of law, may introduce an individual plaint for indemnities to the European Court of Human Rights after he performed all internal effective procedures. European Court may recognize the infringement of the European Convention and give satisfaction for the injured damages.

Since the new Civil code entered into force, before addressing to European Court, an individual whose personality rights regulated by the civil code were injured, may introduce a complaint to the habitual courts on the basis of the delictual (tort) civil liability (article 1349 et subseq. Civil code) and special protection norms of un-patrimonial rights (article 252-257

Civil code). Notwithstanding, national judge shall not overrun the margin of appreciation given by the European Convention of Human Rights.

The injured person, depending on the moment of the breach and its length may demand for: the banning of the breach, the ending of the breach and the banning for the future, the finding of the illicit character of the breach if it continues. The judge may dispose the reinstatement of the parts in the previous situation, such as obligation of the author to publish on his expense the condemnation decision or other necessary measures for the ending of the breach or for reparation of the damage. The injured person may also introduce an action for the indemnities or for the reparation of the prejudice, even un-patrimonial against the author of the breach, being applicable the dispositions for the delictual (tort) civil liability.

For the protection of an un-patrimonial seriously and immediately harmed or threaten right, the injured person may ask to the judge for provisional measures until the introduction of the complaint.

Conclusions

We can infer that personality rights, as inherent rights to human nature have the same characteristics of all rights under natural law. Some of personality rights are fundamental rights enjoying the constitutional and conventional protection through the activity of constitutional justice and of European Court of Human Rights. The protection is also assured by the provisions of Civil Code, the delictual (tort) liability and the special protection of un-patrimonial rights offered by article 252-257. The subjective personality rights benefit only from the protection offered by the civil code.

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A COMPARATIVE ANALYSIS OF THE ROMANIAN AND THE EUROPEAN OMBUDSMEN

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Abstract

Concerning the defense of human rights, in Romania there are several instruments in this sense: the Romanian Ombudsman institution at national level and European Ombudsman institution in the European Union level.

The activity of the two institutions is conducted ex officio or at the request of persons who claim that their rights have been violated by officials or government authorities.

Ombudsman exercises an administrative control mechanism similar to that which enables control of public authorities at national level by the Ombudsman in most EU member countries.

Keywords: *Human Rights, Romanian Ombudsman, European Ombudsman, complain investigation.*

Introduction

In a democratic state, the protection and - not lastly - the promotion of citizens' rights are essential characteristics resulting from the very logic of democracy[1].

Respecting, promoting and guaranteeing the universality of human rights are part of the ethical and legal acquis of the European Union by being one of the cornerstones of European unity and integrity[2].

This thing supposes to be well informed and to obtain thorough the knowledge of the realities and complex problematic of human rights, including the creation of efficient institutions in order to protect and promote them[3].

Recognized by international legal instruments, the human rights are proclaimed and secured by the Constitution of the State of nationality, thereby gaining legal life and efficiency, known as the fundamental civic rights and freedoms[4].

[1] Claudia Elena Marinică, *Promotion and protection of human rights through the institution of "Ombudsman"*, in "Human Rights", no. 1/2009, p. 63.
[2] Developments in promoting and protecting human rights in Romania in 2008, in "Human Rights", no. 1/2009, p. 13.
[3] Irina Moroianu Zlatescu, *EU Fundamental Rights Agency*, in "Human Rights", no. 2/2008, p.3.

The means of defenses, guarantee and enforcement of human rights both on national and local level are resulted from the national legal system and the internal rules of the state.

An important mean of human rights is the Ombudsman institution which the Romanian legislation is calling the Romanian Ombudsman[5].

In the past decades, more and more countries have introduced into their judiciary system an institution which stems from Swedish parliament practice[6] and whose role it is to solve complaints forwarded by citizens who claim that their rights have been breached by civil servants or authorities of public administration[7].

As has been shown in specialized works, the Ombudsman institution presents itself as "an option for correcting the mistakes of public administration, as it is for the citizens an experienced, neutral agent, whose activity requires no payments, no large periods of time and no direct conflict with the opposing side"[8].

This institution has also penetrated into the European Union. According to the dispositions of article 228 of the Treaty of Lisbon[9], the Ombudsman chosen by the European Parliament is empowered to receive complaints from any citizen of the European Union, any person residing within the Union or any judiciary entity based inside the EU. These complaints regard administrative abuses in the activity of institutions, organisms, offices or agencies of the EU, except the European Union's Court of Justice and its activity[10].

As we can see, the Ombudsman institution has as the basic activity also the complaints of corporate, thing which does not happen in Romania; the Romanian Ombudsman institution receives and solves complaints only from individuals.

The European Ombudsman exercises an administrative control mechanism similar to that which allows the control of public authorities at national level by the Ombudsman in most states[11].

The Romanian Constitution of 1991[12] established for the first time the institution of the Ombudsman in its articles from 55 to 57, articles which contain the basic regulations regarding the functioning of this public authority.

Based on the Constitution, Organic law no. 35/1997, it was adopted the organization and functioning of the Ombudsman institution[13]. Through Decision no. 5 of the 17th of April 2002, the Romanian Senate's Permanent Office approved the rules that establish its structure and activity[14].

In the Constitution of Romania, revised in 2003[15], the 4th Chapter of the 2nd Title ("Fundamental rights, liberties and duties") is dedicated to the Ombudsman. It is stipulated within that the Ombudsman is named by a common meeting of the Senate and the Chamber of

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[4] I. Muraru, *Drept constituţional şi instituţii politice*, Actami Publishing House, Bucharest, 1997, p. 176.

[5] G. Uglean, *Drept constituţional şi instituţii politice*, vol. II, fourth edition, revised and enlarged, "Editura Fundaţiei România de mâine" Publishing House, Bucharest, 2007, p. 9

[6] V. Pop, *Avocatul Poporului-instituţie fundamentală a statului de drept*, Perenia Publishing House, Timişoara, 1995, p. 10

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[8] Jorge L. Maiorano, *Ombudsman in Argentina*, "Drepturile Omului" Journal, no. 2/1992, p. 23.

[9] Published in the Official Journal of Romania C115 of the 9th of May 2008.

[10] I. Popescu-Slaniceanu, Marilena Diana Petrovszki, I. C. Enescu, *Rolul Mediatorului European în înfăptuirea dreptului la o bună administrare*, in "Acta Universitatis Danubius. Juridica" Review, no. 2/2010, p. 194.

[11] I. Alexandru, I. Gorjan, I. V. Ivanoff, C. C. Manda, Alina Livia Nicu, C. S. Săraru, *Drept administrativ european*, "Lumina Lex" Publishing House, Bucharest, 2005, p. 121.

[12] Published in the Romanian Official Journal, Part I, no. 233 of November 21st, 1991.

[13] Republished in the Romanian Official Journal, Part I, no. 844 of September 15th, 2004.

[14] Republished in the Romanian Official Journal, Part I, no. 922 of October 11th, 2004.

[15] Republished in the Romanian Official Journal, Part I, no. 767 of October 31st, 2003.

Deputies for a period of five years (which can only be renewed once) and its role is to protect the rights and liberties of citizens.

The Ombudsman and both deputies are named only after considering their professional competences, their moral qualities, their sense of justice and objectiveness. [16]

Similarly, the European Parliament shall appoint an Ombudsman representative among persons who are citizens of the European Union. The person appointed shall enjoy full civil and political rights and has to offer all the guarantee of independence.

However, that person must meet all the requirements in the country of origin in order to exercise the highest judicial office or to possess a special competence and experience, well known for serving as Mediator[17]. This is named after each election of the European Parliament during a parliamentary term (5 years), and his mandate can be renewed.

The Ombudsman representatives exercise his/her functions independently. His/her independence is guaranteed by the incompatibility with other functions or activities and by the fact that his/her financial status is the same as that of a judge of the Court of Justice of the European Union. From this perspective, his/her independence is confirmed by the guarantees provided for by Articles 12 to 15 and 18 of the Protocol on privileges and immunities[18].

The Ombudsman exercises its attributions automatically or upon demands from the persons whose rights have been breached, within the limits established by law and in cooperation with central and local public administration[19].

It must be noted that the public authority of the Ombudsman is difficult to be identified with one of the three "classical" powers of the state, as shown in specialized literature[20] because it presents specific features to each power.

However, it should be noted that this institution is a public autonomous and independent one from any other public authority aimed to protect the rights and freedoms of citizens in their relations with public authorities.

The European Ombudsman is an independent and impartial body that can hold the EU administration liability. The Ombudsman investigates complaints about maladministration in EU institutions, bodies, offices, and agencies. Only the Court of Justice of the European Union, acting in its judicial capacity falls outside the Ombudsman's mandate. The Ombudsman may find maladministration if an institution fails to respect fundamental rights, legal rules or principles, or the principles of good administration[21].

In a situation of total independence in its relation with the Government, the Ombudsman is an instrument through which the legislative power exercises control over the organisms of public administration[22].

In exercising its functions, according to articles 23-26 of Law no. 35/1997, the Ombudsman has the right to perform its own enquiries, to demand any information from the authorities of public administration, to question and collect statements from the representatives of public administration and from any civil servant who can offer the information necessary for resolving the petition.

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[16] Monica Vlad, *Ombudsmanul în dreptul comparat*, Servo-Sat Publishing House, Arad, 1999, p. 14.

[17] These conditions are set out in Article 6, paragraph 2 of the Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the exercise of the office of the ombudsman published in OJ L 113, p.15-18.

[18] Protocol No 36 on the privileges and immunities of the European Communities (OJ L 152, 13.7.1967, p. 13), as amended by the Treaty of Nice (OJ C 80, 10.3.2001, p. 1).

[19] C. Manda, *Drept administrativ. Tratat elementar*, fourth edition, revised and enlarged, "Lumina Lex" Publishing House, Bucharest, 2007, p. 163.

[20] Dana Apostol Tofan, *Drept administrativ*, vol. I, All Beck Publishing House, Bucharest, 2003, p. 20

[21] http://www.ombudsman.europa.eu.

[22] I. Popescu Slăniceanu, C. I. Enescu, Diana Marilena Petrovszki, *Drept administrativ*, Volume I, Piteşti, 2010, p. 59.

It is important to reveal the fact that also in the European Ombudsman institutions or bodies there is the requirement to provide all data required by the Mediator and to facilitate its access to the files necessary his research[23], except if there are secret reasons.

In order to pursuance of legal role that they have, the Romania Ombudsman and the European Ombudsman have a number of legal and constitutional instruments.

Thus, as the Romanian Ombudsman, the main instruments are the petitions received from the country or from abroad. Anonymous complaints are not recorded. Always the Ombudsman communicates to the applicant the handling of his complaints, result which can be made public through the media, with the consent of the complainant and the rules concerning the secret documents status.

It is important to note that according to Article 16 of Law no. 35/1997, republished, the petitions are exempt from any taxes of stamp.

Then, the Ombudsman can do its own motion, because, according to Art. 59, paragraph 1 of the Constitution, it shall exercise the powers ex officio, not only when it is requested by the citizens people whose rights and freedoms are harmed.

Both in the received petitions and ex officio situation, their resolution is made in accordance with the procedure laid down in Law no. 35/1997, republished, procedure which starts from the public authority or institution that violated a right or freedom and it can go up to the Parliament level for a resolution. Whenever the Ombudsman finds out violations of legal rights and freedoms through administrative documents, it will require reform or revoke the administrative act concerned, the compensation and the restoration products for individuals injured in the previous situation. Consequently, the authorities concerned are required to take all measures to eliminate irregularities found, to repair the damage and to remove the causes that have generated or favored violation, informing all the formalities taken in this sense to the Ombudsman.

Similarly, the European Ombudsman representatives considers that the complaints are justified and establishes the presence of maladministration, he/she has the ability to inform the concerned institution, which can then take all necessary measures to solve the problem. Such problems are called “problems solved by the institution”.

When the Ombudsman finds a case of maladministration but the problem is not resolved during the investigation, the Ombudsman shall seek “a mutual friendly solution” to satisfy the request of the EU citizen.

If this is unsuccessful, he may submit a “recommendation project” to the institution, requesting it to take the necessary steps to solve the case of maladministration. If the institution does not accept the recommendations, the Ombudsman may send a “special report” to the European Parliament.

If an amicable solution and a solution for the case of maladministration cannot be found, the Ombudsman may send a “critical review” to the institution concerned, as is expressly provided on the Ombudsman of Romania.

In any case, the Ombudsman must inform the person who made the complaint about the outcome of the investigation.

Also, the Ombudsman emits suggestions which cannot be placed under control of the Parliament or under judiciary control. Through these suggestions, the Ombudsman signals abuses in administrative acts to the authorities of public administration.

[23] This requirement is stipulated by Article 59, paragraph 2 of the Constitution which provides that public authorities have an obligation to ensure the Ombudsman necessary support in his duties.

The Ombudsman may approve the making of its own inquiries if this necessity results from preliminary research. Inquiries may be interrupted if t is established that the violation of the rights had stopped.

When, during the investigation, the Ombudsman comes to the conclusion that there is an abuse, gaps in the law system or a case of corruption, it will present a report containing the results of the investigation to the presidents of the two Chambers of Parliament or, in other cases, to the Prime Minister.

In turn, the European Ombudsman is authorized to initiate investigations on its own initiative. Taking advantages of its authority to exercise the mandate of ex officio, it may investigate a case of possible maladministration submitted to it by a person who is not entitled to file a complaint. The Ombudsman decides, taking into account the specificity of a case, whether to exercise its mandate ex officio. In that kind of cases, the practices suppose to give to that person the same procedural opportunities during the investigation as if the matter should be treated as a complaint.

However, the Ombudsman can notify the Constitutional Court regarding the unconstitutionality of laws adopted by the Parliament, before these are approved by the President; it can raise exceptions of unconstitutionality regarding active laws and ordinances and formulates, upon demand from the Constitutional Court, points of view on the exceptions of unconstitutionality for laws and ordinances referring to the rights and liberties of the citizen.

Ombudsman's work may not be, petitions concerning acts of: Houses of Parliament, Parliament, acts and deeds of Deputies and Senators, the President of Romania, the Constitutional Court, the President of the Legislative Council of the judiciary, and the Government except laws and ordinances. Such petitions are rejected without stating reasons.

During performing its functions, The Ombudsman cannot investigate complaints against national, regional or local authorities within EU countries (government departments, state agencies and local councils), even when the complaints are about EU matters, the activities of national courts or Ombudsman representatives. The European Ombudsman is not an appeals body for decisions taken by these entities, complaints against businesses or private individuals.

Regarding the work of the two institutions, we emphasize that during 2011, the Romanian Ombudsman, according to annual reports[24], there were a total of 16282 audiences. By comparison, in 2010 presented to the audience a number of 17 470 citizens, in 2009 the Romanian Ombudsman has awarded a number of 16561, and in 2008 were presented the audience a number of 17 783 people.

Also, in 2011 there were recorded 759 complaints, in 2010 were recorded 8 895 petitions, in 2009 it was registered 8 295 petitions, and in 2008 there were 8 030 petitions.

To clarify all the issues raised by petitions, in 20122 there were organized by the Romanian Ombudsman a total of 26 surveys. By comparison, in 2010, were conducted 18 surveys, in 2009 were conducted 30 investigations, and in 2008 was made a total of 42 surveys.

According to the annual reports on regarding the activity of the European Ombudsman[25], it has received 2 510 complaints in 2011, among which only 698 were for its competence. By comparison, in 2010 there were 2 667 complaints, of which 744 were for its competence, in 2009 there were 3 098 complaints and in 2008 there were 3 406. In total, in 2011 the Ombudsman has handled over 3828 complaints and requests, increasing inquiries from 3 700 in 2010.

[24] See Activity reports of the Ombudsman published on the website www.avp.ro.
[25] http://www.ombudsman.europa.eu/activities/annualreports.faces.

Ombudsman initiated 396 investigations in 2011, compared with 323 in 2010, 335 in 2009, 293 in 2008 and completed 318 investigations during 2011, compared with a total of 326 in 2010.

The main issues that have been raised in Ombudsman petitions aimed right of petition, the right to private property, the right to information, the person's rights aggrieved by a public authority.

The main issues that have been the subject of complaints to the European Ombudsman focused on unfairness, discrimination, abuse of power, lack of or refusal to provide information, unnecessary delay and incorrect procedures.

Conclusion

All above facts show that actions undergone by the institution of the Romanian and the European Ombudsmen regarding the line of fulfilling its duty – to protect individual rights and liberties – have generated a change in mentality regarding the role and importance of the Ombudsman, both at an administrative level and in public consciousness.

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RESOLVING CONFLICTS FROM THE MEDIATION POINT OF VIEW

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Abstract

The first initiatives to promote mediation in Romania goes back to 1996, when Foundation for Democratic Change, in cooperation with the Canadian International Center for Applied Negotiation (CIIAN) implemented a project targeting the use of mediation in the Romanian judicial system, a project involving more representatives of the legal – related professions and of the Ministry of Justice.

Mediation responds to the need to resolve conflicts among parties, outside trial courts, providing an adequate answer for the problems of the parties, which do not always find an appropriate judicial support, and it is based on the right and possibility of the parties to solve their conflicts in an advantageous manner, quickly and effectively that helps to the decongestion of trial courts, to the social harmony and peace, which we all want.

Key words*: mediation, mediator, mediation agreement,*

Introduction

Dealing with this theme I am going to start by defining mediation.

According to Article 1, paragraph 1 of the Law 192/2006, regarding mediation and the organization of the mediator profession, "Mediation represents a facultative modality of resolving conflicts amicably, with the help of a third person specialized as mediator, in conditions of neutrality, impartiality and confidentiality"[1]. This is the way mediation is defined in Law 192/2006, a "facultative modality".

"Mediation is a «magical» process which enables parties to resolve disputes even if all other attempts have failed. It is a swift, cheap and effective way of avoiding lengthy and costly litigation and achieves a more satisfactory outcome for all"[2].

"Mediation can be used by the rich and by the poor. It can be used in multi-million pound international commercial disputes as readily as it can be invoked in 'minor' neighbor disputes. It is swift, relatively cheap, and has a reported success rate of up to 85%"[3].

According to the Report on the state of justice, released by the Superior Council of the Magistracy[4], statistical data of the last 5 years shows an alarming increase in the number of cases that are on the role of the trial courts. From here it may be implied that every judge had a larger number of cases to resolve.

[1] Article 1 paragraph 1 in Law no.192/2006, 16/05/2006, published in the Official Gazette of Romania, Part I no. 441 on 22/05/2006 on mediation and organization of mediator profession.
[2] Freddie Strasser, Paul Randolph, *Medierea - O perspectivă psihologică asupra soluţionării conflictelor*, FMMM.RO Publishing House, Bucharest, 2012;
[3] For more information see the website: http://www.paulrandolph.net/ what_is_ mediation.php.
[4] For more information see the website: http://www.csm1909.ro/csm/index.php?cmd=24.

Mediation, this modality of extinguishing conflicts, this alternative to justice, appeared as necessary due to the large number of litigations recorded on the role of the trial courts. The large number of litigations recorded on the role of the trial courts determined the prolongation of duration in resolving the cases that attracts not only the discontent of the parties, but also of the ones applying the law.

As "any system of law is governed by basic rules, guiding ideas, called principles"[5], mediation is guided by the following principles: neutrality, impartiality, confidentiality, free consent of the parties.

In 2010, the Law no. 202 regarding certain measures to accelerate the resolution of cases, also called "the small reform of the Judicial System", provides the obligation of the judge to recommend the parties to participate to a mediation meeting.

"During the entire process, the judge will try to conciliate the parties, giving them needed guidance according to the law. For this, he will ask personal appearance of the parties, even if they are represented".

In litigations that, according to the law, may be the subject of the mediation proceedings, the judge may request the parties to participate in an information meeting on the advantages of using this procedure. When he considers necessary, taking into account the circumstances of the case, the judge recommends the parties to appeal to mediation, for resolving the litigation amicably, at any stage of the judgment. Mediation is not compulsory for the parties"[6].

