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FREEDOM OF ESTABLISHMENT AND CROSS-BORDER MERGING

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Abstract

According to the dispositions of the institutive treaties of the European Union, the freedom of establishment of companies is essential for the functioning of the internal market. Based on the importance of the companies' mobility in the European space, the present paper aims to analyze the contribution of the Directive 2005/56 on cross-border mergers of share companies to transform the freedom of establishment of companies on the communitarian territory, from theoretical principle to reality. The solution that the Directive on cross-border mergers suggests to overcome the obstacle of the laws conflict and its extended domain of application, have been particularly taken into account,

Keywords: *freedom of establishment, cross-border merger, juridical regime, share companies*

Introduction

Cross-border merging was always considered by entrepreneurs as an optimum instrument to exercise freedom of establishment, as it allows them to both concentrate their activity, to reorganize themselves or to merely simplify the group's structure, depending on the particular individual situation.

On the other hand, the Jurisprudence of the Court of Justice regarding the freedom of establishment stressed that "cross-border mergers represent specific methods to exercise the freedom of establishment, essential to operate properly on the internal market and, as such, are among those economic activities regarding which Member States must ensure the freedom of establishment imposed by the Community Treaties"[1].

The solutions identified by companies and confirmed by the Court of Justice were found, unfortunately rather late, in a coherent legal framework on the Community level, able to remove the legal obstacles blocking the implementation of cross-border mergers in the Community.

Directive 2005/56 regarding cross-border mergers of share companies[2] *established a uniform legal framework for these operations. As a result, cross-border mergers of share companies became an important juridical tool to ensure the mobility of companies inside the European Union.*

The positive evolution of cross-border mergers after the adoption of the Directive is equally due to the legislative context and the evolution of the community's jurisprudence that appeared in this domain. Thus, the harmonization of domestic mergers under Directive

[1] The Decision Court of Justice of the European Union (CJEU) of December 13, 2005, case C-411/2003, *SEVIC System AG* c. David Halsey (Her Majesty's Inspector of Taxes).
[2] Published in the Official Journal of the European Union, L. 310/25.11.2005.

78/55/CE from October 9th 1978[3], the regulation of a European society by the Council's Regulation no. 2157/2001[4], having found a solution regarding the participation of employees with Directive 2001/86/CE supplementing the Statute of the European Society regarding employees involvement[5], as well as the adoption of the SEVIC Decision of the Court of Justice of the European Community on December 13th 2005 contributed significantly to the usefulness of the Directive 2005/56 in facilitating cross-border restructuring operations of commercial companies.

Freedom of establishment

The achievement of a single market for Member States' economies constituted, starting with the Treaty establishing the European Economic Community in 1957, a priority in the European construction[6]. After the successful completion of the single market in sectorial areas, Member States decided to take a new step and complete the single market within the European Union. The White Paper is the first document that included among its proposals the completion of the single market, a "space without borders in which the free movement of goods, persons, services and capital is assumed"[7]. Based on the White Paper, the Single European Act established as an essential objective the achievement of the single market, objective that was reached on January 1st 1995, when the European Communities became the largest unified market in the world[8].

For commercial companies, a functional single market is one where they can exercise their freedom of establishment on the territory and under the jurisdiction of any participant states, thus being able to move without obstacles and to give their economic activity a cross-border dimension that would allow to consolidate the competition on the European and international level.

The freedom of circulation that includes the freedom of establishment represents one of the four fundamental freedoms on which the European internal market is based. According to the provisions of the institutive treaties, the beneficiaries of these dispositions are societies who were created in respect of the legislation of a Member State and that have the social headquarters, central administration or main area of activity inside the Union, including cooperative societies and other private and public societies, except non-profit ones.[9].

The doctrine showed that two ways of establishing companies, a primary and a secondary one, emerge from the content of the Community provisions.[10]. Mainly, based on the freedom of establishment, societies can establish their headquarters in any European Union Member State, in identical conditions as those required by the legislation of the respective country for its own nationals. Secondarily, the same freedom confers commercial societies established in a Member State the right to establish agencies, branches and subsidiaries on the