In 2012, by the Law 115, the legislator amends and supplements the Law no. 192/2006 on mediation and the organization of the profession of mediator, published in the Romanian Official Gazette, Part I, no. 441 of 22 May 2006, with subsequent changes and additions, as follow: Article 2, paragraph (1) is amended and it will have the following content: "Article 2 (1) - If the law does not provide otherwise, the parties, whether natural or juridical persons, are obliged to participate in the information meeting on mediation, including after the start of a trial in front of the competent courts, for resolving in this way the litigations in civil, family or criminal matters, and other matters, in accordance with the conditions provided by this law"[7].

To be noted that, if in 2006 by Law no. 192, the legislator leave at the discretion of the parties the choice of mediation, as a modality of extinguish conflicts, in 2012, by Law no. 115, obliges the natural and juridical persons to participate in the information meeting on mediation, even if there is already a trial before the competent court. Therefore, information on mediation is no longer facultative, it becomes mandatory.

Also, if a litigation on the role of the trial courts, the legislator asks the parties and the concerned party to show the proof that they have participated at the information meeting on the advantages of mediation, in the following matters:

a) in the field of the consumer protection, when the consumer claims the existence of a lesion, as a result of the acquisition of a defective product or service, for non-compliance with contractual clauses or guarantees, the existence of abusive clauses contained in contracts concluded between consumers and economic operators or a breach of other rights provided in the national legislation or of the European Union in the field of the consumer protection;

b) in the matter of family law, in situations provided in Article 64;

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[5] Maria Ileana Muţiu, *Drept civil. Partea generală şi persoanele*, "Imprimeria de Vest" Publishing House, Oradea, 2001, p. 17.

[6] Article 131, Law no. 202/2010 on certain measures to accelerate the resolution of cases. The Small Reform in Judicial System, published in Official Gazette of Romania, Part I, no. 714 on 26 October 2010.

[7] Article 2, paragraph 1 in Law no. 115/2012 for modification of the Law no. 192/2006 on mediation and organization of mediator profession, published in Official Gazette of Romania, Part I, no. 462 on 9 July 2012.

c) in the field of litigations concerning possession, delimitation of property boundaries, displacement of borders, and other litigations on neighboring relations;

d) in the field professional liability in which professional liability can be engaged, respectively the cases of malpractice, if another procedure is not provided by special laws;

e) in work related litigations occurred from the conclusion, the execution and termination of individual contracts of employment;

f) in civil litigations whose value is less than 50,000 lei, except litigations in which an enforceable decree was pronounced for the opening of insolvency proceedings, of the actions relating to Trade Register and of the cases in which the parties choose to resort to the procedures provided for in Article 999-1018 from the Civil Procedure Code;

g) if offenses for which the criminal action is put in motion prior to the complaint of the injured person and the reconciliation of parties removes criminal liability, after formulating the complaint, if the perpetrator is known or has been identified, with the condition that the victim expresses his/her consent to participate at the information meeting together with the perpetrator"[8].

For the parties or the concerned party, to be able to show the proof of participating to the information meeting on the advantages of mediation in a certain matter, the mediator will release a recording of proceedings of information.

So I tried to show you, in a general manner, but from legislative point of view, the steps taken by the mediation to the present in Romania.

In contemporary society, people have started to evaluate in a different way their interests in certain conflicting situations, and the solution win – win, which justice may not pronounce, is winning more and more followers, and by this, I do not refer only to mediators, but also to ordinary citizens, who have understood that the mediation procedure is a solution for extinguishing a conflict.

We have to appreciate the state's effort, the advantages the state is offering to citizens, in its desire to promote this type of extinguishing conflicts and its desire to encourage the parties to opt for this way in resolving their problems.

Why choose mediation if one is in a conflict with someone else?

For several reasons that I will present:

- The procedure is quick and simple;
- The costs are considerably reduced;
- The interests of all involved are satisfied;
- The mediation meeting is confidential;
- The stamp tax is refunded;
- During mediation the parties have control and find their own solutions to the conflict occurred among them, they do not obey the will of a third party;
- Judicial public aid.

Regarding the judicial public aid, I would like to mention that, under certain conditions, the costs of mediation may be recovered from the state, in accordance with Article 20 of G.E.O. no. 51/2008, Emergency Ordinance regarding judicial public aid in civil matter, which transposes into national law the provisions of the Directive of the European Union Council 2003/8/EC "to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes", taking into account that the directive, whose transposition must be ensured, provides minimum standards for the system of legal aid to be considered as providing an effective access to justice for the citizens of the member states of the European Union, and the acquisition of these standards at legislative level requires the creation of at least identical conditions on internal level, not to lead to the

[8] Article 60^1 in Law no. 115/2012 for modification of the Law no. 192/2006 on mediation and organization of mediator profession, published in Official Gazette of Romania, Part I no. 462 on 9 July 2012.

appearance of discrimination among its own citizens and citizens from other Member States or persons, who have the domicile or usual place of residence in the territory of a Member State and who would require judicial assistance before Romanian courts or other authorities with judicial powers, having regard that the access to justice - expression of democratic principles in a state of law and the primacy of law - must be real, and the costs of a judicial procedures must not constitute a barrier in an attempt to appeal to justice for the achievement or defense of a right, justifying, in certain situations and conditions, the support of the state from public financial resources"[9].

Therefore, Article 20 of the G. E. O. 51/2008 provides that:

"In the case in which the person, who meets the conditions provided in Article 8 (1) or (2), shows the proof that, prior to the commencement of the trial, he/she has performed the procedure of mediating the litigation, he/she shall be entitled to the refund of the amount paid to the mediator as a fee. Of the same right shall benefit the person, who fulfills the conditions provided in Article 8 (1) or (2), if he/she requests mediation after the process has started. But this should happen before the appearance on the first day of trial. The amount of refund to which the part is entitled is established by the court, by a pronounced ruling according to Article 15"[10].

Judicial public aid is granted in civil, administrative, commercial cases, as well as in other cases, with the exception of criminal ones. Any natural person, who is in a position when he/she cannot bear the financial expenditure of a process or to obtain legal information, related to a right that it has been violated, he/she may require a judicial public aid.

Article 8 of the same normative rule provides that:

"(1) The judicial public aid in the forms provided for in Article 6 is assigned to persons, whose average monthly net income per family member, in the last two months prior to the formulation of demand, is under 500 RON[11] (Romanian currency). In this case, the amounts, which constitute judicial public aid, are paid entirely by the state.

(2) If the average monthly net income per family member, in the last two months prior to the formulation of demand, is under 800 RON[12], the amounts, which constitute judicial public aid, is paid by the state in proportion of 50 %.

(3) Judicial public aid may be granted in other situation too, in proportion to the applicant's needs, in the case where concrete or estimated costs of the process are of the nature to limit the actual access to justice, including because of the differences in the cost of life between the Member State in which it has his domicile or usual place of residence and the one in Romania"[13].

"To determine the income, any periodical incomes are taken into account, as salaries, allowances, fees, annuities, rentals, profit from commercial activities or independent activity and others, as well the amounts due on a regular basis, such as rents and maintenance obligations"[14].

It is observed that the state encourages, by concrete measures, the litigants to appeal to this modality of extinguishing conflicts.

Many people begin to understand that in certain litigations, such as those of family, and I am talking about here in particular to divorce, confidentiality is more and more

[9] G.E.O. 51/2008, enacted on the basis of Article 115, paragraph 4 from the Romanian Constitution, published in Official Gazette of Romania, Part I, no. 327 on 25/04/2008.
[10] Article 20 in G.E.O., published in Official Gazette of Romania, Part I, no. 327 on 25/04/2008.
[11] 500 RON is approximately 110 Euro.
[12] Approximately 170 Euro.
[13] Article 8 in G.E.O., published in Official Gazette of Romania, Part I, no. 327 on 25/04/2008.
[14] Article 9 in G.E.O., published in Official Gazette of Romania, Part I no. 327 on 25/04/2008.

important, decency and, why not, the elegance of mediation procedure, since we are talking about internal problems of the family life.

Mediation may also be applied in criminal cases, in civil and criminal delicts, where the law provides that criminal prosecution begins with the prior complaint of the injured party or with the reconciliation of the parties.

We can apply the mediation procedure in other types of conflicts, such as:

- Conflicts that have occurred in schools, taking into account that our system of education has many flaws, which led for many times to situations with serious consequences on students,
- Work conflicts with respect to non-compliance with the provisions of the contract;
- Conflicts that appear among persons belonging to different religions;
- Inter-ethnic conflicts;
- Conflicts occurring between citizens and institutions of the state, in these types of conflicts we must accept that we still must insisted on for the change of mentalities somewhat obsolete.

In criminal matters, mediation, by Law 192/2006 on mediation and the organization of the mediator profession, as well as Article 10, letter h and Article 16, index 1 of the Law 202/2010, which is applied in criminal cases regarding offenses in which criminal liability is removed, according to the law, by the withdrawal of the complaint, the reconciliation of parties, or conclusion of a mediation agreement, in the following offenses:

- Hitting or other forms of violence, offense provided for in Article 180 paragraph 1 and 2 in the Criminal Code;
- Bodily harm, offense provided in for in Article 181 paragraph 1 and 2 in the Criminal Code;
- Bodily harm by negligence, offense provided for in Article 184 paragraph 1 and 3 in the Criminal Code;
- Disturbing the use of habitations, offense provided in for in Article 320 in the Criminal Code;
- Threat, offense provided in for in Article 193 in the Criminal Code;
- Violation of postal secrecy, offense provided in for in Article 195 in the Criminal Code;
- Rape, offense provided in for in Article 197 (1) in the Criminal Code;
- Seduction, offense provided in for in Article 199 in the Criminal Code;
- Theft committed between spouses, offense provided for in Article 210 in the Criminal Code;
- Breach of trust, offense provided for in Article 213 in the Criminal Code;
- Destruction, offense provided for in Article 217 in the Criminal Code;
- Non-abidance by measures for child custody, offense provided for in Article 307 in the Criminal Code;
- Desertion of family, offense provided for in Article 305 in the Criminal Code.

Article 16 in the Procedural Criminal Code provides that, during the criminal trial, regarding the civil claims, the defendant, and the party civil liable may conclude a transaction or a mediation agreement, according to the law, with respect to civil remedies. Article 16^1 "Transaction, mediation and recognition of civil claims" states: "During the criminal trial, with respect to civil claims, the defendant, the civil party and the party civil liable may conclude a transaction or mediation agreement, according to the law. The defendant, with the parties civil liable, may recognize entirely or partly, the civil party's claims. In the case of recognizing civil claims, the court requires to compensation to the extent of the recognition. With regard to unrecognized civil claims, proofs can be administered" [15].

[15] Article 16 in the Procedural Criminal Code, modified by the Law no. 202/2010 – regarding measures to accelerate the resolution of trials, published in Official Gazette of Romania, no. 714 on 25th October 2010.

Conclusions

In conclusion, mediation responds to the need to resolve conflicts among parties, outside trial courts, providing an adequate answer for the problems of the parties, which do not always find an appropriate judicial support, and it is based on the right and possibility of the parties to solve their conflicts in an advantageous manner, quickly and efficiently, which helps to the decongestion of trial courts, to the social harmony and peace, which we all want.

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LEGAL AND POLITICAL CONSEQUENCES FOR AROMANIANS AFTER THE TREATY OF BERLIN IN 1878

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Abstract

The current paper points out the legal and political situation of Aromanians after the Treaty of Berlin in 1878, which led to the creation of new states and changes of borders in the Balkans inhabited by Aromanians.

The treaty revises provisions of the San Stefano Peace through which enhanced the Russian influence in south-eastern Europe, as a consequence of the victory against the Ottoman Empire. For the first time in an official document Aromanians are mentioned as a distinct minority.

Key words: *Balkans, borders, territory, change, minority.*

Introduction:

The Treaty of Berlin, dated 1/13 July 1878, was meant to revise the provisions of San Stefano Peace through which the Russian influence was enhanced in south-eastern Europe as a consequence of the 1877 war and the victory against the Ottoman Empire.

The Treaty of Berlin agreed de facto to the independence of Romania, proclaimed on May 10th 1977, but also the independence of Bulgaria, Serbia, and Montenegro.

Two important aspects regarding the Aromanians are mentioned in the Treaty of Berlin, as a result of the Russian-Turkish-Romanian war in 1877.

Their mention for the first time as a distinct entity within the Ottoman Empire in an international document is the first consequence.

A second consequence ragarding the redrawing of the boundery lines, however, had negative effects because it marked the partition of the Aromanians in several Balkan countries.

Thus, the inclusion of Thessaly and Epirus -areas densely populated by Aromanians- in the composition of Greece made the connections over the new border line much more difficult and the Aromanian shepherds from Pindus (Greece) were no longer allowed to wintering flocks on the plains of Thessaly (Albania)[1].

On the other hand, as a positive fact, we reveal the position of Romania, which became independent and because it received international recognition, was able, during the following years, to act in the interest of Aromanians who lived in compact communities within the territory of the Balkan Peninsula[2].

[1] G.V. Barba, "Our Flight" Journal, no. 1, 2, 3, 4/1995-1998, Freiburg, Germany.
[2] C.C. Giurescu, Dinu C. Giurescu, *Istoria Românilor*, "Ştiinţifică" Publishing House, Bucharest, 1975

Therefore, in 1879, the Macedo-Romanian Committee from Bucharest turned into the Macedo-Romanian Cultural Society[3].

The constituent assembly took place on September 23, 1879, under the presidency of the Calinic Metropolitan bishop and with V.A. Urechia as Secretary.

The main objectives of the Macedo-Romanian Cultural Society were as follows:

- The recognition of the Society as a legal entity;
- The foundation of an Aromanian diocese in the south of the Danube Rriver, subordinated to the Autocephalous Church of Romania;
- The foundation of a boarding school in Bucharest for Aromanian scholars from the Balkans[4];
- To obtain a subvention from The Ministry of Interior for the Society's publications;
- To gain the support of the Church for propaganda and to attract new members.

Meanwhile, in the years that followed, Romania's state budget for the Romanian schools from the south of the Danube was increased to over 40.000 lei per year (a substantial amount at that time), and in 1879 a dipomatic branch of Romania was opened in Athens. Also in 1879 a Romanian Consulate was opened in Thessaloniki[5]. Its activities irritated the Greeks, who accused our country of taking actions to "revive the Romanian national feelings of the Aromanians who have been Hellenized for centuries"[6].

Gradually, as a reaction to these measures taken in the favor of the Aromanians, an anti-Romanian campaign was triggered in Greece, led by the Ecumenical Patriarch of Constantinople itself.

Furthermore, the Turks were tolerant regarding the actions of the Aromanians even though they were not to their liking, because they considered that they could benefit from the adversities between the various nationalities.

As we have shown, the use of the mother tongue in Church became one of the main demands of the Aromanian national movement[7].

At first, attempts were made to fulfill this goal in the main Aromanian communes, without creating a church hierarchy of their own. It is worth to outline the proposal of 150 Aromanian families from Prlepe who were working towards having their own church in which to celebrate the liturgy in their own language, so as not to have to attend the Greek or Bulgarian churches. Priests from the churches where the Aromanian language was inserted were threatened, and the Greek Metropolitan bishop of Ohrid and Prespa, Alexandros, addressed a letter to the Aromanian community in which he drew attention to the fact that it would be a great sin to pray in church in the Aromanian language instead of the Greek language[8]. The Aromanians were not influenced by these threats, especially because a lawsuit filed by their Metropolitan bishop did not have the desired result[9].

The Ecumenical Patriarchate of Constantinople, which was under Greek influence, however, did not seem intolerant and allowed the use of the Aromanian language for religious services (June 16, 1889), but only where Aromanians had their own churches. Aromanians did not agree to build a new church in the areas where they lived in compact communities and where they represented the majority.

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[3] Rodica Silvia Stan, *Aspecte ale liricii aromâne*, "Tribuna" Journal, VIII, No. 46, 1996.
[4] *Ibidem*
[5] Gh. Gheorghe, Tratatele internaționale ale României, "Științifică și Enciclopedică" Publishing House, Bucharest, 1975.
[6] G. Maiorescu, D.C. Giurescu, C. Turcu, *Mihail Kogălniceanu – Documente diplomatice*, "Politică" Publishing House, Bucharest, 1972.
[7] Rodica Silvia Stan, *Aspecte ale liricii aromâne*, "Tribuna" Journal, VIII, No. 46, 1996.
[8] Rodica Silvia Stan, *Aspecte ale liricii aromâne*, "Tribuna" Journal, VIII, No. 46, 1996.
[9] Ioan Neniţescu, *De la Românii din Turcia Europeană: studiu etnic şi statistic asupra Aromânilor*, "Institutul de Arte Grafice Carol Göbl" Publishing House, Bucharest 1895, p. 215.

On June 27, 1891, the Sultan issued a decree at the request of the Aromanians, through which they were recognized the right to use not only their own language in their churches, but also Romanian religious books if they were approved by the Ecumenical Patriarchate[10], which of course did not give its consent to this issue.

A satisfactory resolution of the matter regarding the use of their own language in Aromanian churches could only be achieved by creating a church hierarchy of their own, namely by choosing a bishop for the Aromanians. The diplomacy from Bucharest entered into negotiations with the Gate again and at the same time Aromanians from several communes of the Ottoman Empire prepared a petition regarding the same issue.

Thus the premises for creating an Aromanian episcopate were met and with the participation of Aromanian leaders from several communities, a protocol was signed. Through it, monk Antim, of Albanian-Romanian origin, was elected the metropolitan bishop of the Aromanians from Turkey.

On November 20, 1896, the Grand Vizier was requested to officially recognize the metropolitan bishop through a petition which arrived at the Ministry of Justice and then it ground to a halt at the Ecumenical Patriarchate.

Later, the tensions occurring between Constantinople and Athens because of the Crete Island, led to the general mobilization of Greece, which resulted in the initiation of efforts to create a Turkish-Romanian alliance.

The Romanian government refused to condition the problem regarding the recognition of the Aromanian Metropolitan bishop with the proposed alliance, which was approved even by Austria-Hungary. Also, the new government from Bucharest and the Minister D.A. Sturdza were warned that forces "which should be directed especially towards strengthening the internal situation and to a better administration of Dobrogea, where interests more vital than the ones from the distant Macedonia have to be defended"[11] are wasted into the Aromanian issue.

The more obvious involvement of the great powers in the Balkan affairs where Romania had major interests (the international factors could not be ignored), the worsening of the relations with Bulgaria, which had a fixation on the rectification of the boundaries of Southern Dobrogea, the fall of the Minister D.A. Sturdza (March 30, 1899), made the support for the Metropolitan bishop Antim and for the ecclesiastical hierarchical structure, to move into the background[12].

It must be emphasized that if these efforts would have been more strongly supported by the Aromanians themselves (for whom the diplomacy from Bucharest made these efforts constantly, requesting the election of priests from their own ranks), they would have had more chances of success and with time, it would have definitely led to their recognition as a distinct ethnic minority.

Whereas following the Treaty of Berlin in 1878, Greece did not receive all the territories it claimed from Epirus and Thessaly, negotiations with Turkey were resumed at Prebeza and then at Constantinople (August 1879- March 1880).

The Aromanians, inspired by national feelings[13], did not agree to ceding pars of Epirus to Greece, because such a border would split the villages from Pind and Gramos inhabited by the Aromanians during summer, from the wintering areas in The Thessaly Plain to the coastal area of The Ionian Sea. Despite the memoirs and the protests of the Aromanian delegates, the

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[10] Idem, p. 220.

[11] D. A. Sturdza, *Acte, Proiectul bazelor de organizare a viitoarei biserici române din Imperiul Otoman*, "Academia Română" Library, II, 7/19.02.1898, p. 140.

[12] D. A. Sturdza, *Acte, Proiectul bazelor de organizare a viitoarei biserici române din Imperiul Otoman*, "Academia Română" Library, II, 7/19.02.1898, p. 151.

[13] Rodica Silvia Stan, *Aspecte ale liricii aromâne*, "Tribuna" Journal, VIII, No. 46, 1996.

imperial representatives from Constantinople, under the influence of Austria-Hungary, agreed to trace the borders on The Arachthos and The Pencias Rivers, which led once again to the division of a territory inhabited only by Aromanians[14].

This division represented a heavy setback for the Aromanian national movement insufficiently supported by the diplomacy from Bucharest, because a territorial basis for possible autonomist actions for creating an independent Aromanian area (a future state) at the Albanian-Greek border was lost.

All territorial changes that occurred led to the tensioning of relations between Romania and Greece, which, however, did not result in the decrease of the support of the diplomacy from Bucharest regarding the Aromanians.

The reaction of the Greeks was materialized through a brutal campaign against the Aromanians who cherished national feelings.

Both the press related to Macedonia and the diplomatic correspondence from 1900-1908, are full of details regarding the bloody acts of Greek gangs focused on the Aromanians and the Aromanian settlements from Pind, Thessaly and Ephira.

This is the socio-political, legal and historical setting in which the Aromanians, organized by their own customary rules, were perceived in the Balkans: as a distinct entity closer to Romania due to their common origin[15]. These are the reasons why Romania's actions in support of their cause were characterized by repeated pressures over Turkey in order to grant the Aromanians the status of nation acknowledged and equal to other nations of the Ottoman Empire.

In this context, the diplomatic machinery set in motion by Romania, forced Turkey to yield and to meet the demands of Bucharest on May 20, 1905, through repeated interventions in Vienna, Rome, Constantinople and other European capitals, in the following official structure:

1. "The explanations between the Valiant of Ioannina and the Consul of Romania, through which the first declares that neither him, nor the imperial government are animated by hostile feelings towards the Aromanians.

2. The recognition of the Aromanians' rights to choose their own mayors in the areas where they represent a majority.

3. The recognition of The Sublime Gate of Romanian school inspectors, provided that they obey the Ottoman laws.

4. The recognition on the Aromanians' rights to have their own churches and schools in which to use the Romanian language".

Moreover, after an ultimatum of the Romanian diplomacy, on May 22, 1905, Sultan Abdul Humad issued the following imperial decree:

"His Imperial Majesty the Sultan, inspirited of His high righteousness feelings and parental care for His people, grants His blessings and goodwill to all His faithful subjects, irrespective of race and religion, considering the applications submitted now at the feet of the Imperial Throne by the Vlachs, His subjects, deigned to command in their regard that under the civil law that they rejoice, like other Muslim subjects, that their communities designate mayors, according to the regulations in force, so, as it it done for the other communities, Aromanian members are admitted, according to the existing rules, in administrative coucils, and facilies are granted by the Imperial authorities for the teachers appointed by the communities for the inspection of schools and for the fulfillment of the formalities required by the laws of the Empire regarding the opening of new school establishments".

[14] D. A. Sturdza, *Documente*, "Academia Română" Library, The Manuscripts Collection, III, 1897.
[15] Rodica Silvia Stan, *Aspecte ale liricii aromâne*, "Tribuna" Journal, VIII, no. 46, 1996.

The acceptance of the Aromanians as a distinct entity[16] within the Ottoman Empire was a great success for the diplomacy from Bucharest, but the fact that this acceptance was the result of the skillful political calculations of the Constantinople must be emphasized.

On May 23, 1905, through a Ministerial disposal, Abdul Rahman Pasha, the Minister of Justice and Religious Affairs, communicates the content of the decrete from May 22, 1905, and expressly specifies that the Aromanians can freely perform their own religious ceremonies.

The newly created legal situation which was in the favour of the Aromanians was unambiguous and could hardly be reconciled with the traditions of the Ecumenical Patriarch of Constantinople, who was known for his traditional position towards the Greeks.

In the months before the outbreak of the First Balkan War (1912), the situation from Turkey was not evolving in the favour of the Aromanians, who were now recognized as a nation in the Empire.

The internal crisis from Turkey in 1912 led to the victory of the nationalist forces gathered around the Young Turks group and the political crime became a trend. Over 500 political assassinations took place in the province of Macedonia in the first half of this year, events that have not spared the Aromanian representatives either.

Preceding the outbreak of the First Balkan War, a Greek-Serbian and a Greek-Bulgarian alliance were created in August 1912.

These alliances, which made no reference to the Aromanians, had common objectives: the expulsion of the Turks from Europe; the territorial issues that directly affected the Aromanians, were to be resolved later[17].

The states that have carried out these Balkan alliances demanded Turkey to implement the previously agreed reforms. The Sublime Gate responded to Serbia and Bulgaria with war declarations on October 17, 1912. In the following days, Greece declared war on Turkey and the Ottoman armies were defeated on all fronts, the Greeks occupied Thessaloniki and Ioannina and the Bulgarians and the Serbs liberated territories from Macedonia and from the European Turkey.

In February 1913, when there was not much hope left for Turkey, a "Committee for the defense of the Muslim, Israelite and Aromanian populations from Macedonia" was founded in Constantinople. A memoir counersigned by the Aromanian N.A. Popahagi was addressed to the Austrian Embassy for the empowerment of Macedonia in which Aromanians have a decisive role. A delegation of this committee stopped in Vienna on their way to London, where they requested the independence of Thessaloniki, without achieving tangible results, but merely promises.

In March 1913, at the Austro-Italian proposal, the Romanian Consulate in Tirana, Nicholas Milu was empowered to officially represent the interests of the Aromanians from Albania[18]. He demanded the inclusion of Pindus in the territory of Albania in order not to divide the Aromanians and the recognition of their language as an official language in all the areas with a majority population represented by Aromanians[19]. It is significant that the guarantee of rights for the Aromanians was requested not only by a stipulation of the Treaty of Peace which was concluded after the First Balkan War, but by explicit provisions that were to be included in the forthcoming Constitution of Albania. In Romania, some proposals were heard regarding the establishment of an Aromanian state within the territorial limits of the former Great Medieval Valahia.

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[16] Rodica Silvia Stan, *Aspecte ale liricii aromâne*, "Tribuna" Journal, VIII, No. 46, 1996.
[17] M. D. Peifus, *Chestiunea aromânească*, "Enciclopedică" Publishing House, Bucharest, 1994.
[18] G.V. Barba, "Our Flight" Journal, no. 1, 2, 3, 4/1995-1998, Freiburg, Germany.
[19] Rodica Silvia Stan, *Aspecte ale liricii aromâne*, "Tribuna" Journal, VIII, No. 46, 1996.

The misunderstandings between the winners of the first Balkan War concerning territorial issues led to a new war between the old allies, this time Romania engaging directly against Bulgaria after it attacked Serbia and Greece.

Conclusions

In the analyzed period, political events that had significant legal and political consequences for the Aromanians took place:

- The Aromanians are listed for the first time as a separate entity in an official international document, The Treaty of Berlin, 1878;
- A negative consequence of the treaty was their division in several countries (the entrance of several parts of Thessaly and Epirus from the area of The Pindus Mountains inhabited by Aromanians in the composition of Greece), which was a heavy setback for the Aromanian national movement;
- Aromanians are granted the status of nation [8], recognised and equal to the other nations from the Ottoman Empire through the Sultan's decrete from May 22, 1905, as a result of the repeated pressures of the diplomacy from Bucharest;
- The education in Romanian schools from the Ottoman Empire is strenghtened- the Romanian state allocates 40.000 lei (a substantial amount at that time) for the improvement of the schools;
- The concern of the Aromanian communities, supported by the diplomacy from Bucharest, led to obtaining the right to officiate religious ceremonies in Romanian[20] and to the foundation of an Orthodox Aromanian Diocese in the south of the Danube River, subordinated to the Romanian Orthodox Patriarchate.

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[20] Rodica Silvia Stan, Aspecte ale liricii aromâne, "Tribuna" Journal, VIII, No. 46, 1996.

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SECOND OFFENCE MATTERS IN THE NEW CRIMINAL CODE

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Abstract

Legislative changes to the legal norms governing the second offence matters in the New Criminal Code are the expression of the need to adapt the criminal policy to the changes occurring in the Romanian society, in line with the trends in the European legislation in order to prevent and combat the criminal phenomenon.

Keywords: *natural person, legal person, terms of second offence, post-sentence second offence, post-executory second offence.*

Introduction

In regulating the second offence matters in the New Criminal Code, imposed by the peculiarities involved by recidivism in the context of the fight means against the criminal phenomenon, the Romanian legislature showed evidence of exactness for the regulation of the sanctioning method both of a natural person and a legal person in charge with such states[1]*. On the other hand, we should not neglect the fact that it is necessary to adapt the national legislation in terms of recidivism to the trends existing in international criminal policy, in order to improve the legislation in force and to match the Romanian criminal legislation with the European legislation in the field.*

Both in our legislation and of other States, the foundation of aggravation of criminal liability in the event of recidivism is represented by the persistence of crime attested by the perpetrator[2]*, from which the idea of its increased injuriousness is derived.*

The second offence is one of the most serious manifestations of the criminal phenomenon, representing the proof that the offender may persevere in ignoring the law also after he was tried and convicted for a crime even after he executed a sentence, that he failed to change his conduct in spite of the previous experience represented by the execution of a sentence, thus proving the inefficiency of the prevention and control activities of the second offence phenomenon as well as of the criminal policy regarding the punitive system.

[1] V. Dobrinoiu, Gh. Nistoreanu, I. Pascu, Al. Boroi, I. Molnar, V. Lazăr, *Drept penal. Partea generală*, "Europa Nova" Publishing House, 1997, p. 270.
[2] M. Zolyneac, *Drept penal-Parte generală*, vol. II, "Chemarea" Foundation Publishing House, Iași, 1992, p. 637.

Relapse is a form of crime with a plurality of the offenses of which differs in the repeated commission of one or more offenses that occur after the offender was sentenced for another offense, while the competition offenses, offenses are committed before there is a final conviction for any such offense[3].

In both forms of multiple offenses, a person is accused of committing at least two offenses.

For the sentence to accomplish its functions and to achieve its goals, it must be well adapted to the severity of the offence, the personality of the offender and all objective and subjective conditions of committing the deed. The operation by which the sentence is adjusted in relation to the gravity of the deed, as determined by all the circumstances and data that characterize its content in relation to the offender person, with the state of second offence, as well as the appropriateness of the sentence during its execution, depending on how the convicted person reacts to detention conditions, bears the name of sentence individualization, a basic principle of criminal law that guides the criminal policy in crime prevention and combating[4].

The second offence is a form of plurality of crimes that implies the existence of two crimes committed by the same person, but while in the case of multiple crimes, the same person commits two or more offences before being definitively convicted, in the case of second offence, the same person commits one or more offences after it has been definitively convicted for another offence previously committed[5]*. This implies a high degree of injuriousness of the person who commits crimes in a state of second offence, proving a greater degree of incorrigibility*[6].

Regulation of second offence in the New Criminal Code[7] *is differentiated for the natural person (article 41-43 Of the New Criminal Code) and for the legal person (article 146 of the New Criminal Code).*

Second offence in case of a natural person

According to the provisions of the New Criminal Code, the article 41, paragraph 1 regulates, in a more simplified structure than in the current Criminal Code provisions, the conditions on the second offence of the natural person, through a synthetic yet comprehensive definition which also includes its forms[8]. Thus, there is a second offence when, after the definitive remaining of a conviction decision at the incarcerating punishment longer than a year and until the rehabilitation or until reaching the rehabilitation term, the convict commits again an intentional offence or an offence with an over-crossed intention for which the law stipulates the incarcerating punishment of a year or longer.

There is second offence also if one of the sentences stipulated in paragraph 1 is the life prison.

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[3] L. R. Popoviciu, *Drept penal. Partea generală*, "ProUniversitaria" Publishing House, Bucharest, 2011, p. 209

[4] M. Zolyneac, *Drept penal-Parte generală*, vol.III, "Chemarea" Foundation Publishing House, Iasi, 1992, p. 803.

[5] Al. Boroi, Criminal Law. General Part, According to the New Criminal Code, C.H.Beck Publishing House, Bucharest, 2010 p. 228; the contents of the criminal record, in accordance with the provisions of article 2 of Law no. 290/2004 published in the Official Gazette no. 586 of June 30, 2004 keeps a record of the persons to whom criminal or administrative measures have been taken.

[6] Al. Boroi, *Drept penal. Partea generală, Conform Noului Cod penal,* C.H. Beck Publishing House, Bucharest, 2010, p. 229

[7] Law no. 286/2009 on the Criminal Code published in the Official Gazette of Romania no. 510 of July 24, 2009.

[8] See I. Ristea, *Drept penal, partea generală, Conform prevederilor Noului Cod penal*, "Universul Juridic" Publishing House, Bucharest, 2011, p. 183; V. Dobrinoiu, T. Dima, *Drept penal. Partea generală*, "Lumina Lex" Publishing House, Bucharest, 2002, p. 125.

From the content of this article, we can notice that, in matter of the second offence, the number of its forms has reduced and although these provisions do not expressly regulate post-sentence second offence and post-executory second offence, from the text content of law, however, their existence and the fact that the legislator gave up the regulation of the small second offence can be inferred[9].

Thus, there is a *post-sentence second offence* according to the provisions of article 41, paragraph 1 and 2 of the New Criminal Code when, after the definitive remaining of a conviction decision at the incarcerating punishment longer than a year or at life prison, the convict commits again an intentional offence or an offence with an over-crossed intention for which the law stipulates the incarcerating punishment of a year or longer or the life prison.

With regard to the first term of the post-sentence second offence, the first condition it should meet is represented by the existence of a final decision of conviction to prison larger than one year or to prison for life. Taking into account this fact, we can consider that a definitive conviction to a fine sentence, regardless of its size, and a conviction to prison of one year or less may not constitute the first term of the second offence[10]. Also, the sentence stipulated in the sentence decision of the court may be applied for only one offence or for a conjuncture of offences[11], and in this case the resulting sentence should be longer than 1 year.

The provisions of article 41, paragraph 3 of the New Criminal Code regulate the conditions of existence of international second offence, with its features. In the current regulation, article 41, paragraph 3 stipulates that when establishing the status of second offence, we also consider the conviction decision pronounced abroad, a fact reconfigured in the provisions of the New Criminal Code in the sense of the mandatory nature acquired by the legal norm by the introduction of the phrase "to consider"[12].The conviction decision pronounced abroad in this case may be for an offence committed by a foreign citizen who has committed a crime abroad or by a Romanian citizen or a person without citizenship residing in our country[13]. Last but not least we should mention the need for recognition of the conviction decision pronounced abroad for a deed also provided for by the Romanian criminal law, thus conditioning the existence of the double incrimination of the deed as a crime, both in the Romanian legislation and the foreign legislation.

Also, another prerequisite for the existence of the first term of second offence is represented by the form of guilt it is committed with, i.e. with intention or with praeterintention. The third condition concerns the conviction decision which should not be one of those which result in the second offence status under the provisions of article 42, letter c, of the New Criminal Code[14].

Thus, according to the provisions of article 42 of the New Criminal Code, when establishing the status of second offence, we do not consider the conviction decisions regarding the facts that are not stipulated by the criminal law anymore, the amnestied offences and the guiltily committed offences. We should note that the conviction decisions regarding the offences committed during minority are no longer mentioned, because in the New

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[9] E.G. Simionescu, *Recidivismul şi recidiva legală*, "Universul Juridic" Publishing House, Bucharest, 2012, p. 243.

[10] See Al. Boroi, *Drept penal, partea generală*, C.H. Beck Publishing House, Bucharest, 2008, p. 217

[11] Bucharest Tribunal, The Second Criminal Department, decision no. 421/2005, Law Magazine no. 2/2006, p. 59.

[12] E.G. Simionescu, *Recidivismul şi recidiva legală*, "Universul Juridic" Publishing House, Bucharest, 2012, p. 254.

[13] Gh. Mateuţ, *Recidiva în teoria şi practica dreptului penal*, "Lumina Lex" Publishing House, Bucharest, 1997, p. 205

[14] Al. Boroi, *Drept penal. Partea generală, Conform Noului Cod penal*, C.H.Beck Publishing House, Bucharest, 2010 p. 231.

Criminal Code the minors are no longer punished with prison, but only with educational measures[15].

With regard to the provisions of article 42, letter a, of the New Criminal Code, the law of exculpation causes the criminal liability to cease for deeds outside the field of criminal unlawfulness, and all the criminal consequences of conviction decisions on these deeds. Also, in accordance with the provisions of article 42, letter b, of the New Criminal Code, the convictions for the amnestied offences do not result in the status of second offence, because amnesty is an act of clemency of the legislator that removes criminal liability of the perpetrator and, as a result, shall not attract the status of second offence of a natural person. On the other hand, the convictions for guiltily committed offences do not result in the status of second offence, according to the provisions of article 42, letter c, of the New Criminal Code.

*With regard to the second term of the post-sentence second offence***,** the first condition to be met is that the offender to commit after a definitive conviction decision, one or more offences, with intention or praeterintention, in consumed form or in tentative stage, as an author, instigator or accomplice[16]. The second condition concerns the requirement that the sentence prescribed by law for the offence committed again to be the imprisonment of one year or more or the imprisonment for life, and the third condition is that the offence must be committed until the rehabilitation or until reaching the rehabilitation term, which means that this new offence may be committed after the definitive remaining of a conviction decision, prior to the commencement of the previous sentence execution, during its execution or in the escaping status[17].

We should note that the provisions of the New Criminal Code in second offence matters change the conditions referring to the second offence terms, the limits of the first term increase so that the sentence established by the court for the first term should be prison longer than one year or life prison, not prison longer than 6 months, as it is stipulated in the current Criminal Code, while for the second term the sentence stipulated by the current regulation should be prison longer than one year or life prison. We can consider that the provisions relating to the conditions of the first term of the second offence are more favorable, encouraging the convicts to prison of less than one year to future second offence[18].

According to the provisions of article 41, paragraph 1 and 2 of the New Criminal Code, there is a *post-executory second offence* when after executing an imprisonment sentence longer than one year and until the rehabilitation or reaching the rehabilitation term, the convict commits again an intention offence or an offence having an over-crossed intention for which the law stipulates the imprisonment sentence for one year or longer[19].

*With regard to the first term of the post-executory second offence***,** the first condition to be met is the execution of the sentence of imprisonment for more than one year or life prison. Some clarification must be made in this case, namely that the execution of the sentence can occur under detention or at the work place[20], or that the total pardon or the one of the rest of the sentence was granted, or that the prescription term of the sentence execution was reached[21]. Concerning the sentence of imprisonment for life, the text of the law refers

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[15] See I. Ristea, *Drept penal. Partea generală, Conform prevederilor Noului Cod penal*, "Universul Juridic" Publishing House, Bucharest, 2011, p. 184.
[16] See Al. Boroi, *Drept penal, partea generală*, C.H.Beck Publishing House, Bucharest, 2008, p. 218.
[17] Idem
[18] E.G. Simionescu, *Recidivismul şi recidiva legală*, "Universul Juridic" Publishing House, Bucharest, 2012, p. 245
[19] Idem, p. 251
[20] Al. Boroi, *Drept penal. Partea generală, Conform Noului Cod penal*, C.H.Beck Publishing House, Bucharest, 2010, p. 231.
[21] V. Păvăleanu, Drept penal. Partea generală, "Lumina Lex" Publishing House, Bucharest, 2003, p. 249.

implicitly to the commutation or replacement of the sentence of imprisonment for life with imprisonment[22]. Also, another condition is represented by the form of guilt of the offence for which the sentence was executed, namely with intention or praetor-intention. The third condition is related to the sentence executed or considered as executed, which should not make the object of a conviction that does not attract the status of second offence, according to the provisions of article 42 of the New Criminal Code.

With regard to the second term of the post-executory second offence, the first condition to be met is related to the offence committed after the execution of the sentence or after the date of publishing the decree of total pardon or of the rest of the sentence or after the reaching the prescription term of executing the previous sentence; the second condition is related to the fact that this offence has to be committed with intention or praeterintention, and then the sentence stipulated by the law for the new offence should be prison for a year or longer or life prison[23].

The application of *sentence in case of second offence for the natural person* shall be carried out according to the provisions of article 43 of the New Criminal Code, namely whether a new offence is committed in a status of second offence before the previous sentence is executed or considered as executed, the sentence established for it is added to the previous sentence not executed or to the rest of it left not executed. Also when multiple concurrent offence are committed before the previous sentence is executed or considered as executed, of which at least one is in a status of second offence, the sentences established merge according to the provisions relating to the conjuncture of offences, and the resulting sentence is added to the previous sentence not executed or to the rest of it left not executed.