[3] Published in Official Journal of the European Communities, L 16/ 20.1.1978.
[4] Published in the, Official Journal of the European Communities, L 294/1 from November 10, 2001.
[5] Published in the Official Journal of the European Communities, L 294/22 from November 10, 2001.
[6] Art. 2 of the Treaty shows: "the Community has as a mission, by developing a common market and the harmonization of the economic policies of the Member States, to promote a concordant development of the economic activities in the whole Community, a continuous and balanced expansion, an increased stability, an accelerated growth of the living level and closer relations between the Member States".
[7] Cornelia Lefter, *Fundamente ale dreptului comunitar instituţional*, Economic Publishing House, Bucharest, 2003, pp. 22-25.
[8] The concept of internal market evolved with the successive changes of the institutive treaties. Currently, the Treaty regarding the functioning of the European Union, modified by the Treaty of Lisbon, defines the market as containing "a space without borders, where the free circulation of goods, persons, services and capital is assured according to the treaties' provisions".
[9] The right of establishment of juridical persons is governed by Art. 49 and Art. 54, Chapter 2, Title IV from the Treaty regarding the functioning of the European Union, the consolidated version after the Lisbon Treaty.
[10] See M. Menjucq, *Droit international et européen des sociétés, 2ème éd., Paris, Montchrestien, 2008*, p. 12.

territory of another Member State. Regardless of the modality adopted, the right of establishment cannot be limited, with the exceptions mentioned by the Treaty: the exercise of the State authority, public interest, general interest and the abuse of EU law.

Beyond the *ad literam* content of the institutive treaty provisions, the freedom of establishment must guarantee all the rights that, directly or indirectly, contribute to the mobility of the commercial companies on European market.

As showed, for a commercial society, the freedom of establishment on the Community territory means not only the foundation or the development of main or secondary activities in any of the Member States, but also the right to free transfer of the main location of activity in any other Member State than that of origin and the right to freely merge with a company from another Member State.

In practice, despite the provisions of the institutive treaties regarding the single market and the freedom of establishment, due to a EU legislative void regarding the mobility of commercial societies, citizens of Member States faced, for a long period of time, a multitude of juridical issues every time they tried to give their activities a cross-border character. The host state was the one that raised barriers to the immigration of other Member States, or the origin state was the one opposing the migration of the companies under its jurisdiction, contrary to the express provisions of institutive treaties; the commercial companies faced an enclosure almost without escape of the right to free circulation and free establishment.

In this context, the Court of Justice was the one who, whenever legal texts were not explanatory, proceeded to interpret EU Law. Although its decisions did not always lead to a coherent interpretation, their contribution to the definition of the right of establishment and understanding the content of this right is undeniable[11]. Thus, the Court showed that "the right of establishment covers all the measures allowing or simply facilitating the access in another Member State and the exercise of an economic activity in that State, allowing the respective persons to participate to the economic activity of that country in the same conditions as the national operators"[12].

Although the need for an EU legal framework regarding the freedom of cross-border movement of companies was often claimed by commercial companies and the Court, the adoption of some normative acts in this matter was delayed.

The first Community document that regulates cross-border companies' circulation was adopted on October 8th 2001. The Council Regulation no. 2157/2001 regarding the status of the European society outlined a legal regime for cross-border mergers and had, at the same time, a significant contribution to the adoption of a new regulation in order to ensure for companies from the EU the right to free establishment - the Cross-border Merger Directive.

Directive 2005/56 regarding cross-border mergers of share companies has the merit of filling a major gap in the field of EU law regarding commercial societies. Adopting this measure constitutes a fundamental step in ensuring and guaranteeing the freedom of movement for share companies, from which it was expected, before all, to remove all the legal obstacles in achieving cross-border mergers.

The contribution of cross-border mergers regulation to the freedom of establishment of commercial societies inside the EU

In our opinion, overcoming the obstacle of the law conflict and a wide domain of application are the contributions that the Directive on the cross-border mergers can claim exclusively, as far as the mobility of commercial companies is concerned.

[11] The most relevant decisions of the European Court of Justice regarding cross-border mobility of commercial societies were delivered in the following cases: "Segers", "Daily Mail", "Centros", "Überseering", the "Inspire Art" and "SEVIC System".

[12] The decision of the European Court of Justice from September 13th 2005, case C-411/2003, *SEVIC System AG* c. David Halsey (Her Majesty's Inspector of Taxes).

- Overcoming the obstacle of the law conflict

Before the adoption of Directive 2005/56, mergers between commercial societies with different Member States' nationalities could have been achieved only by passing the conflict of laws, specific to international law. This method offered a legal instrument for companies involved in an international merger, without giving solutions to all the problems raised by transactions[13]. In the absence of a legislative harmonization on the Community level, the practice of Member States to impose the respect of their own *lex societatis* made almost any form of cross-border movement impossible[14]. It suffice to recall that the merger of commercial societies of different nationalities could have been achieved only if the national laws applicable to their organic statute foresaw a legal regime that ensured the mutual recognition of the concept of cross-border merger and the legal form of the companies involved in such an operation, in order to understand that such a legal mechanism lacked flexibility and was difficult to access.