According to the provisions of article 43, paragraph 3 of the New Criminal Code whether the summation of the sentences under the conditions of the paragraph 1 and paragraph 2 would lead to exceeding by more than 10 years the general maximum imprisonment sentence, and for at least one of the offences committed the sentence prescribed by law is imprisonment for 20 years or more, the sentence of life prison may be applied instead of imprisonment sentences. When the previous sentence or the sentence established for the offence committed in a status of second offence is the life prison, the sentence of life prison shall be executed. If a new offence is committed in a status of second offence after the previous sentence has been executed or considered to be executed, the special limits of the sentence prescribed by law for the new offence shall be increased by half, without exceeding the general maximum of the fine sentence[24].

According to the provisions of article 43 paragraph 6 of the New Criminal Code if, after the definitive remaining of a conviction decision for the new offence and before the sentence to be executed or considered as executed, it is discovered that the convict is in a status of second offence, the Court shall apply the provisions of paragraph 1 to 5. The provisions of paragraph 6 shall apply also where the conviction to life imprisonment sentence was commuted or replaced with the sentence of imprisonment.

Second offence in case of a legal person

Since it is a matter recently introduced in the Romanian criminal law[25], the consecration of a special title in the contents of the New Criminal Code was chosen[26], by

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[22] G. Antoniu et al., *Explicaţii preliminare ale Noului Cod penal*, Vol. I – Articles 1-52, "Universul Juridic" Publishing House, Bucharest, 2010, p. 545.

[23] E.G. Simionescu, *Recidivismul şi recidiva legală*, "Universul Juridic" Publishing House, Bucharest, 2012, p. 253.

[24] G. Antoniu, C. Bulai, *Dicţionar de drept penal şi procedură penală*, "Hamangiu" Publishing House, Bucharest, 2011, p. 786.

[25] Art. 19^1 of the current Criminal Code introduced by the Law no. 278/2006 on the modification and completion of the Criminal Code, as well as for the modification and completion of other laws, published in the Official Gazette no. 601 of July 12, 2006.

using the model of the Finnish Criminal Code, although some provisions on criminal liability of legal person remained necessarily outside of Title VI, as is the case of the provision on the application of the Romanian criminal law based on the principle of personality and with reference to legal persons (article 9 of the New Criminal Code)[27].

For the regulation of criminal liability of legal person the principles on which this liability is based in the conception of the present Criminal Code in force, as amended by Law no. 278/2006, have been kept, while maintaining the option for the model of direct liability of the legal person, which can be entrained by any natural person acting under the conditions provided for by law, in accordance with the provisions of article 136 of the New Criminal Code and not just by the actions of bodies or its representatives.

Considering that in the New Criminal Code there are a few changes on the individualization of sanctions applicable to the legal person, resulting from the changes to the sentencing system, we can notice some changes in the content of the terms of the legal person' second offence, meaning that the fine sentence in the case of a legal person shall apply based on the system of fine-days, with the simultaneous introduction of five ways of legal individualization of the fine sentence by the provisions of article 137, paragraph 4 of the New Criminal Code, depending on the limits of the prison sentence provided by law for the natural person[28].

Conclusions

Given that the active subject of an offence can be both a natural and a legal person[29] and that in the New Criminal Code the provisions concerning the criminal liability of the legal person have been kept, as a result the provisions relating to the second offence of the legal person have been also kept in Chapter III of title above mentioned.

Thus, the article 146, paragraph 1 of the New Criminal Code stipulates there is a second offence in the case of a legal person when, after the definitive remaining of a conviction decision and until the rehabilitation, the legal person commits again an offence, with intention or with an over-crossed intention. From the text of article 146, it follows that there are two forms of second offence in the case of a legal person – *post-sentence second offence and post-executory second offence.*

*With regard to the first term of the post-sentence second offence***,** the first condition it should meet is represented by the existence of a final decision of conviction to a fine sentence for an offence or a conjuncture of offences[30]. Also, another condition is represented by the form of guilt it is committed with, namely with intention. The third condition concerns the conviction decision which should not be one of those which result in the second offence status. Thus, according to the provisions of article 42 of the New Criminal Code[31], which shall apply appropriately also in case of second offence of the legal person (according to the provisions of article 146, paragraph 4), when establishing the status of second offence in the case of a legal person, we do not consider the conviction decisions regarding the facts that are

[26] In the criminal doctrine, the existence of legal or moral person as an active subject of an offence represented a controversial issue of criminal law - Al. Boroi, Criminal Law. General Part, C.H. Beck Publishing House, Bucharest, 2008, p. 145.

[27] Recitals to the New Criminal Code, in www.just.ro.

[28] Recitals to the New Criminal Code - www.just.ro.

[29] Al. Boroi, *Drept penal. Parte generală*, C.H. Beck Publishing House, Bucharest, 2008, p. 145.

[30] Al Boroi, Drept *penal. Partea generală, Conform Noului Cod penal,* C.H. Beck Publishing House, Bucharest, 2010 p.233; G. Antoniu et al., *Explicații preliminare ale Noului Cod penal*, vol. II, "Universul Juridic" Publishing House, Bucharest, 2011, p.146; V. Păvăleanu, Drept penal. Partea generală conform Noului Cod penal, "Universul Juridic" Publishing House, Bucharest, 2012, p. 455.

[31] Al. Boroi, *Drept penal.Partea generală, Conform Noului Cod penal*, C.H. Beck Publishing House, Bucharest, 2010, p. 231.

no longer stipulated by the criminal law, the amnestied offences and the guiltily committed offences.

*With regard to the second term of the post-sentence second offence***,** the first condition to be met is that the legal person to commit again a new offence with intention, and another condition requires that the offence to be committed before the commencement of the execution of the sentence previous to the fine.

*With regard to the first term of the post-executory second offence***,** a condition to be met is represented by the existence of a definitive conviction to the fine sentence, executed or considered as executed by the intervention of its pardon or prescription; the offence for which the sentence was executed was committed with intention, and the third condition to be met is that the conviction decision should not refer to the facts that are no longer stipulated by the criminal law, the amnestied offences and the guiltily committed offences which do not result in the status of second offence.

The conditions of *the second term of the post-executory second offence* are the perpetration of a new offence with intention, after the execution of the fine sentence or after the sentence pardon or after reaching the prescription term of the sentence execution, and for the new offence the sentence prescribed by law shall be the fine.

The sentence in case of second offence for the legal person shall be applied according to the provisions of article 146, paragraph 2 of the New Criminal Code, the special limits of the sentence prescribed by law for the new offence being increased by half, without exceeding the general maximum of the fine sentence. Also, when the previous fine was not executed, completely or partially, the fine established for the new offence shall be added to the previous sentence or to the rest of it left not executed, according to paragraph 2.

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THE JUDICIAL SHARE PROCEEDINGS BY THE NEW CIVIL PROCEDURE CODE

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Abstract

The New Code of Civil Procedure regulates the division of assets among the special procedures. Without bringing any real new elements of procedure, the new norms are in agreement with the stipulations of the Civil Code, especially with regards to the effects of the judicial decision of division, which loses its declarative quality and becomes a title of property from the date of definitive attribution.

Keywords: *division of assets, New Code of Civil Procedure, procedure, decision, prescription.*

Introduction

The division of assets represents a procedure whereby any form of communal property ends[1]*. The regular form it takes is voluntary division. The parties or co-owners could cease their communal property upon request by petitioning for an ad partitionem motion or through a notary public. However, if one of the parties is absent, he is deprived of the capacity to exercise his right or has a limited capacity and lacks the authorization of the court in order to finish the division of assets. If the parties simply cannot come to an agreement with regards to the division of assets, there is a misunderstanding between them, then the judicial division of assets becomes mandatory.*

1. The Parties in the Division of Assets

The parties in such a case are the co-owners, also known as the spouses who hold their property jointly. Either one could be the plaintiff, having an active position while the other co-owners are passive. The demand can also be made by the rightful heirs of the co-owners in support of or against them, as well as by the creditors of the co-owners or of their heirs, depending on the case.

The division of assets is also called *judicium duplex*, in which either party can be both a plaintiff as well as a defendant, being interested to put forward their reason for quitting the

[1] Fl. Baias, E. Chelaru, Rodica Constantinovici, I. Macovei, *Noul Cod civil, comentarii pe articole*, C.H. Beck Publishing House, Bucharest, 2012, p. 727.

co-ownership. This particularity allows the parties certain procedures which could not be done jointly.

2. Petition for Distribution

The petition of distribution presents particularities different to those of the summons before the civil court. The code requires that this petition must be made by the persons whose property is divided, the title under which the petition is made, all the property to be divided and its evaluation, the place where it is housed as well as the person who holds it or administers it.

With the division, the court must resolve other matters closely connected to it, such as succession: the donation report, the reduction of excessive liberties, settling of succession debts, the matter of succession property etc. In this sense, it is imposed that there be a delay between the moments when the petition can be made. Another solution would determine a subsequent law suit for other goods or debts run up by the succession. This helps us conclude that the division of assets did not eliminate the common property, but rather generated new litigation between the parties. Thus it purpose has not been reached.

Until a decision is reached on the division it is possible to formulate a new complementary petition in case it is discovered other goods after the judge's decision on the property properly divided, although according to general procedures this petition should be formulated on the first appearance (article 958 NCCP).

Also, article 684 of the Civil Code mentions the possibility of the division of the omitted goods to be subsequent and supplementary.

3. The Competent Authority

Pursuant to article 94 of the New Code of Civil Procedure, the petition for the division of assets must be put forward to the court no matter what the total value of the property is. This value shall not determine which authority is competent in the first instance, because the legislator's intention is to exclude splitting the authority between the judge and the court, in relation to the value of the objective of the petition and thus avoiding sending too many requests to the higher court, which require more a mathematical effort than a judicial interpretation.

4. The Procedure of Division

The procedure of division is characterized by the fact that the first instance, on the first hearing, the court is obliged to draw certain acts of procedure, to take the parties declarations concerning the property to be divided. Thus, according to the Code, the court hears declarations about every one of the goods, whether the parties acknowledge or agree that these goods exist, where they are and what their value is. For example, the court first of all does not contest what the parties invoke in their petitions or on the contrary, without properly hearing the parties, although this seems mandatory for its utility, tending to clearly determine the existence of the goods and to verify also if by this demand either party does not seek to defraud the law or the other party.

Also, the code stipulates that the court will try in any case to resolve the division of property through agreements, in order to avoid any further costs for acts of procedure either for the parties or the court. This regulation represents a special disposition, which resumes the judge's role to try to help the parties reach an agreement. However, in the framework of the division of property, the agreement does not represent a way of returning to the previous stage before their appearance in front of the court, but a way of resolving the request by using the agreement the parties have come to. Also, on the occasion of the presentation of the convention or of a transaction between the parties, the court has a chance to analyze the demands to validate it, in the sense of recognizing only the transaction which could resolve the division (ceasing co-ownership or joint possession), but not the defrauding of other people.

On the other side, the framework of the division of property is difficultly determined if the parties could not come to a voluntary agreement with the aid of the court's decisions, which is why they have been spared court fees and other expenses, to which they would be subjected in the case of confirmation. However, the legislator has tried at one time to, through the stipulations of the tax on stamps, to discourage divisions of property don for convenience sake, and therefore he instituted the mandatory tax on value and the removal of the children's names from the court decision, which carries the mention that it is definite, that the total tax must be paid depending on the value of the object[2].

According to the Code, the procedure has only one stage, in principle, if there is no need for a closing to be given by the court.

The former regulations stipulated that such a closing is only necessary in complex cases[3], since the court does not have to draft this document for simple cases. If after half a century, the arguments made in the literature have passed into law, articles 983 and 984 of the Code, which show the circumstances in which it is mandatory to go through these two stages.

Therefore, at present, an assessment is not necessary, nor is evaluations of any such things, because the court does not have sufficient data. It will reach a decision whereby it will establish which goods are to be divided, the quality of co-owner, the rate for each co-owner and the debts resulting from the common property that the owners owe other people. When an inheritance is divided, the court will assess the sums owed by the legacy and the debts of the co-inheritors to the decease party as well as the inheritance taxes.

If, on the contrary, all these are not necessary, the court will divide the inheritance itself and will assign a part thereof, whose value it will eventually complete depending on the inequality of the balancing payment and sometime even decides what to attribute to each party.

As such, in certain situations the court gives its decision in anticipatory statements, which according to the general rule cannot be appealed except in the first instance, which is mentioned in article 986 of the New Code of Civil Procedure, in order to avoid any interpretation that could be used to attack them separately. The current regulation tends to fill in the many gaps and correct the errors in the previous legislation, in the matter of the methods to attack the decision in principle[4], since the norms from the old code gave way to many possibilities of violating the principle of solving the case in a reasonable amount of time, as derived from the jurisprudence of the European Court of Human Rights, article 6 paragraph 1 of the Convention.

The way of forming the separate shares, based on the stipulations from the Civil Code, article 676 and 677, is regulated by the New Code of Civil Procedure, which stipulates the criteria which the court takes into consideration, namely: the agreement of the parties, the size

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[2] Article 8 from Law no. 146/1997, amended by Law no. 276/2009 mentioned the following: "The requests for the court to issue copies of the rulings, with the mention that they are definite and irrevocable, by which it is established: the status of heir, the legacy, the rates and goods received by every heir, if the postage tax was paid for the probate procedures done by the notary public, the tax rates are given by article 3 c)". This stipulates that requests for establishing the status of an heir cost 50 lei per heir, requests for assessing the legacy 3% of the total worth of that legacy; requests for a report 3% of the value of the goods for which the report is made; request for reduction of liberties 3% of the reserve which will be completed by the reduction if liberties; request for division of property 3% of the dividable legacy. Apart from these taxes, if the parties contest the objects to be divided, their values or the rights or the if they have a claim to the rights of a co-owner as set in the requests mentioned above, the postage tax is owed by the person requesting it to the value contested within the conditioned stipulated by article 2 paragraph (1).

[3] V. M. Ciobanu, *Tratat de drept procesual civil, vol. II*, "Naţional" Publishing House, Bucharest, 1996, p. 555 concerning the opinion given by Ilie Stoenescu and Savelly Zilberstein on art. 4 from Law no. 603/1943.

[4] The text previous to the amendment by Emergency Government Ordinance no. 65/2004 published in the Official Gazette of Romania 840 from 14 September 2004, shows that these court decisions are appealed separately.

of the share owed to each one or the amount of goods to be divided, the nature of the goods, the residence and occupation of the parties, if either of the co-owners had made any improvements or changes with the consent of the other co-owners and many more (article 987).

It is clear that the solution offered by the Civil Code is maintained, the division in kind being essentially only used when the possessions cannot be divided or it has significantly dropped in value by dividing it. Therefore the court must follow the stipulations of article 990 of the New Code.

The Civil Code expressly states in article 676 paragraph 2 that when the property is indivisible or more easily divided in kind, then the object is given whole in exchange of a balancing payment to one or more of the other co-owners. In case of a disagreement, the object will be place on public auction, under the terms of the law and the money made from its sale will be distributed equally among the co-owners.

Therefore, if division in kind is not possible, should it cause an important drop in its value or should it modify its economic purpose aversely in any way, the court may attribute the entire object, upon the demand of one of the co-owners. If all the co-owners make a request for temporary attribution, then the court will consider the criteria stipulated in the code to make the shares.

The court will decide upon the deadline wherein the co-owner who previously held the object is obliged to compensate the others. If the former pays before the deadline, then the court may decide on the facts and grant the object. If the co-owner does not pay the compensations, the court will grant the object to another co-owner.

At the request of one of the co-owners, the court can grant him the object[5] directly, taking into account the facts of the case and for sound reasons, but also establishes what sums are owed to the other co-owners and the deadline for the payment[6].

Given that the object is granter temporarily or definitely by way of request, should none of the co-owners demand the object or, if the object had been temporarily attributes and the payments were not made to the other co-owners, the court will have the object sold.

This way of ceasing the co-ownership is also a subsidiary, since it is necessary so that the division of assets not be done in kind or the separation of the goods lead to their loss of value.

The sale can thus be made for an object or a part thereof. The code allows for this conclusion, while it mentions other goods that require a division in kind (article 991 paragraph 5 and article 992 from the New Code of Civil Procedure).

If the court decides to put the property up for sale, it will also decide the way in which it will be done, either by agreement of the parties or court order. If the parties have agreed to sell the property, the court must set the date of the sale, within a limit of 3 months. If by this date the parties cannot give proof of the sale before the court, then the sale will be conducted by a court represented official.

As opposed to the decisions by which the property to be divided and the co-owners are established, or which complete such a decision, those that decide the sale of a property or goods may be appealed separately. If they were not thus appealed, these decisions can no longer be attacked once the case is settled.

If it was decoded that the sale would be done by the court official and the decision was not appealed, then the court official will proceed with the sale by public auction, setting the

[5] Mihaela Tăbârcă, *Drept procesual civil*, vol. II, "Universul Juridic" Publishing House, Bucharest, 2008, p. 258 on the interpretation of the text concerning the number of goods the legacy should have.

[6] Decision no. 1.019 from 8 November 2007 referring to the exception of unconstitutionality of the stipulations of article 673/10 from the Code of Civil Procedure, published in Official Gazette of Romania 826 from the 4 December 2007.

date in accordance with article 991 of the New Code. Thus, the date must be set within a 30 day limit for movable objects and 60 day for an immovable object, before the auction.

As opposed to the ordinary legal situations, in this one, the co-owners may agree to sell at any price offered during the auction.

If the division cannot be done within the terms of the law, the court will decide the case and will give a ruling.

5. The Ruling in a Division of Property case

This ruling resolves the request by terminating the co-ownership must be executed against the party who holds the goods and does not respect the court's decision on the composition of the shares.

The Civil Code clearly stipulates in article 684 paragraph 2 that the division in null and void if not all the parties take part. Therefore, any co-owner omitted can demand the nullification, by invoking the fact that he could not oppose a decision on the division of assets in a court procedure in which he did not take part.

The decision may be appealed, yet if the division of assets is requested incidentally, then the decision can be appealed in the same way as the decision given in the main suit. In this last case, the date for the appeal against the main request will be set by law, even if only the solution is attacked.

In order to settle once more the limits within which an appeal can be made, against the appeal, the law shows that there is no further means of criticizing the criteria set in article 987, which constitutes the main aspects, different from the hypotheses of inequality presented in article 488.

On the date of the final ruling, the co-owners become exclusive owners of the goods or the sums of money owed to them and the ruling has a constitutive effect as opposed to a declarative one.

If the division involves immovable property, the judicial ruling takes effect if it stands and is recorded in the land registry, pursuant to article 680 of the New Code.

The ruling is executed both with regards to the property as well as its equivalent value assessed by the court, in case the property is declared missing. In order to offer the equivalent value it is necessary to prove that the execution of the ruling was underway. Also the absence of the property must be recorded with the court official. Only in this situation, is it no longer necessary to use the procedure mentioned in article 891 of the New Code. The court will approve the equivalent sum as mentioned in the assessment[7].

Concerning the delivery of the object, there are different views depending on the nature of the object, whether movable or immovable. In the latter, the deadline in case of a forced surrender should be 10 years[8], but there have also been suggestions of 3 years, despite the object's nature.

The New Code of Civil Procedure maintains the 10 year deadline for rulings delivered in matters of real rights and ceases the previous dispute, because it may be requested that the ruling on divided property be carried out as stipulated in article 696 (3 or 10 years), just as the decision of division of property refers to movable or immovable objects.

Concerning the rather useless relation between division and the claiming of property, based on the previous doctrine[9], the New Code of Civil Procedure stipulates that the decision is susceptible to be carried out by force, even if the parties have not specifically requested the surrender of the goods or the court makes no reference to it in the documents.

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[7] V.M. Ciobanu, G. Boroi, *Drept procesual civil. Curs selectiv. Teste grilă*, C.H. Beck Publishing House, Bucharest, 2005, p. 465.

[8] I. Deleanu, *Tratat de procedură civilă*, vol. II, C.H. Beck Publishing House, Bucharest, 2007, p. 471.

[9] V.M. Ciobanu, *op. cit*., pp. 572-573.

Conclusions

In order to come into possession of the owed property and the other co-owners refuse to surrender it, the interested party must not make a claim. Taking into consideration that the law distinguishes two types of decision and also the purpose for which the parties make the request for division, it would be too costly for the creditor to go through a new procedure in order to obtain another document mentioning the debtor's obligation to surrender the property. However, if the parties expressly state that they do not request the surrender, the division ruling is not susceptible to a forced execution. In case of opposition, the claim becomes unnecessary. The justification in this case is given by the fact that if the party that agrees during the civil suit to decline to take possession of the property, which makes the division partially useless, because it lack the force of execution.

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Abstract

Autonomy is a principle/a form of administrative-territorial organization that some states use, generally for reasons of historical, geographic, demographic, and, in rare cases, the ethnic considerations. This, as do various forms of federalism or decentralization, achieved balance between the state and its constituent units, inhabited by populations of the same origin or origins, creating some favorable conditions for promoting and guaranteeing human rights and thus to preserve the persons belonging to minorities.

Autonomy is not a right or obligation for territorial community or state, for a minority or ethnic group. It can however claim to be a local entity, thus including the minorities.

Keywords: *autonomy, local autonomy, personal autonomy, territorial autonomy, ethnic autonomy, decentralization subsidiarity, federalism.*

Introduction

The issue of autonomy led to a number of conflicting interpretations due to different meanings attributed to the concept of autonomy by the representatives, minority leaders, politicians or law professionals from various countries, including Romania. Controversy starts generally for the following reason - autonomy would be a specific right of national minorities to preserve the identity of nature or an administrative-territorial way.

In light of these considerations, the perspective correct understanding of the concept of autonomy and the incidence of this principle with issues of identity preservation of minority rights will make a brief presentation of the institution specified in terms of content, scope, methods of regulation to the international documents and conclusions reflect the results of the analysis.

I. *Considerations on the autonomy.* Autonomy, as is the self-government or self-management, essentially involves the delegation of powers to local authorities or recognition, sharing certain attributes of state power between central and local bodies, giving the latter some skills in which to address issues of territorial units that compose a particular state[1].

Objectives similar to those characteristic of autonomy are concerned and promoted decentralization policy as a rule, in countries with democratic systems at their territorial units.

If federal structures that are found in different states they lead to the same results for all federal units constituting the State, delegation of powers but in these situations is much deeper than for local autonomy and decentralization. In unitary states the powers of government/power can be a greater or lesser extent decentralized, being assigned to administrative-territorial units of competency.

[1] I. Diaconu, *Autonomia. Drept sau modalitate de realizare a drepturilor omului*, in "Drepturile omului" Review, no. 1, edited by IRDO, 1966, p. 7-8; T. Tănăsescu, *Minorităţile. Repere instituţionale şi legislative,* Sitech Publishing House, Craiova 2006, p. 191.

Remember however, noticed that in these cases the government maintain control over local authorities can intervene in the exercise of their functions. In contrast, in federal states between central government and local governments are sharing their skills they each perform independent, being subordinate only Constitution.

Please note that federalism is not the same autonomy although in some cases, both lead to the creation of local structures with relatively similar responsibilities. In fact, federalism ensures achievement of certain categories of local autonomy, in all federal states. If autonomy can be unitary states as local autonomy for the territorial units that compose a State, and in exceptional cases only some units based on specific statutes, regulations and there were some areas of some federal states[2].

Juridical point belongs to the constitutional autonomy of each country it represents therefore a national institution (the administration is considering a territory under its sovereignty).

Treat it in different circumstances, in relation to minority issues is because in most cases local autonomy is considered part of democracy, it provides a more favorable exercise of human rights, including the identity of persons belonging to minorities. In certain cases some minorities claim autonomous status only for them or they live in compact regions. In some situations the use and inadequate concepts such as "ethnic autonomy", "personal autonomy", notions whose content and purpose must be established, necessarily, according to the general requirements of human rights and the requirements respecting the territorial integrity and sovereignty. The issue of decentralization, autonomy, is essentially an expression of attributes of the state, of division between central and local bodies, the existence of minorities is not essential for claiming autonomy[3].

In conclusion it should be noted that autonomy be granted to ethnic and degree of autonomy is the same for all territorial units, irrespective of the ethnic population[4].

Therefore we can say that autonomy is a political objective that aims to fight for power and not a right of a minority can be claimed as such[5].

In the cases demands for autonomy of minorities, authors[6] and experts in the field relies, inter alia, the following: unequal economic and social development of different regions of the country (a claim of ethnic autonomy, in this case is an alternative to ethnic economic or social problems), some inequalities in the exercise of human rights, discrimination and prejudice exacerbated own targets to achieve political domination, the reality of discrimination, denial of a minimum standard of specific rights of persons belonging to minorities and the absence of a coherent program democratic, to guarantee their rights, deep mistrust between the majority and minority (which is based on historical experience or painful, or the refusal of new minorities to accept this situation, when for decades had a dominant position in an empire or a federal state).

II. Autonomy reflection in international documents

Throughout the international treaties the principle of autonomy was used to determine the legal status of territories and populations given incorporated into empires or states but different to other populations of their language, religion, traditions. This was done in the

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[2] I. Diaconu, *Minorităţile. Statut. Perspective*, Romanian Institute for Human Rights, Bucharest, 1996, p. 151.

[3] Vezi Hurst Hannum, *Autonomy, Sovereignty and Solf – Determination, The Accomodation of Conflicting Rights*, Philadelphia 1990, p. 3-34.

[4] T. Tănăsescu, *op. cit.*, p. 193.

[5] In relation to this matter Hurst Hannum shows that if the request of a minority being granted territorial autonomy aims to enable the rights of people with composing, protecting and promoting national identity, autonomy is a means, one of the methods achieving compliance with specific rights of such persons. (Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, University of Pennsylvania Press, Philadelphia 1990, p. 474).

[6] I. Diaconu, *op. cit.*, p. 153.

provinces of the former Ottoman Empire, which the action internal security, it has provided a system of internal autonomy (eg Romanian principalities, some Arab provinces), and later 18th century the European powers-19 have imposed the same empire by treaties such a regime to ensure a growing number of territories.

This principle of autonomy in the situation we find statutes free cities, Danzig (after World War) and Trieste (after the Second War), and the Memel territory (after World War)[7].

These cities remained, due to border redrawing after two wars, outside the states that previously belonged to. It was given to these cities, given the differences to neighboring populations, a regime that recognized local authorities certain powers, especially in domestic affairs, leaving important issues in the Member within the limits or borders which were international forums (where Danzig and Trieste). These were transitional status have ceased to exist, for various reasons.

UN Charter (Article 73) stipulates notions like self-governing territories not ("non-autonomous") regarding former colonial territories, which at the end of the Second World War were taking those cities (now most they are independent states and territories except for small islands). United Nations member states have pledged the administration of these territories, those territories autonomy development taking into account the political aspirations of their peoples and to help the progressive development of their free political institutions according to the circumstances of each territory and its peoples and with different levels of their development.

At UN level, the principle of autonomy has been reflected as a political solution, and in several resolutions. Remember attention on this line resolution 390 (V) in 1950, which, upon the report of a committee of the General Assembly, recommended the establishment of a federation between Ethiopia and Eritrea, the latter assigning a status of independence which in 1962 was canceled. But creating a federation that Eritrea had his government with legislative, executive and judicial internal affairs, but sovereignty remains Ethiopia. Eritrea became independent in 1992.

Also, *in the work of the CSCE* were made proposals calling for states as the "dividing their territories the political subdivisions, administrative and judiciary to consider favorably the situation of national minorities and to provide an appropriate form of administration local or autonomous".

The participating countries are not accepted "*autonomy*" as a form of mandatory administrative-territorial organization, given the particular situation of each of them.

In this context, it is significant document of the Copenhagen[8] Meeting of the Conference on the Human Dimension of the CSCE (5 to 29 June 1990), which states in chapter IV.35 that "Participating States note the efforts to create and facilitate conditions to promote the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one means to achieve these aims, appropriate local or autonomous administrations, according to specific historical and territorial situation of these minorities, in accordance with State policy".

On the same theme, the Report of the CSCE Meeting of Experts on Minorities (Geneva, 1 to 19 July 1991) states that taking into account the diversity and variety of their constitutional systems, making any approach may not be generally applicable, the participating States note with interest that some of them have passed in a democratic, among others by:

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[7] T. Tănăsescu, *Protecţia drepturilor identitare ale minorităţilor naţionale în tratatele României cu ţările vecine*, ANI Publishing House, 2005, p. 32.

[8] Text on Securitatea şi cooperarea în Europa, Documente, Documents, 1989-1992, vol. II, edition edited by V. Lipatti and I. Diaconu, p. 12ff.

- local and autonomous administration, and territorial autonomy based, including the existence of consultative bodies, the legislative and executive bodies chosen through free and periodic elections;
- self-administration of a national minority of aspects concerning its identity in situations where autonomy on a territorial basis does not apply;
- local or decentralized forms of government.

States participating in the meeting expressed the opinion that these suggestions or others, separately or in combination, can be beneficial in improving the situation of national minorities on their territories.

The solution recommended by the documents referred to is therefore based on territorial autonomy, so that all local units and not on ethnic autonomy.

International documents most relevant to this issue are those adopted by the Council of Europe, on the line retaining particular attention to the European Charter of Local Self-Government, adopted in Strasbourg on October 15, 1985[9] which defines the right of local autonomy and the ability of local authorities to regulate and manage the law in their own name and in the interest of local population, an important part of public affairs (paragraph 1, Article 3). It also suggests that this right is exercised by councils or assemblies composed of members elected by free, secret, equal, direct and universal, which may possess executive organs responsible to their deliberative (para 2, art. 3). Expressly provides that the exercise of these rights is a territorial basis, i.e. administrative units to which these organs are chosen based on equal suffrage, direct and universal (Art. 4).

Also, the same act expressly states the principles of local autonomy to local authorities in all administrative units of the state, without any distinction. There is established but no relationship between size and minority ethnic and local autonomy among the ethnic origin of inhabitants of a territorial unit and the principle of local autonomy.

Local autonomy is defined so that the principle of internal organization of states, as a way to achieve decentralized governance system, an integral part of democracy without minority ethnic connotations.

The actual legal document on minorities is the Framework Convention on National Minorities, adopted by the Council of Europe in 1994 and signed in Strasbourg on 1 February 1995. The Convention contains provisions on the protection of national minorities and guaranteeing the rights of persons belonging to these minorities.

This document makes no reference to the organization of the territory and state government, so it makes in any obligations arising from its provisions establishing a system of autonomy or other ways of organizing the administration of the territory.

Stability in Europe, signed in Paris on March 20 to 21, 1995, concerns about the issue of minorities, the Framework Convention of 1994 and the rights of persons belonging to minorities, in general, without going into details.

At European level, are referred to Recommendation 1201/1993 the Council of Europe Parliamentary Assembly, entitled “on an Additional Protocol to the European Convention on human rights, regarding national minority rights”.

By this document, the Assembly “recommends Council of Ministers to adopt a Protocol to the European Convention on Human Rights on the rights of national minorities”, inspired by the text of the draft annexed project protocol which is part of the recommendation.

Recommendation not addressed so the Member States of the Council, but its Council of Ministers (both organs involved being the Council of Europe) on a document that it was to develop it.

[9] Ratified by Romania by Law no.199 of November 17th, 1997, published in Official Gazette of Romania no. 331/ November 26, 1997.

In "The proposal of Additional Protocol", which is part of the Recommendation, states in Article 11, that "In regions where they are mostly people who are part of a national minority have the right to has the appropriate local or autonomous administrations, or special status under specific historical and territorial situation and in accordance with national legislation of the State".

At the summit the European Council in Vienna in October 1993, Council of Ministers was unable to present a document on minority issues. The Declaration adopted by Heads of State and Government asked the Council to continue efforts to develop and adopt a document on the protection of minorities.

Document prepared and subsequently adopted and signed on 1 February 1995, the Framework Convention on National Minorities, not taken in any such provision (on the right to dispose of local government or autonomous Article 11) of "proposal Additional Protocol" and therefore did not follow the recommendation of the Parliamentary Assembly.

After adoption of the Convention, it is only legally binding document. Preliminary Proposals (Additional Protocol proposal) would come from whatever source, by the very fact that they were not incorporated in the legal document adopted, not only the historical significance of working papers.

Therefore, in a subsequent negotiation, even on the same topic, they cannot be invoked as some relevant documents, except as part of preparatory work. Consequently, the fact that some countries have registered their bilateral treaties refer to the provisions of Recommendation 1201/1993, meaning that they apply in their bilateral relations, the legal obligation is not likely to cause effects on other countries, but only in relations between countries.

Another document recently adopted by the Council of Europe which are of some importance in the field and can generate interpretations of autonomy is Resolution 1334 of 24 June 2003 the Parliamentary Assembly of Council of Europe on the positive experience of autonomous regions as a source of inspiration for conflict resolution in Europe.

The content is recommended resolution, alternative cultural or territorial autonomy introduction (i.e. not exclusively territorial) as a way to mitigate the tensions and internal conflicts (section 8), and as a means of settling such claims in the cultural identity coming from minorities. If unitary states (point 13) the autonomy, autonomy so required by resolution, requires decentralization, while federal states when it is considering sharing of power between federal and regional states.

We specify that Resolution 1334 is to promote not granted by Member States of ethnic autonomy, purpose of this document is to highlight the beneficial role of certain forms of autonomy (cultural or territorial) to prevent or mitigate tensions and internal conflicts in some countries. Also Section 9 of resolution shows that the concept of autonomy can sometimes negative connotations and can be perceived as a threat to territorial integrity and as a first step towards secession. More sections 15 states that autonomy cannot be considered a solution relevant and applicable in all situations, requiring that any statute of autonomy to be adapted to the specific geographical, historical and cultural, and very different characteristic features of cases and areas of conflict.

The explanatory report of Gross Swiss parliament which preceded the adoption of Resolution 1334, that refers to granting territorial autonomy as a possible solution, not infallible, for resolving conflicts and tensions between state and national minorities.

In the context of the above conclusions are also the provisions of point 16 the document, that the implementation of autonomy should not make people feel that local government is a minority business exclusively. Also, the point 17 states that an autonomy statute requires managed the development of balanced relations between majority and minority state and also between all national minorities, and any autonomous status to the

principles of equality and non-discrimination and should be based on territorial integrity and sovereignty.

In conclusion, according to the presented Resolution 1334 is not likely to encourage separatist actions, but is territorial disintegration, in some cases, a means of inspiration, prevention and settlement of internal conflicts and tensions that are related and minorities, which are designed to actually preserve their identity rights. Document is worth recommendation to Member States and was given political and, consequently, its application is not mandatory for countries belonging to the Council of Europe on whose territory national minorities live.

Resolution is not legally binding and therefore promoted the application of autonomy is not mandatory.

The purposes of this evaluation is circumscribed and attitude of the Committee of Ministers did not follow proposal made in Recommendation 1609/2004 the Council of Europe Parliamentary Assembly, in the explanatory report of Swiss Gross Andreass (document preceded Resolution 1334), namely to develop and adopt a convention on regional autonomy.

Recently, in the context socio-political development of Southeastern Europe is found in favor of autonomy, decentralization, delegation of powers that local authorities, acting and other community organizations promoting European context, certain principles such as subsidiarity and regionalism.

There are significant in this sense steps taken in the field of the Committee of Regions (EU advisory body consisting of representatives of regional and local) to popularize and implement the principle of subsidiarity, the regionalist policy[10].

According the Committee, subsidiarity is a principle of law under which central authorities are competent to intervene in solving certain problems, only if they cannot be solved at the local community (local and regional authorities).

Subsidiarity principle, as it is enshrined in Article 5 of the Treaty of Amsterdam in October 1997 (former Article 3-b of the Maastricht Treaty of February 7, 1992) involves decision making level closest to citizens, in this case the local and regional community. Thus, consequently, induces self-subsidiarity, of regionalism as a phenomenon of empowerment regions, affirming them, including international relations, issue not expressly refer to national minorities and not to the ethnic element.

Unfortunately, the arbitrary adoption of these principles, generous in nature, in many cases leads to the emergence and favoring the ethnic secessionist tendencies.

Conclusions

In the context of the main conclusions presented emphasize the autonomy of the following:

♦ *Autonomy is a form of territorial and administrative organization* to which some states use for reasons of historical, geographic, demographic, and quite a few cases, on grounds of ethnic. This exercise in collective self-determination as well, as is the right to development, right to a healthy environment and other social solidarity.

Existing autonomous systems in different countries all relate to the type territorial autonomy, thus not ethnic.

♦ *Autonomy*, as well as various forms of federalism or decentralization, *achieved balance between the state and its constituent units*, inhabited by populations of the same origin or origins, *creating favorable conditions to promote and guarantee certain human rights* issues and therefore the preservation of identity of persons belonging to minorities. Therefore it is necessary to build structures that meet the diversity of interests and social

[10] I. Stan, *Organizaţii Internaţionale Guvernamentale*, "Agora" University Press, Oradea, 2011, p. 57, p. 45.

tensions, cultural, economic and political interests of individuals and groups to conform to the principles of democratic society respecting human rights for all people and ethnic minority groups living in the territories such as compliance with the requirements of independence and territorial integrity.

♦ *Give autonomy regimes, under certain conditions, an organizational structure that provides administrative, generally, a more appropriate promotion of human rights, including rights of persons belonging to minorities.*

Identity of persons exercising rights belonging to minorities, and minority identity preservation and expression, but does not require some form of state organization or administrative countries there are minorities. This is the case in most countries (Germany, lands were set based on historical and geographical whether some of them minorities live in Switzerland, also several German and French-speaking cantons, their training criteria as historical and geographical rather than ethnic or linguistic).

In the division of powers between central and local authorities, it is governed unit within each country, meaning that all local units - states, provinces, Länder, cantons, autonomous republics and regions - have the same powers, irrespective of the ethnic their inhabitants. Skills can be larger or smaller, can grow at the expense of central power, they must be the same for all units that make up a state. Exceptions would be cases where a Member accepts, through an international treaty, or create, through a national law, special treatment for one or some of the territorial units within it for some specific reasons, including because they would be inhabited by persons belonging to minorities.

♦ Development and strengthening democratic institutions are likely to objectively determine capacity building of local structures (especially in the economic, cultural and educational). Consequently local autonomy would expand the consolidation and development of democratic institutions. In these circumstances we can say that *autonomy is a political tool designed to ensure the exercise of rights and not a guarantee of preservation of culture and identity threat.* Autonomy is not a right or an obligation for a territorial community or state, for a minority or ethnic group. It may however be a claim of local entities, thus including the minorities in the democratic process.

♦ The vast majority of specialists in constitutional law and public international law on the *principle of autonomy*, maintain that it is a matter *exclusively for the administrative territorial structure of states*. They, referring to autonomy shows that the concepts conveyed by some leaders or representatives of national minorities on issues concerning minorities such as "autonomy", "self- government" have no connection with human rights and not enshrined in the rule of law, so the bound states. They cover the administrative territorial structure of states, which is determined by each State from its historical traditions and circumstances, specific[11] geographic and demographic.

Local autonomy is not in any way substitute for community autonomy as a general principle recognized by all democratic states, including Romania, are, among others, an appropriate framework to guarantee human rights, and consequently, and the rights of persons belonging national minorities.

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[11] I. Stan, *Drept Internaţional Public*, "Agora" University Press, Oradea, 2010, p. 149.

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CERTAIN CONSIDERATIONS REGARDING THE PRACTICE OF PROSTITUTION IN ROMANIA OF THE FIRST HALF OF XXth CENTURY

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Abstract

Practice of prostitution is considered the oldest handicraft of the world. Discussion about it aroused along centuries and is still arousing ardent talks. Our study tries to analyze, from a legal and institution perspective, the practice of prostitution phenomenon in Romania of the first decades of XXth century.