To overcome the limits that the application of private international law imposed on commercial societies into the European space, the adoption of a coherent legal framework on the EU level was necessary to settle the law conflict generated by cross-border mergers.

As one can see from the preamble of Directive 2005/56/EC, the third consideration, the overcoming of the law conflict, constitutes one of the reasons of adopting this EU document. In full agreement with the quoted consideration, art. 4 of the Directive 2005/56/EC regulate the law applicable to cross-border mergers under three aspects:

a) It regulates the application of the legal regime of the internal mergers to cross-border merging operations. The Directive institutes the rule according to which "commercial societies participating in a cross-border merger remain under the dispositions and formalities of national legislations" (art. 4, par. 1, letter a);

b) It regulates the application of the Directive's dispositions as an exception. The law applicable to cross-border mergers will be the Directive in exceptional cases where the internal law dispositions are contrary to the dispositions of the EU law (art. 4, par. 1.);

c) It admits measures of national law that constitute restrictions regarding cross-border mergers, with the condition of imperative necessity and their proportionality. The reasons of public interest that a national authority can oppose to internal mergers can be also opposed to cross-border mergers, if at least one of the participant societies is under the incidence of the respective Member State' law (art. 4.2). In other words, restrictions are exceptionally admitted regarding cross-border mergers, if these are imperatively necessary and proportional in respect with the protected general national interest.

Applying in principle the regime of the national mergers regime to cross-border merger operations is the main solution adopted by the EU legislator to overcome the obstacle of law conflict.

It is important to underline that the reference that the Directive makes related to the internal mergers regulation from Member States comes amid the harmonization of the States' legislation in the area of national mergers, by transposing the Directive 78/855/EEC. In these circumstances, the national legislations are similar, so that such a reference cannot prevent or inhibit the merger.

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[13] The main source of the conflict generated by cross-border operations was the existence on the European territory of two laws regarding the *lex causae* applicable to the juridical regime of the commercial society. In states such as Denmark, United Kingdom and Netherlands, the *lex societatis* is the law of the state where the commercial society is registered, named also *the statutory headquarter' law*. In other states, such as France, Germany, Luxemburg and Belgium, the *lex societatis* is the law of the state where the commercial society has its decisional headquarter, named also *the law of the real headquarter.*

[14] Exceptions were the cases when the absorbent company had a 100% participation in the absorbed company. In fact, the first cross-border merger was made in 1993 through the absorption of the Barclays Bank PLC branch by the mother-company Barclays Bank SA.

The juridical regime of the internal merger is applied, before all, to the subjects of the cross-border merging. According to art. 4, par. 1, letter a, "cross-border mergers are possible only between societies that can merge according to the internal law of the respective Member States". The purpose of this disposition was that of preventing societies that couldn't have demanded, before the adoption of the directive regarding cross-border mergers, to obtain the statute of merger' subject, based on Directive 2005/56/EEC.

The question is whether this provision contravenes to the freedom of establishment, as it is regulated in the founding treaties. In our opinion, the reason why certain commercial societies are not recognized the right to merge is because they do not offer enough guarantees regarding legality, security and transparency of the operation. To allow all companies to merge, regardless of the existence or absence of protective measures, citing the freedom of establishment, would only jeopardize the very purpose for which such freedom was established, namely the completion of the internal market. In conclusion, we believe that the merger mechanism is open to all types of companies that do not violate the freedom of establishment.

Another important legal aspect of cross-border mergers, regulated by the dispositions of the national legislations, is the decisional process. The General Assembly of each company involved decides on the participation in cross-border mergers as established by the national law for domestic mergers.

This rule has eliminated one of the main obstacles of the operation, governed by the laws of some Member States, namely the obligation to decide by unanimity among all associates on the merger. It is true, on the other hand, that the rule of unanimity protected smaller partners against the abuse of the majority. That is why, to counterbalance such lose and to ensure a balance between partners' interests, the Directive decided that Member States can adopt dispositions designed to ensure the adequate protection of small members that have opposed the cross-border merger. Also, the law applicable to internal mergers regulates the protection of the creditors who claim debts or shares, as well as that of employees.