Key words: *prostitution, Romanian legislation, institution, brothel, place.*

Introduction

Extracted outside the law in 1936, the prostitution will continue to be a tacitly protected handicraft by the Romanian authorities, including by the communist ones, even if, in 1949, on Stalin day, the last brothels of Bucharest were closing their gates, and the practitioners of the oldest handicraft in the world became responsible partners[1]. "Prostitution" is not just a term with a strictly legal value, appointing a complex psycho-social phenomenon, superficially treated the most of the times. For Laure Adler, "prostitution is a business of couples: the girl-customer and brothel matron - girl couple; the sex-money, desire-unableness, desire-perversion and imaginary-real couple"[2]. We will try to surprise, hereinafter, a few elements - we say important - of the prostitution practice on the Romanian territory during the first half of the XX century, but not without mentioning certain issues regarding the prostitution and prostitutes in the whole world along the history, especially those related to the establishing of this activity.

[1] ****Scurtă istorie a prostituţiei*, *non vidi*, *apud* http://cersipamantromanesc.wordpress.com/2012/06/13/scurta-istorie-a-prostitutiei-in-romania-2/, viewed on October 3rd, 2012, at 21, 25.
[2] Laure Adler, *Casele de toleranţă între 1830-1930: viaţa cotidiană*/ trad. Irina Cristea, "Corint" Publishing House, 2004, p. 16.

Short ingression in the history of established prostitution

Even since Antiquity, the prostitution has been manifesting as a form of established venery, either within the brothels, *house boats* or in the temples of gods, where, in the name of the so-called religious prostitution, the venery was raised to the range of art. The main causes of the oldest handicraft in the world are considered to be, like then, the religious apostasy and the desire of socially or financially ascending.[3]

It seems that this practice was born in the Old East from the traditions of hospitality, the men of those times offering their wives to those who showed creditable of their honor that was made to them. But legally, the phenomenon is established in Babylon, a place where the cults of Militta and Venera were born and developed.[4] A proof is the description offered by Herodot, according to which the Babylonians "established a shameful law. Every Babylonian woman is liable to appear, once in her life, at the Temple of Venus, to accomplish her legal debt to give herself to an unknown man"[5]. The Antic Egypt is the place where the habits had decayed so much that, because the embalmers satisfied their wills with the deceased, it was established the application of a law that prohibited the embalming of young girls at least three days after the date of decease.[6] But the woman was respected and, for this, the Egyptian courtesans where the most known and admired sellers of pleasures, raising their handicraft to the range of art and this way realizing to bring huge fortunes, in the name of serving Isis and Osiris.[7]

India, China, Japan or Korea also appears on the map of regulated sex.

In China, the establishing of brothel, situated in certain quarters and fully equipped, was known as licit yet from 720 before Christ[8]. The stories with *gisaeng/kisaeng houses* of Korea or those regarding the fascinating Japanese *geishas* are famous. Until contemporaneous age, the institution of geisha has played a main role in Japanese civilization, the women offered their sexual services, and they were girls educated in the spirit of satisfying the pleasures, mainly of the esthetic pleasures of clients[9]. They, like the "girls of the night" of Korea or China, were masters in a field or another of the art.... They sang, aroused passions, the sexual act itself being a crowning of the whole show that these beings venerated or ran down, and were offering, sometimes after long years of work. In India, for example, it was a true science of satisfying the sexual pleasures, the courtesans being obliged to have solid knowledge in the field. According to this science, *auparishtakha* or the oral sexual contact benefitted of a great name to conjure with, the oral sex contact being practiced, for women and men, both by men and by women, in those "true places of venery", which were the public baths.[10]

And in the Judaic-Christian area, we find many references to the prostitution practice by women and by men. Being a determinant space in the religious field, the vetero and neo-testament precepts stood for laws. The divine prohibition of not selling your body has been infringed for many times, fact that determined God to destroy Sodoma and Gomora, universal centers of venery. There are proofs that prostitution, feminine or masculine is practiced in private or in *fornication houses*. Even after Christ begins His mission on Earth, there are

[3] ****Prostituţia de-a lungul timpului*, "Seso Hipparion" Publishing House, Cluj-Napoca, 1999, p. 7.
[4] *Ibidem*, pp. 9-10.
[5] *Ibidem*, p. 10.
[6] D. Stanca, A. Voina, *Prostituţia şi bolile venerice*, "Dr. S. Bornamisa" Publishing House, Cluj-Napoca, 1922, in A. Majuru (coord.), *Prostituţia între cuceritori şi plătitori*, "Paralela 45" Publishing House, Piteşti, 2007, p. 64.
[7] ****Prostituţia de-a lungul timpului*, p. 14.
[8] *Ibidem*, p. 20.
[9] M. Bălan, *Istoria prostituţiei*, Second edition, Vol. 2, "Eurostampa" Publishing House, Timişoara, 2006, p. 230.
[10] *Ibidem*, vol. 1, p.69.

mentioned women who had practiced prostitution before the meeting with the God's Son. Maria Magdalena or the Egyptian Maria are two of those who were selling their bodies, but who, by penance, by renouncement to sin and serving the Truth, have been forgiven and saved.

A special case of this category is that of the prostitutes of old Hellas, named *hetaire* or *dikteriade*, obliged by the wise Solomon to contribute to the budget of Athens, but obliging them to wear the clothes that differentiate them from the "normal persons". In this respect, he conceived a decree whereby the brothels were put under the jurisdiction of fortress, establishing at the same time a State brothel.[11] The issue is mentioned by Philemon in his work paper "Those from Delphi": "O, Solon! Your act will eternally remain in the history of our fortress, because this place serves the peace of Athens citizens. It never could be otherwise, if we think about the passionate temper of our youth..."[12]. But the prostitute woman was not always considered with very much love in the Ancient Greece, being considered a human being without soul, only good for making children. Therefore, passionate by their temperament and eager to be good citizens, the Athenians called the services of male *prostitutes*, although the gay prostitution was prohibited and censured. Censured only in the case of citizens, because the foreigners and slaves "had free pass" to venery[13]. Rome borrowed from Greece not just the culture and gods, but also the vices, the first brothels appearing in Subura and Aventin. The prostitutes, used but ran down, were named *meretrices*, shrewd tongues, vampires etc. If *meretrices*, the prostitutes who practiced the handicraft in night secret were accepted, the restless *prostibulos*, who had a non-stop program, made crazy the good and wise inhabitants of the Eternal Fortress.[14]

In the Middle Eve Europe, despite the Christianity, of the oppression established by Inquisition, the phenomenon received bigger and bigger sizes. We don't have to be surprised by the "original" ideas of prince Guillaume de Aquitania, called Goliat of Prostitution, who wanted, nothing but to build a monastery - brothel, where the most unrestrained prostitute of Poitou to be named abbess[15]. Only the thought that this would happen filled France of the XI century with terror. The medieval Italy regulated the practice of prostitution, too. If at the beginning the un-loyal wives and panders were punished by cutting their nose, public flicking and application of a sign on their front head with hot iron, while it was imposed the acceptance of prostitution and regulation of its practice, by reasoning related to the control need of diseases with sexual transmission. In 1412, Venice established a tax for brothel in quantum of two thalers, of which one half was assigned to the practitioner.[16]

The practice of sexual act against cost did not only restrain to France and Italian states, the phenomenon irradiating and in Spain, the German cities, at Vienna and in Hungary, not talking about the Turkish area or Asia. Practically, the entire medieval world knew and was reported to the prostitution phenomenon, the most countries accepting the handicraft of *bimboes* and regulating it legally. In Moldova of 1472 year, Stefan cel Mare will try to stop the activity of recruiting illegally of Moldova young girls by panders, who sold them at Stambul. Later, in 1751, Timisoara will host the prostitutes banished in Banat by Maria Tereza to depopulate it. For the fear of disease, the authorities take measures to ensure the establishing measures of prostitution and of its control, including measures that aimed the hygiene of ill person.[17]

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[11] ****Prostituţia de-a lungul timpului*, p. 18.
[12] Philemon, *Cei din Delphis, apud ibidem*.
[13] M. Bălan, *op. cit*., vol.1, pp. 130-133.
[14] *Ibidem*, pp. 153-154.
[15] ****Prostituţia de-a lungul timpului*, p. 80.
[16] *Ibidem*, p. 156.
[17] ****Scurtă istorie a prostituţiei, non vidi, apud* http://cersipamantromanesc.wordpress.com/2012/06/13/scurta-istorie-a-prostitutiei-in-romania-2/, viewed on October 7th, 2012, at 18.08.

And "the sport" with risks - illness with sexual transmission diseases, death - and penalties - material and moral - continued to be practiced in the following centuries, too, the last three XIX, X and XXI centuries) being considered centuries of generalized venery.

According to the researches issued by Laure Adler, in France, during the period 1830-1930, the number of clandestine and official prostitutes was fluctuating between 30000, at the beginning of the period, and 500000, in 1930, although this number was advanced yet since 1914 by Cogniart. Only in 1872, Paris *owned* 120000 prostitutes[18]. The end of XIX century brings with itself the increase of request and offer of paid sexual performance, although the official prostitution, at the pressures of moralists and Left side, should fall within the more and more exigent norms. Therefore, the "rendez-vous" houses will change into true temples or theaters of pleasure[19]. Regarding the number of clandestine prostitutes, in Paris of 1900, there were about 100000 practitioners. "In «Petites Capitales», in 1900 next to city names were mentions about the fornication houses"[20]. Therefore, in France and in the colonies, there were operating 63 *fornication houses* and 554 legal prostitutes.[21] In their studies of 1922, the doctors Dominic Stanca and Aurel Voina offer the following numbers for the clandestine prostitution of Europe: 50000 prostitutes at Paris, 25000 at Berlin, 20000 at Vienna, and with respect to their report to the total number of population, we have the following data: 320 girls for one inhabitant in Toulouse, 400 at Budapest, 480 at Paris, 2000 at Lille, 3000 at München, 13000 at Stuttgart.[22] In the XX century, Buenos Aires will become the center of international prostitution and of the trade with live meat. The specificity of this city was that the stewardesses did not take their customers from the street, but from the theaters, bars, coffee stores, taverns, cinemas, etc.[23]

The Soviet Russia will also use the expertise of these *Venus abjected*[24] in the building of socialism. In the battle of any rebellions, revolts or revolutions, the hot minds produce including laws, decisions, and decrees as strange as possible. Such a case is the one of the decree signed, in 1920, by the Council of Seratoff city of the free Association of anarchists, which provided the establishment of a generalized and mandatory venery, in the name of the so called abolishment of the woman's slavery. The motivation of anarchists sound like this: The social unevennesses and the legitimate marriages constituting in the past a condition that served for instrument of bourgeoisie and due to which the most wonderful beauty specimens where the private property of bourgeoisie, the convenient continuation of race was this way prohibited"[25]. The project provided the abolishment, starting from March 1st, 1920, of the right to dominate women of ages included between 17 and 32 years old (Art. 1), except for those having five or several children (Art. 3), they becoming the good of the whole people (Art. 6). The women's age would have been established depending on the existent documents, based on statements or, in their absence, would have been established "by a commission that judges upon features" (Art. 2)[26]. Articles 18, 19 and 20 regulated the measures related to the women's health and of their customers, as well as their corresponding penalties. "The male citizens have the right to benefit of a woman three times weekly, no more than three hours, taking into account the specific rules below" (Art. 9), rules according to which man should have owned a certificate from the commission or from the professional union (Art. 10),

[18] Laure Adler, *op. cit*, p. 17.
[19] M. Bălan, *op. cit*., vol. 2, pp. 30-31.
[20] *Ibidem*, p. 41.
[21] *Ibidem.*
[22] D. Stanca and A. Voina, *op. cit*., in A. Majuru (coord.), *op. cit.*, pp. 59-113.
[23] R. Salardenne, *Capitalele desfrâului*/ trad. M. Dorobanţu, Editura Orfeu, Bucureşti, 1993, p. 123.
[24] Laure Adler, *op. cit*., p. 17.
[25] ****Proiect de Decret din 1920 al Asociaţiei libere a anarhiştilor din oraşul Seratoff, apud* R. Salardenne, *op. cit*., pp. 106-107.
[26] *Ibidem.*

paying 2% of his revenue to the Fund of General Public Action, in the case that he was a soldier, worker or villager (Art. 11), and 10% the other categories (Art. 12), the women following to receive 23% of this fund, each month (Art. 14).[27]

The prostitution continues nowadays, too, to be a mass phenomenon, the number of prostitutes and panders raises, upon our estimation, to several million in the entire world, either we talk about a permanent, accidental, established or clandestine prostitution.

2. Several elements of the establishing of prostitution in Romania during the first decades of XX century.

The analysis of the prostitution phenomenon in Romania needs a pluridisciplinary approach, the practice of this old handicraft having very different causes. We try by this study to re-open the discussion concerning the phenomenon, its regulation and, obviously, the way that the society can contribute to its diminishing. Like the Romans took over the habits of Greece, the Bucharest people, named "Small Paris", because they imitate the social life of the authentic one, both took over the French habits and fashion - Eminescu criticizes in "Ai nostri tineri…" (Our youth) the habits acquired in the city of lights - as well as the French legislation. Concluding, they also took over the idea of prostitution regulation. The XIX century is the century when, towards its end, Romania, the new state of Europe that earned its State independence after the war from 1877-1878, will regulate the situation of *demoiselles* who were offering their pleasures to generous men. Newly entered into the composition of Romania, Dobrogea will be with a step forward from the capital city, regarding the establishing of the phenomenon, by the need of keeping under control and public order and safety, and, especially, the explosion of the biologic bomb of lues.

Which were the reasons for which, in a mostly orthodox country, it was allowed the operation of brothels and laws were adopted in this respect? It was only the desire of some of the local leaders; it was a necessity or just a fashion? We think that a little bit of all these because prostitution existed from the beginning of the world. The establishing of brothels in Romania was made at the end of XIX century, reasoned by the increase of practicing phenomenon of clandestine prostitution and, implicit, of the increase of sexual transmission disease cases. Starting from the idea that the legalization of brothels was a consequence of increasing the number of the girls who offered the services against cost, a new question arises: there could be an outlet of sexual performances without a likewise request? Named "easy girls, girls of the night, girls of pleasure, street women, scum whores, hostesses, chutes, scum bags, prostitutes, mistresses, courtesans, artist visitors, sluts, cheerful spinsters, Venus abjected"[28], the prostitutes could not exist without matrons or panders and, obviously, without *prostituters*[29], meaning without those who, for one hour, two or several days of pleasure, offered from few coins to entire fortunes.

2.1. Laws, regulations, circular orders, aiming the prostitution practicing

With respect to the norms regarding the practicing of prostitution, there are indexes that all the county residence cities regulated the way that the brothels may operate, establishing clear obligations for the prostitute women and for the matrons with respect to personal hygiene, the health and observance of public order and silence. At Constanta (*Regulation of the urban commune Kiustenge*, from June 7th, 1879, *Regulation for the medical surveillance of prostitution in Constanta*, from September 7th, 1887, and *Operating regulation of Social Assistance at Constanta Municipality*), Bucharest (*Regulation for the surveillance of prostitution in Bucharest city. Invested with the royal decree no. 1085 from March, 1898*) and Cluj (*Circular order no. 10992/ 1921, regarding the re-education*

[27] *Ibidem.*
[28] Laure Adler, *op. cit.*, p. 16.
[29] *Ibidem.*

measures and placement of prostitutes) the brothels developed their activity in a legal frame, as well as at Braila, where the norms had been established before 1890.

On April 7th, 1789, it is approved the Regulation for internal administration of urban commune Kiustenge, including fifteen chapters and reviewed on May 7th, 1879.[30] Chapter XI of the decision of Constanta Town Hall, named "For the prostitute women", established a series of permissions and interdictions that aimed the practicing of prostitution at Constanta. Any woman (it is not made the specification, but we suspect that it should be major – author's note) could open a "prostitution house", with the condition to refer "with a request to the black commissary and the physician of the city, with a clarified specification of the house where he wants to install", not to be situated "in the proximity of churches and schools, in the immediate neighborhood of public gardens, in the hotels (for travelers), pubs and taverns", and the prostitutes were not allowed to stay on the open doors and walk indecently dressed on the street or make noise together with their clients[31]. For the infringement of these provisions, there were established penalties, chapter XII – "Penalties of Public Women" - established that "any disregard of this regulation by the prostitute women or of the women who hold prostitution places will be punished by a penalty from 7 to 10 francs or by jail from 24 hours to 5 days, according to Article 77 from the commune law and Art. 393 of the Criminal code. The public women without a fixed dwelling will be sent as whores on their turn, as well as those who will infringe this Regulation for several times"[32]. The increase of the number of brothels, of the Constanta population and of illness with sexual transmission diseases led to the adoption of a new decision of local authorities, which answer the needs of Tomis city. Consequently, at 8 years after the adoption of the Regulation of urban commune Kiustenge, it was adopted, on September 7th, 1887, the Regulation for the surveillance of prostitution, with norms and penalties (Art. 57 - Art. 65), with a total of 65 articles. Despite the previous regulation, the current regulation made a strict reference to the age when a woman can "practice", "no woman can be allowed for prostitution if she is not 20 years old. The ascertainment of age will be made upon the marital status documents, and in default of documents after the physical development that (sic!) will be considered by the Physician, noting in the booklet provided at Art. 6 together with the ascertainment of health" (Art. 9)[33]. It is ascertained by the analysis of document a high care for the health of prostitute women and the one of the clients. Therefore, the service of prostituted women was managed by the Chief Physician of the City (Art. 1), who will pay sanitary visits to all the practitioners at least two times per week, on Tuesday and Saturday (Art. 3) in the visit place (Art. 3, art. 14), both the prostitutes, and the matrons of brothels, hereinafter referred to as matron, were obliged to hold registers - one for the Brothels, and another one for the practitioners - whereby to be registered the identification data, deviations from the regulation or observations regarding the disease, access into the range or leaving the place (Art. 18 - Art. 20), near the register provided by Art. 10.[34]

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[30] *** *Regulamentul comunei urbane Kiustenge*, from June 7th, 1879, National Archives of Romania, Constanţa County Department, fund of Constanţa Town Hall, file 9/1879, f. 5-16, in ****Constanţa: mărturii documentare*, vol.1: *Regulamente ale administraţiei locale (1879-1949*), edition by Virgil Coman and Constantin Keramidoglu (coord.), "Ex Ponto" Publishing House, Constanţa, 2012, pp. 81-89.

[31] *Ibidem*, in****Constanţa: mărturii documentare*, vol.1: *Regulamente ale administraţiei locale (1879-1949*), pp. 85-86.

[32] *Ibidem*, in****Constanţa: mărturii documentare*, vol.1: *Regulamente ale administraţiei locale (1879-1949*), p. 86.

[33] ****Regulamentul pentru supravegherea prostituţiei în Constanţa*, National Archives of Romania, Constanţa County Department, fund of Constanţa Town Hall, file 1/1887, f. 83-88., in ****Constanţa: mărturii documentare*, vol.1: *Regulamente ale administraţiei locale (1879-1949*), pp. 100-101.

[34] *Ibidem*, in ****Constanţa: mărturii documentare*, vol.1: *Regulamente ale administraţiei locale (1879-1949*), p. 101.

A little later than Constanta, the Bucharest management will release, too, by the sanitary service of city, the Regulation for the surveillance of prostitution in Bucharest city, invested with the royal decree no. 1085 from March 1898. It was a comprehensive, with 50 articles, distributed in seven titles: General decisions (I), About the prostitutes women (II), About the brothels (III), Sanitary measures (IV), Health registers and registries. The registries of brothels (V), Public order measures (VI) and Penalties (VII).[35]

Art. 1, letter a) of the Title I provided the prohibition of practicing of prostitution in bars open to the public, in public bars, or on the streets, letter b) stated a firm control on the brothels, while letter e) established the need of a vigilant observation of the prostitution phenomenon. Article 2 prohibited the persons of both sexes to directly or indirectly provoke, to practice prostitution.[36]

The prostitute women were registered in a special registry by the mayor or by his delegates (Art. 4). All the women subject to specialization medical control were registered [Art. 5, letter a)], all those who stated to the mayor or the delegates the fact that they are prostitutes, with the condition of being major [Art. 5, letter b)], all the major women of whom public prostitution will be noticed by direct challenge on the street, or their existence in the brothels" [Art. 5, letter c)], as well as the women in the houses known for the practicing of this handicraft [Art. 5, letter d)]. Article 8 provided the conditions whereby the prostitute women could be de-registered from the register of prostitutes, for the Articles 20 and 21 refer to the rights of prostitutes, like article 23, where it was specified that, from the cashed income, the sexual service provider will remain with at least one third, the rest, but no more than 2/3 of the amount to be retained by the matron, as fee for rent, heating, washing of the laundry, etc.[37]

These two regulations - the one of Constanta from 1887 and the one of Bucharest from 1898 – served as models for other such norms. It is added to them the circular Order no. 10922/1921, regarding the re-education measures and placement of prostitutes, one of the five steps made by the local authorities for reclamation of prostitution in Transylvania. The other four measures were: 1) stressing the prostitutes; 2) mandatory medical control; 3) forced treatment in case of a sexual transmission disease and 4) individual preventive measures.[38]

Based on them, the prostitution phenomenon could be, at least partially, controlled, even if, according to the principle that any law must be infringed, the clandestine prostitution was infinitely more efficacious in Romania of the first decades of XX century.

2.2. Issues of the establishing of prostitution

The established prostitution existed before and concomitantly with the adoption of the two regulations mentioned in our study. But the phenomenon became a mass phenomenon around the First World War (1914-1919). If in 1900, 34 prostitutes were registered in the files of Constanta Town Hall, the number of these pleasure sellers was raising at 800 at the beginning of worldwide conflagration[39]. The distribution of brothels in Constanta, as Constantin Cheramidoglu informs us, was made on the whole area of the city, especially in the ford areas. The following are mentioned among them: Ovidiu, Lascăr Catargiu street, Traian street, Militară street (today General Manu), Rahovei street, Tătară street, behind Peleş beerhouse, and Infanteriei street.[40] There are known some of the owners of brothels in Constanta. An ex prostitute, Tinca Teodorescu requests and receives the approval from the

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[35] ****Regulament pentru privegherea prostituţiei în oraşul Bucureşti*, Sanitary service of Bucharest city, invested with the royal decree no. 1085 from March 1898, in A.Majuru (coord.), *op. cit*., pp. 229-244.

[36] *Ibidem*, în A. Majuru (coord.), *op. cit*., p. 230.

[37] *Ibidem*, în A. Majuru (coord.), *op. cit*., pp. 231-236.

[38] D. Stanca şi A. Voina, *op. cit*., în A. Majuru (coord.), *op. cit.*, p. 111.

[39] C. Cheramidoglu, *Bordelurile Constanţei vechi*, in "Poliţia impact", year X, no. 104, August 2011, Constanţa, pp. 16-17.

[40] *Ibidem.*

Town Hall, in 1909, to open a place, the motivation of granting the approval being that "she is a prostitute who infringed the rules (...) not having claims against anybody"[41]. Other known matrons were: Todoriţa Alexandrescu, Rabeica Veinberg, with two places (one on Tătară street, and the other one on Junona street, corner with Cuza Vodă street), Ghiţe Bal, with one brothel on Mihăileanu street, and Adela Hagi-Pavel.[42]

The clandestine prostitution was practiced especially at "Machedonia" Hotel and "Londra" Hotel, places where there have been detected Mina Craus, Miţa Lobam Lucreţia Trandafirescu, Adela Ornt, Janeta Ionescu, Lisaveta Dumitrescu, Maria Iliaş and a certain Alexandrina.[43] The attitude of prostitutes was always a subject of Constanta citizens' claims to the local authorities. On April 20th, 1900, several inhabitants on Ovidiu street claim to the police officer about 9 prostitutes who infringed the public silence and order, 8 of them living in an "obscure prostitution nest" and one, "a woman who under the name of waitress, singer or inhabitant", who provoked the inhabitants on Traian street[44]. Issues related to the practicing of clandestine prostitution are given by the media of that time. In the number on July 24th, 1929, the "Dacia" newspaper shows that, in the night of 23 - 24 of July, there were arrested "30 prostitutes, of whom 15 were selected, because practiced clandestinely the prostitution. During the last period, many women left their jobs, throwing themselves into the venery arms"[45].

In Brăila, at the end of XIX century, about 250 prostitutes offered their services, of whom over one hundred were clandestine and another 120-140, the number varying every year, were "employed" in the brothels, of which number was also varying between 20 and 26. From the total of matrons holding public houses, in 1888 - 1889, 16 were Jewish, 3 Romanian and 2 Hungarian. Among the registered prostitutes (123), 58 were Romanian, 41 were Jewish, 15 were Hungarian, 3 German, 3 Polish and 3 Russian. According to medical reports, 91 of them hospitalized (86 for sexual transmission diseases and 5 for other diseases).[46]

In Bucharest, too, the sex for money, either established or not, benefitted of a great conjure during the first decades of XX century. The famous brothels from "Crucea de Piatră", was just one of the venery places of the Romanian Metropolis. Like in the other cities of the country, in the old Phanariot fair *the artist visitors* were a lot. In 1927, at the level of the whole country, 12431 prostitutes were registered, of whom 9610 Romanian[47]. But most of the illness was given by the clandestine prostitutes. The study of phenomenon led to the conclusion that prostitution of the brothels had the advantage of a control of sexual transmission diseases, despite the clandestine one. After a control issued In Bucharest, on May 1925, there have been detected 1% sick persons of the 434 established prostitutes, while 58% of the 119 clandestine prostitutes who came for control (69 persons) were detected with sexual transmission diseases[48]. Among the clients of *night girls* was Carol the Second, considered as "the terror of brothels from «Crucea de Piatră»"[49]. During the Second World

[41] I. Munteanu, *Lumea subterană: prostituatele (I)*, in "Poliţia", year X, no. 518, 7-13 September 2000, Constanţa, p. 14.
[42] *Ibidem (II)*, in "Poliţia", year X, no. 519, 14-20 September 2000, Constanţa, p. 7.
[43] C. Cheramidoglu, *op. cit.*, pp. 16-17.
[44] Corina Samoilă, *Bordelul de pe strada Ovidiu, reclamat la poliţie*, in « Ziua de Constanţa », year X, no. 3369, 23 of July 2012, Constanţa, p. 8.
[45] Article of "Dacia" newspaper, XVI year, no. 145, 24 of July, 1929, Constanţa, f.p., cf. Camelia Ungureanu, *Prostituţia la Constanţa*, in "Poliţia Impact, XI year, no. 115, July, 2012, Constanţa, pp. 19-20.
[46] I. Butărescu, *Prostituţia şi extensiunea sifilisului în oraşul Brăila*, f. ed., Brăila, 1890, in A. Majuru (coord.), *op. cit.*, pp. 175-186.
[47] ****Scurtă istorie a prostituţiei*, *apud* http://cersipamantromanesc.wordpress.com/2012/06/13/scurta-istorie-a-prostitutiei-in-romania-2/, viewed on October 8th, 2012, at 21.37.
[48] R. Anselme, *Lupta pentru înfrânarea prostituţiei*, "Universul" Publishing House newspaper, Bucharest, s.a., in A. Majuru (coord.), *op. cit.*, pp. 115-146.
[49] M. Bălan, *op. cit.*, vol. 2, p. 258.

War (1939-1945), the "brothels, restaurants and bars were full of German and the whores of Bucharest and other cities were fine. But times will change and the communists will come (...) The ex-prostitutes of «Crucea de Piatră» felt within production and obliged to build the socialism"[50].

Conclusions

After the researches issued and of the materials studied, the following conclusions are imposed:

1. The prostitution is a complex phenomenon; its practicing has its origins in the eaves of civilization, the establishing of the sex for money being registered, for the first time, in Babylon. There from, it extended on the whole Antique East, arriving to Athens and Rome. In Egypt, China, Korea or Japan, the prostitution was raised to the range of art. The kisaeng houses or those of geishas, the house boats in the China of VIII century a. Chr. were equipped with all the necessary elements, and the inhabitants had exceptional qualities of singers or dancers, combined with solid knowledge of philosophy and poetry. But the prostitution continued to be a phenomenon debated during the centuries, too, the practitioners of handicraft giving birth to envy and passion, being rewarded or punished, depending on the time or geographic area, where they developed their activity.

2. By our study, we tried to synthesize, on the one hand, several of the most important issues of the establishing of prostitution along the centuries, and on the other hand to contour certain issues of it's practicing in Romania of the first half of XX century. It was detached the idea that, in the case of prostitution, the number of lues and other sexual transmission diseases proved to be much lower than in the case of clandestine prostitution. Also, the number of rapes and harasses was sensitively lower during the periods when the brothels duly developed their activity in Romania.

3. Currently, the relevant phenomenon acquired huge proportions. Together with it, the terrible pest of the second Christian millennium - AIDS. Despite the appearance of the protective measures, of the permanent medical support, the prostitution is still making victims. Girls and boys, of lower and lower ages, fall as trophy to the prostitutes traders. Romania is one of the main countries that produce and export prostitutes for the West, but also for Turkey or other Eastern countries. In this respect, we propose, as the main research direction, the issuance of a large research, which has to involve specialists of psychology, criminalists, physicians, jurists, historians and sociologists, research that leads to the conclusion of a Treaty of prostitution, extremely necessary in knowing the complex psycho-social phenomenon of practicing the sex for money. It is imposed, at the same time, the assignment or not assignment the legalization of prostitution in Romania, as well as taking certain urgent and efficient measures for the diminishing of phenomenon, especially of young prostitution.

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THE PSYHO-CULTURAL COORDINATES OF JUVENILE DELINQUENCY

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Abstract

The complexity and interrelationship of forms posed by diversity delinquency phenomenon, outlines the establishment of comparative references, thematic and operational as a structured approach becomes indispensable. In today's society, as is characteristic of a phenomenon more pronounced, juvenile delinquency is the subject of numerous researchers in the country and abroad. Understanding the psycho-individual causes and social situations that cause this phenomenon in general and specific knowledge of how cultural expression compared with other countries, provides for measures to prevent criminality and deviance escalation phenomenon.

Key words: *aggression, violence, subcultural, psychological, juvenile delinquency*

Introduction

Juvenile delinquency is defined as: the ensemble of acts stipulated by criminal law committed by minors with criminal liability and by juveniles aged between 14 and 18. According to law no. 272, juvenile delinquency also includes those acts committed by children with no criminal liability. This psycho-social phenomenon, along with other psycho-individual causal determinations, presents a social-cultural conditioning that points to the great influence exerted in society by culture and the sub-cultural marginal characteristics, respectively. The complexity of the forms of manifestation and the inter-relations the diversity of delinquency phenomenon implies, contour the determination of comparative, thematic and also operational landmarks that consequently become indispensable to a structured approach. In present-day society, being increasingly accentuated, juvenile delinquency becomes a matter of study for many researchers within and outside the country. Understanding the psycho-cultural causes as well as the social circumstances that trigger this phenomenon in general, but also getting to know the typical cultural way of manifestation compared to other countries, contribute to taking measures in order to prevent and surmount the criminogenic deviance phenomenon. Referring to Western Europe countries, Gârleanu (1996)[1] summarizes that juvenile delinquency is more frequent than criminality in general, the number of juveniles rises in relation to the total population, and delinquency in general is more common among them in at least the same proportions. The characteristic of these countries is the great number of crimes committed by children more frequently organized in gangs, this predisposition to delinquency becoming more serious, at increasingly younger age. The difference between young delinquents and adolescents on one hand and younger

[1] I. Girleanu, *Coordonate psihosociale ale delincvenţei juvenile în perioada tranziţiei*, Timişoara, "Ando Tours" Publishing House, 1996, p. 40.

delinquents on the other hand is legally delimited by the age under which one cannot be criminally liable.

Although it does not take the same shape and it is not as accentuated as in other Western countries, juvenile delinquency manifests in our country as well, the latest social events people under 18 years old participated in being a reason for concern to the entire society. In our country there are several juveniles and children that participate in committing criminal acts. They participate and particularly commit the crimes like theft, beggary, vagrancy and it's not uncommon for them to be involved in rape or physical aggression. There are some less frequent cases when they commit murder and attempted murder.

The subcultures of juvenile delinquency

Researchers Grecu Florentina and Rădulescu Sorin pointed out in the paper *"Juvenile delinquency in contemporary society"*[2] that the cultural approach attempts to explain the deviance from the point of view of the characteristics generated by a certain sub-culture that influences the criminal or delinquent phenomenon. A subculture is represented by a group adhering to a system of values and rules and that is in conflict with those of the culture generally accepted. One of the researchers who studied this phenomenon when it first appeared, Franck Tannenbaum (1938) had launched the hypothesis that juvenile delinquency can be an effect of the *social reaction* to certain behaviors of children or juveniles, rather than a conduct in conflict with the law. Another author, Milton Gordon (1947), quoted in the paper also defined the culture of a society as consisting of an alternation of sub-cultures, social circumstances, such as class, ethnical identity, regional and urban-rural residence, confession, that combined as a functional unit might have an integrated cultural impact on the individual. The term "sub-culture" was used by American sociologists when referring to the lifestyle of the immigrants that adopted various types of behavior in order to adapt and survive in the early American society. The examination of statistic data pointed out that some groups of emigrants (e.g. Italians, Mexicans, Portoricans and Africans) would violate law more frequently than others (e.g. Scandinavians, Germans, Dutch, and Japanese). Another author, Albert Cohen, showed that these sub-cultures influence juveniles when they "socialize in groups", by passing down and learning various delinquent procedures and techniques, and his theory was also known as the reaction-formation theory. When referring to them, A. Cohen stated that they are: *"systems of beliefs and values generated within a process of communicative interaction of children in the same situation, with respect to their position in the social structure, being a solution to their adaptation issues to which the existing culture does not offer a satisfying solution"*. E. Sutherland supports the importance of culture for the deviance phenomenon in general; pointing out that delinquency is learnt and passed down just like normal behavior through the process of socialization. It connects the individual to the values and norms of deviant groups, determining him to adopt the behaviors, norms and their cultural (sub-cultural) symbols. W. E. White elaborates (1943) the theory of "roadside groups". He claims that adolescence and youth can be characterized, along with other features, by the appearance of relations of friendship, sociability and communication between juveniles, but in the unfavorable circumstantial context of the influence of a delinquential environment they lead to the limit of social conformity and even to serious crimes. Walter Miller (1958) ascertains a difference of the culture of social classes by identifying "*the culture of under-privileged classes*". He attempts to explain juvenile delinquency through social-cultural factors, pointing out that juvenile delinquency is but a natural phenomenon generated by norms, values and lifestyles specific to under-privileged classes. Richard Cloward and Lloyd Ohlin (1960) consolidate Cohen's concept and mention that when juveniles are

[2] Florentina Grecu., S. Rădulescu, *Delincvenţa juvenilă în societatea contemporană*, "Lumina Lex" Publishing House, 2003, pp. 145-146.

frustrated by the opportunity to achieve social success various forms of deviance will appear. A delinquent sub-culture, the two authors underlined, "*is that sub-culture where certain forms of delinquent activities represent key requirements for playing the dominant roles supported by the respective sub-culture"*. Not in the least, Clarence R. Jefrey (1959) pointed out the theory of "*social alienation*" focusing on the relationship between the criminal or delinquent behavior and the system of criminal law, attempting to highlight a correlation between sociological and psychological theories. This concept also showed that since he doesn't belong to any legitimate group, the delinquent becomes a person with poor social contact, affectively cleaved, hostile, aggressive and many times violent. He doesn't perceive himself as being accepted within the community and experiences an accentuated feeling of alienation from community norms or values.

Aggression as factor of delinquent sub-cultures socialization

Compared with socialization within family, where the role of picturing "role models", norms and values comes to the adult, socialization within a social group implies the interaction of children or adolescents, equal in terms of age and authority, and that share the same perspective on the world, sensitively different from that of the adults[3]. The similar activities, the confrontation with the same life instances imprint a special influence to the group in the child's socialization, who sees in this group a real "family" that offers him identity, distinction, as well as solving problems, things that the adult world does not provide him. Numerous criminologists have pointed out that the presence in the group of friends that develop delinquent behaviors accentuates the children's delinquent and criminal orientation. The gang appears as a specific form of the delinquent sub-cultures and mirrors the characteristics that define delinquent sub-cultures. As far back as the interwar period, Frederic M. Trasher (1927) considered that gangs organized juveniles are a way of survival and adaptation of those marginalized the system of norms and values of the privileged[4]. The gang, as *form of alternative social organization* of juveniles functions on the strength of the agreement between its members. The studies performed in Romania confirm this ascertainment highlighting the fact that in street groups the influence exerted by leaders is dominant, most of them being young delinquents. In these groups one can find adolescents that present profoundly deviant behaviors, children with limited intellect and obvious health deficiency, as well as children presenting relatively normal behavior, emotionally stable but who seek identity and acknowledgement within the group. The leaders of these groups rise from the ranks by means of physical strength, courage and by speculating the desires of the group members. They then induce a real "slavery" in the group "*that produces the most perturbing environment of minors and juveniles' conduct, the most criminogenic environment"*.[5] The criticism of the sub-culture concept of violence showed that certain hypotheses still raise a lot of questions. Quoting Tedeschi and Felson (1994), Farzaneh shows that they suggested that accepting the concept implies: a) that the demographic factors are tightly connected to certain values and b) that these values promote aggression and violent behavior. The authors conclude that the proof of this type of correlation is very poor[6].

Aggression as sub-cultural product

Both at the level of emotions and at the level of behavior, cultures and sub-cultures, respectively, can develop various psychological combinations of aggression, fear and hate, which in some cases represent the premises for triggering deviant behaviors. The

[3] D. Banciu., M. S. Rădulescu, *Evoluţii ale delincvenţei juvenile în România. Cercetare şi prevenire socială.* "Lumina Lex" Publishing House, Bucharest, 2003.
[4] Florentina Grecu., S. Rădulescu, *op. cit.*
[5] V. Preda, *Delincvenţa Juvenilă. O abordare multidisciplinară*, Editura "Presa Universitară Clujeană" Publishing House, Cluj-Napoca, 1998 p. 23.
[6] Farzaneh Pahlavan, *Comportamentul agresiv*, "Institutul European" Publishing House, Iaşi, 2011.

socioculturalist model initially focuses on the learnt social behavior. This view has been indirectly accredited as of 1935 by Margaret Mead,(Net source)[7] in her paper *Sex and Temperament in Three Primitive Societies*, in which she claimed that cultural rules are the ones that are responsible for standardizing masculinity and femininity in society and for assuming gender and not biological heritage. In the development of an aggressive behavior there is a great contribution of the culture or sub-culture to which an individual belongs; R.K. Merton and A. Cohen stated[8] (V. Preda1998). From the moment when it is established that a culture approves of violence, social learning becomes the main factor of propagation and dissemination of its behaviors. Contemporary psychology and sociology bring convincing evidence regarding the role learning plays in the appearance of aggressive behavior. Various forms of aggressive behavior are learnt either by observation or by personal experience. The indirect, observational learning and the direct learning – by personal experience – combine in different proportions in modeling aggressive behaviors. Research showed that most aggressive children and juveniles come from families in which parents or other members of the family manifest aggressive behaviors. Aggression, as well as other forms of social behavior, is also acquired by social learning. In this socialization process aggressive feedbacks within the group of delinquents are frequent. These behaviors have been adopted either by direct learning as a consequence of rewards or punishments, or by observing and imitating conducts and consequences in the case of others. Most frequently, the aggressive conduct models can be encountered in: the family, the social environment, media (especially television) and last but not least in internet games that promote aggression in particular.

Research highlighted that delinquent pupils have a natural tendency to free activities, their need for violent actions being acknowledged clinically, self-motivated and valorized. Unlike peaceful pupils, aggressive pupils build themselves an imagology of aggression that has an important role in creating a way to adapt in the relationship life. Thus motivating their fashion, by valorizing aggression, they explain their need to be socially acknowledged by using physical strength, but in the meta-language we can actually distinguish the unconscious attempt to justify and motivate their behavior, by trying to attribute to physical aggression a common and positive connotation, projective desirable to the entire group. Aggressive pupils want to be heard, to have a superior status to other colleagues and to be admired and acknowledged for their masculine attributes they associate with physical strength and domination over other colleagues. The aggressive pupil refuses his child identity but on the other hand solicits the acknowledgement of a new cultural identity that includes him, beyond the school group, closer to the adult community where he hopes to acquire more power and prestige. In order to obtain this acknowledgement they are interested in the impression they make on others – to look strong, tough, to inspire fear and submission, to provoke in order to have the opportunity to react aggressively – regardless of whether it is about their relationships with colleagues or teachers. They prefer to communicate in a small group, where they feel ideologically safe by sharing the same values and by the satisfaction provided by expressing the ego in the conditions of a negative-supportive group. Aggressive pupils showed satisfaction when other children fear them, when they are perceived as physically strong, although they have a low self-esteem and their confidence is very reduced to assert themselves positively. Compared to normal pupils, they have the tendency to easily turn to risk addictions such as tobacco, alcohol and drugs. An aggressive pupil's empathic capacity is highly self-reduced in order for him not be labeled as vulnerable although research showed that violent pupils are not only authors but frequent victims of others as well[9].

[7] http://www.interculturalstudies.org/Mead/bibliography.html#byMead.

[8] V. Preda, *Delincvenţa Juvenilă. O abordare multidisciplinară*, Editura "Presa Universitară Clujeană" Publishing House, Cluj-Napoca, 1998, pp. 33-34

[9] Farzaneh Pahlavan, *op.cit.*

Sub-cultural influences on children

We sometimes notice that these children did not even turn to adolescents and that their clothing, language, preferred music or attitude imperceptibly transform yesterday's child into an amoral adolescent who claim their independence from adults by means of aggressive behaviors but also feelings of sadness and reclusiveness.[10] But why sadness? Lacking natural communication with parents or institutors, children coming from vulnerable families develop in turn behavior disorders that make them adopt life models identified in heroes of comic books and Japanese cartoons or other similar TV productions. These fictional characters have an uplifting fate that condensely goes through a story with a lot of action in a few pages or minutes, substituting in the adolescent's vision the lack of meaning and purpose of his own life. The heroes of comic books or animations are courageous and eager, have special haircuts with hair falling on their eyes and at the same time lifted in a comb, have clothing that combines the pieces of the '70 with piercings and the customary eye make-up. The female characters of comic books are identified as models by vulnerable adolescents that imitate their shocking appearance. Nails in usually dark colors, black or brown, tattoos with sinister symbols are desolate, making one think of a morbid appearance. These films or comic books are turned into projected models by adolescents that call themselves "emo" as well. These disoriented children imitate the heroes of comic books because the cognitive, affective-volitive and adaptation acquisition did not produce efficiently. Not in the least, these adolescents express their protest mainly claiming the lack of meaning of fate, blaming family and society for their "deplorable" state. Blocking the child's evolution and development mechanisms by stopping or delaying the above-mentioned acquisitions offers an open road to aberrant, imitative conducts that seem to momentarily secure and offer an imagined meaning of life. It is not uncommon for the fate of the hero in these comic books to be ended or for the scenario to place him in the position of engaging in an initiation journey in the world of shadows or in the after-world. This aspect is very exciting for the "emo" adolescent who, by mentally projecting without a censorship of the conscience the film of those heroes' destiny, comes to identify themselves with the story and thus being convinced with the character's immortality, he decides to put in practice the suicidal act as a passing to that seductive world. Those that could be saved brought into notice of researchers and therapists that a slightly willing-demonstrative suicidal was attempted that should have satisfied their curiosity to try the same transcendental experiences of the after-world, just like the model-heroes and also to set things straight and intimidate the adult world, either consisting of parents or teachers being to blame for having constrained them with moral and behavior norms. But not only "emo" adolescents are prone to self-aggressive acts but, as it is now ascertained, most of the school groups present depression states, self-aggression or suicide. At this age there is no authentic thanatological drive, drawing attention to adults with radical means and attitudes being attempted as a matter of fact. Moreover, Western rock, metal, punk music trends as social attitude determine hundreds and thousands of juveniles to choose this distinct sub-cultural identity and that prepossess by the expression of rhythm, attitude and group mentality the frond spirit towards "guilty" adults or towards social structures "guilty" of their state and condition.

Conclusions

The cultural factor can become sources that pregnant appear in learning a deviant behavior. They are highlighted by negative dynamics from a psycho-affective point of view and an adaptation of the family and community to social realities: maternal affective deficiencies, paternal authority abuse, lack of balanced models within the family indicate the

[10] D. Marcelli, Elise Berthaut, *Depresie şi tentative de suicid la adolescenţă*, "Polirom" Publishing House, 2007.

future aggressive behavior of the adolescent. It is known that if they live in hostile conditions, children learn to be aggressive; living in a hostile atmosphere, children come to feel vulnerable and to react consequently, considering the model of aggression learnt within the family to be necessary and the group as a safe way to solve material everyday problems. Moreover, if by means of television and films the child is exposed to a negative mental impregnation, to violence and hostility, it significantly contributes to vectors that perpetuate accentuated aggression and violence.[11]

The difference between young delinquents and adolescents on one hand and younger delinquents on the other hand is legally delimited by the age under which one cannot be criminally liable. Although it does not take the same shape and it is not as accentuated as in other Western countries, juvenile delinquency manifests in our country as well. The latest social events people under 18 years old participated in are a reason for concern to the entire society engaged in democratic political transition. In our country there are several juveniles and children that participate in committing criminal acts. They participate and particularly commit the crimes like theft, beggary, vagrancy and it's not uncommon for them to be involved in rape or physical aggression. There are some less frequent cases when they commit murder and attempted murder. The concern of researchers comes from ascertaining that these adolescents and teenagers that engage in claiming social events are professionalized by financial stimulation or instigation and the consolidation of aggressive behaviors by hierarchical leaders. Thus the delinquent gang imperceptibly turns into a professionalized and violent gang capable of major antisocial actions.

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GENERAL CONSIDERATIONS ON THE "SPECIFIC RULES BETWEEN PROFESSIONALS" ACCORDING TO THE NEW CIVIL CODE

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Abstract

Regarding the obligations, the new Civil Code states multiple and essential changes. In this context, by this article we aim to analyze to what extent all derogatory rules, as it were stated by the Commercial Code were inserted in the new regulation. We aim all those rules which determine the derogatory feature of commercial obligations towards the civil obligations, namely: conclusion of distance contracts, determining the location for performance of contractual obligations, determining the price between professionals, solidarity between obligors and guarantors, the interdiction for granting the grace period.

Keywords: *new Civil Code, commercial obligations, professionals, contract*

Introduction

The autonomy of the commercial law towards the civil law was stated in clear terms by Art 1 Para 1 of the repealed Commercial Code: "The law applicable for trades is the present Code, where this does not state the Civil Code shall be applied". For reasons that have emerged with the creation of the medieval rules of commercial law have been imposed certain exceptions from the rules of the common law regarding obligations[1].

Specific rules stated by the Commercial Code repealed by the entrance into force of the new Civil Code which stated a different legal regime for trade relations were inserted in the new Civil Code and either extended for all private law relations regardless of their parties (for instance the conclusion of distance contracts, legal regime of interests, determining the location for performance of contractual obligations etc.) or still aim only the relations between professionals (for instance solidarity between obligors, determining the price between professionals etc.).

Conclusion of distance contracts

The conclusion of distance contracts is stated by Art. 1182-1200 of the new Civil Code, and is applicable both to civil law contracts, as well as for the relations between professionals.

[1] Presently, according to the Civil Code "activities of production, trade and services".

The new Civil Code states the theory of reception, generally adopted by the continental law, according to which the contract is considered to be concluded when the assent has reached the tenderer, by receiving the confirming document: a letter, telegram etc., namely it entered into his area of activity, regardless if the tenderer is or not aware of its content. Which is really important is the confirmation of receiving it[2].

In other law systems[3] the theory of reception is attenuated by the presumption that the very fact of receiving the letter of assent, the tenderer, knowing the fact that in trade the prompt reading of correspondence is usual. In practice, it is considered that the simple fact of receiving the correspondence sent by the accepter for the tenderer represents a relative presumption[4], according to which the tenderer is aware of the assent.

Regarding the specific application of the theory of reception, referring to European law systems we note that this theory is a creation of the German legal doctrine. Also, the theory of reception was inserted in the text of the Vienna Convention in 1980 on contracts for the international sale of goods. Thus, Art. 23 of the Convention states that "a contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention". Art. 18 Para 2 of the same Convention states that "an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror"; and Art. 24 states the significance of the expression "the indication of assent reaches the offeror" stating that "an offer, declaration of acceptance or any other indication of intention *reaches* the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence". Corroborating the two texts above mentioned, it is clear that in the area of international sale of goods, the contract it is considered to be concluded at the moment the assent of the acceptor reaches the tenderer.

Unlike the new Civil Code, the repealed Commercial Code expressly stated the mechanism for concluding distance contracts for trade relations, stating the theory of information. The System of Information is considered a version of the system of receiving the acceptance of an offer[5]. In commercial law this system was inserted by the Romanian Commercial Code, by its Art. 35 and previously, by the Romanian Civil Code of 1940 never entered into force (Art. 1084), as well as by the Italian Civil Code of 1942 (Art. 1326)[6]. Art. 35 of the Commercial Code stated that a contract is considered concluded "*if the acceptance of an offer has reached the tenderer within the period determined by him or within the time required for the exchange and acceptance given the nature of the contract*". In other words, according to this theory, a contract is considered concluded only when the tenderer is fully aware of the effective content of the acceptance sent to him by the acceptor.

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[2] Decision of the Romanian International Court of Arbitration No. 48/1973 in T.R. Popescu, O. Căpăţână, C. Cunescu, *Repertoriu practicii arbitrale române de comerţ exterior*, 1982, p.14.

[3] See in this regard Art. 1807 of the Mexican Civil Code; Art. 1 of the Panama Commercial Code; Art. 75 of the El Salvador Commercial Code; Art. 204 of the Uruguayan Commercial Code.

[4] This relative presumption can be overturned by contrary proof, in the meaning that, without being his fault, the tenderer was not aware of the assent of the acceptor when he received his correspondence. The tenderer is able to prove that it was impossible for him to know the content of the communication, namely the assent, being possible that the tenderer to be in a voyage, or not to check his mail in time by negligence. It is also true that this theory can offer the tenderer a genuine premise for an abuse, therefore by invoking genuine excuses can claim that he became aware of the assent at a date subsequent that when the communication reached his place of business or habitual residence. On the other hand, it is known the fact that the communication of the assent is not automatically, namely by the simple fact of reaching the place of business (residence) of the tenderer. As a consequence, the disadvantage of this theory is the creation of a discrepancy between the moment when the communication of assent reached the place of business (residence) of the tenderer and the moment when the latter one became aware of the content of the communication.

[5] Deleanu S., *Contractul de comerţ internaţional*, Lumina Lex Publishing House, Bucharest, 1996, p. 94.

[6] Art. 97 of rthe Egyptian Civil Code; Art. 1137 of the Venezuelan Civil Code; Art. 1214 of the Porto Rican Civil Code; Art. 1553 of the Honduran Civil Code; Art. 113 of the Panama Civil Code; Art. 1319 of the Filipinas Civil Code.

The disadvantage created by this system consists in the fact that the determination of the moment of concluding the contract is left for the tenderer who can deny that he is aware of the content of the indication of assent when it reaches his place of business (or habitual residence) (the moment when the indication of assent reaches him).

Because of this disadvantage it was created a presumption according to which the tenderer becomes aware of the content of the indication of assent right in the day when it reaches his place of business so the moment of receiving the communication, presumption based on the fact that reading business correspondence with maximum speed is the essence of trade[7], except if the tenderer proves that not by his fault he was not able to be aware of the assent[8]. This is a relative presumption[9] which can be overturned if the tenderer proves otherwise.

At the end of this section must be mentioned that Law No. 71/2011 regarding the application of Law No. 287/2009 on the Civil Code (the "LPA") states transitory provisions on the application of this rule, which is not applicable for contracts if the offer was sent before the entrance into force of the new Civil Code.

Determining the location for the performance of contractual obligations

The rules on the determination of the location for the performance of the contractual obligations, stated by Art. 59 of the Commercial Code only for trade relations, are now applicable for all private law relations. Specifically, Art. 59 stated that "Any trade obligation must be performed in the location indicated by the contract or in the location resulted from the nature of the operation, or from the intent of the parties. In the absence of an express term, the contract can be performed in the location where the acceptor has his place of business or his habitual residence or domicile. If a specific good is to be traded, which is located elsewhere at the moment when the contract was concluded, then the trade shall be performed in that location".

Art. 1494 of the new Civil Code refers to the situation in which the parties have not settled the location of the performance of the obligations or the location cannot be established because of the nature of the trade or, based on the contract, because of the customs of the parties or usance. In all these situations, the location for the performance of the obligations shall be determined based on the type of obligation. Thus, financial obligations must be performed at the residence or place of business at the moment of the trade of the creditor, the obligation to hand over a determined good must be performed where the good is located when the contract is concluded, other obligations being performed at the residence or place of business at the moment of the trade of the debtor.

Determining the price between professionals

One of the rules of the Commercial Code extended by the new Civil Code for relations between professionals refers to the determination of the price between the latter ones. Thus, according to Art. 1233 of the new Civil Code, if a contract concluded between professionals does not state a price nor a mean for determining it, it is assumed that the parties have considered the price usually practiced in that area for the same services performed in similar conditions or in the absence of such price, to a reasonable one.

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[7] C. Bârsan, D. Al. Sitaru, *Dreptul comerţului internaţional, vol. II, Partea I*, University of Bucharest, 1990, p. 28.

[8] Căpăţână O., Ştefănescu B., *Dreptul comerţului internaţional. Partea specială*, Romanian Academy Publishing House, Bucharest, 1988, p. 28.

[9] The presumption we mention was both stated in judicial practice as well as in the jurisprudence of the Romanian International Court of Commercial Arbitration, where the court stated that a contract negotiated by mail is considered to be concluded at the moment when the intention of assent of the acceptor reaches the tenderer by telex, telegram or letter. Decision of the Romanian International Court of Arbitration No. 48/1973 in T. R. Popescu, O. Căpăţână, C. Cunescu, *Repertoriu practicii arbitrale române de comerţ exterior*, 1982, pp. 14-15.

Solidarity between obligors and guarantors

Another rule applicable according to the old regulation of trade relations and extended on all obligations contracted by professionals is the presumption of the solidarity between the debtors of an obligation contracted in the benefit of a company, if the law does not state different. Specifically, Art. 42 para 1 of the repealed Commercial Code stated that "in commercial obligations the debtors are bonded by solidarity, if the law does not state different". The same presumption is valid also against guarantors, even if they are not traders, but guarantee a trade obligation. It is not applicable for non-traders for operations which, even if concerns them, are not trade operations.

According to the previous Civil Code contemporary with the present repealed Commercial Code, solidarity was an exception from the rule of dividing the obligation. Thus, according to Art. 1041 of the previous Civil Code "solidary obligation is not presumed, it must be expressly stated; this rule ceases only when the solidary obligation has its own place, in the virtue of the law". Analyzing this text it results that solidarity, in the vision of the previous Civil Code, should have been the result of a legal provision or of the express agreement of the parties. Unlike civil law, in commercial law the solidarity of commercial debtors it is presumed, except the cases where the parties expressly derogated from the rule, stating the contrary. Nowadays, Art. 1446 of the new Civil Code states that "solidarity is presumed between the debtors of a contracted obligation in the benefit of a company, if the law does not state different".

Comparing Art 1446 of the new Civil Code with Art. 42 of the Commercial Code we note a difference in that for the latter case the presumption is relative the parties having the possibility to establish the contrary ("for trade obligations the debtors are bonded by solidarity, if the law does not state different"). Or, in the new Civil Code the presumption is applicable for all these relations, except the cases in which the law states different. The conclusion is that the presumption of solidarity between debtors is no longer relative, but became absolute. The parties no longer have the possibility to overturn this presumption.

The rule stated by Art. 42 para. 2 of the Commercial Code, according to which the guarantor, even if he is not a trader, guarantying a trade obligation, is presumed to be solidary with the main debtor, was not kept in the new provision. On the other hand, Art. 2300 of the new Civil Code states the fact that even when the guarantor agrees with the main debtor as a solidary guarantor or solidary co-debtor, he can no longer invoke the benefits of discussion[10] and division[11].

Term of grace

In terms of applying the Commercial Code, nowadays repealed, Art. 44 stated provisions derogating from the common law, but represented the general rule in trades, namely the interdiction of granting a term of grace. The explanation of this interdiction lies in the commercial principles namely, the protection of the creditor, circulation of goods and celerity in the performance of obligations according to which the obligations must be performed precisely and within the established term[12]. Nevertheless, in literature[13] was stated that the party who has performed his obligations can grant a "term of grace" for the other

[10] Art. 2294 (1) of the new Civil Code states that "the conventional or legal guarantor has the possibility to require the creditor to perform action against the goods of the main debtor, if he has not expressly waived this benefit".

[11] Art. 2298 (1) of the new Civil Code states that "as a result of division each guarantor may require the creditor to firstly divide his action and equally share it for each side; (2) If any of the guarantors is insolvent when he received the division, he will remain bonded proportional with the insolvency. He shall not be held responsible for insolvency occurred after the division".

[12] I.L. Georgescu, *Drept comercial român. Teoria generală a obligațiilor comerciale. Probele. Contractul de vânzare cumpărare comercială*. Lumina Lex Publishing House, Bucharest, 1994, p. 99.

[13] S. Angheni, M. Volonciu, C. Stoica, *Drept comercial, 3rd Edition*, All Beck Publishing House, Bucharest, 2004, p. 349.

party. This term is unique, and if not this time the obligations were performed, the resolution operates and any performance beyond this term becomes unacceptable. Now, regarding the interdiction of granting a term of grace in trade matters, the rule is not treated as such in the new Civil Code. Granting a supplementary term for the debtor to perform his obligation is stated in the situation of delay. Thus, Art. 1522 para. 3 states the fact that the notification issued to the debtor to perform his obligation must grant him a term of performance considering the nature of the obligation and circumstances. If the notification does not grant such a term, the debtor shall perform his obligation in a reasonable term, calculated from the day when the notification was communicated.

Unpredictability

Along with the above mentioned notions unpredictability is worth being mentioned, even if it does not fit the patterns of the theme analyzed by this article, the very commercial existence determined its regulation, so although it has a long existence in law, it was recently stated by the positive law. The principle of unpredictability is stated by Art. 1271 of the new Civil Code "*if the performance of the contract has become excessively onerous because of exceptional changes of the circumstances which would indeed led to the unjustly coercion of the debtor to perform his obligation*" the court shall either order for the adjustment of the contract, to equally share between the parties the benefits and loses resulted from the change of the circumstances, or the cease of the contract at the moment and under the conditions established by it. Practically, unpredictability is an imbalance in the parties' obligations occurring after the conclusion of the contract, contemporary with its performance[14], independent of the parties' will and more designed to produce imbalance in the performance of the obligations, meaning that at least one of the obligations is excessively onerous is relation to the provisions of the contract. So, we consider that the text allows the contract to be reviewed because it must survive because it is in the best interest of the parties for it to be performed.

Conclusions

We consider that the new Civil Code was created with the strong belief of representing common law for all private law areas. With the same strength we argue that there is a vast special commercial legislation settling the judicial regime of traders, mainly Law No. 31/1990, republished and amended, Government Urgent Injunction No. 44/2008, the Insolvency Law No 85/2006, Law No 26/1990 on the Trade Register, proving that the new Civil Code is rather a code which absorbed not abolished trade matters, because specific rules regarding trade, professionals in general, are inserted and extended for all private law relations.

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[14] This being the distinctive element between unpredictability and lesion, which is also a significant imbalance of the parties' obligations, but a primary one, namely contemporary with the conclusion of the contract.

Decision of the Romanian International Court of Arbitration No 48/1973 in T.R. Popescu, O. Căpăţână, C. Cunescu, *Repertoriu practicii arbitrale române de comerţ exterior*, 1982.