- An extended area of application

Unlike the Commission's proposal in 1984[15] that instituted an application of cross-border mergers limited to the share companies, Directive 2005/56/EEC extends the area of application to all share companies.

Also, it should be noted that the Directive regarding cross-border mergers is applied to Member States and to the states belonging to the European Economic Area (EEA).

Through the Decision no. 127 from September 7th 2006 that involved the modification of the Annex XXII of the Agreement regarding the Economic European Area (EEA), the mix Committee of EEA decided that the Directive no. 2005/56/EC should be incorporated in the EEA Agreement. Consequently, the provisions of the Directive shall be applied, in equal measure, to the companies from EEA' Member States[16].

Share companies that have their headquarter, central administration or the main activity inside the EU and are established according with the state' legislation, can become subjects of a cross-border merger "if at least two of them are regulated by the legislation of different Member States". *Per a contrario,* a cross-border merger with a society under the

[15] On December 14th 1984, the European Commission adopted a first proposal of the 10th Directive regarding cross-border mergers of share companies that did not receive the Parliament's approval. The proposal made on the 10th Directive of the Council, based on Art. 5, par. 3, letter g of the EEC Treaty was published in the Official Journal of the European Communities, C 23 on January 25th 1985.

[16] A legal argument to sustain this decision for companies from EEA countries to enter under the application *rationae loci* of the Directive was that Art. 31 and 34 from the EEA Agreement recognizes the freedom of establishment similarly with Art. 43 and 48 from the EC Treaty, presently Art. 49 and 54, chapter 2, title IV from the Treaty regarding the EU functioning.

legislation of a third party state will not enter in the area of application of the Directive, these types of operations remaining based on the rules of international private law.

- Companies that are beneficiary of the cross-border merger

Share companies. In order to define share companies, the Directive refers firstly to Article I of the Directive (EEC) no. 68/151 that contains, for each Member State, the different types of companies that constitute share companies. According to Art. 2, par. 1, letter a of Directive 2005/56/EEE regarding cross-border mergers between share companies, "a share company is a company as mentioned by art. 1 of the Directive 68/151/EC". Whatever names they have, the commercial companies that can be subjects of cross-border mergers are: joint stock companies, limited partnership companies and limited liability companies.

Corporations that offer sufficient guarantees for the protection of third parties' interests. In a more general regulation, art. 2, par. 1, letter b of the Directive 2005/56/EEC stipulates that the Directive is also applied to "any company with a social capital and juridical personality, that possess a separate patrimony and responds only for the debts of the company, required by the national legislation as guarantees, as explained by Directive no. 68/151/EEC, to protect the shareholders and third parties interests'.

The second meaning of the notion of *Capital Company* made the area of application of cross-border mergers to be an extended one. More precisely, any company, regardless its name, which meets all the requirements of Article 2, par. 2, letter b of the Directive can be subject of this operation.

- Companies excluded from the cross-border merger area of application

Companies that do not provide enough guarantees to protect third parties' interests. From a *per contratio* interpretation of art. 2, par. 1, letter b of the Directive 2005/56/EEC, one can conclude the rule that companies that do not protect the third parties' interests such as equity, juridical personality, patrimony with which to be liable for debts and who do not have a publicity requirement (whose has as reason allowing others to be informed of the fundamental documents of the company) cannot participate in cross-border merging.

The bodies of collective placement in securities. The Directive imposes that its norms are not applicable in case of cross-border mergers between bodies of collective placement in securities (Art. 3, par. 3, Directive no. 2005/56/EEC). This disposition is fully justified because the mutual funds are under specific regulations. In practice, the commercial companies having as object of activity the collective placement of capitals delivered by the public prefers to opt for the form of the European society which is most appropriate for such companies.

- The special regime of cooperative companies

According to art. 3, par. 2 from Directive no. 2005/56/EC, Member States can decide not to apply the present Directive to cross-border mergers where a cooperative company participates, even when this responds to the definition of a "stock company", provided by art. 2, par. 1.

In other words, each Member State, according with to its own interests, is able to grant or deny the quality of subject in a cross-border merger to cooperative companies[17].

Including such a provision in the matter of cross-border merger can raise uncertainties and disturbances in practice. In cases where the national legislation of a Member State excludes the cooperative companies from the area of application of the cross-border merging

[17] In the Council, German representatives supported the exclusion of the cooperative companies from the area of application of the Directive of cross-border mergers, arguing that those interested had the possibility to develop an European cooperative company. The Southern countries, where the use of cooperative companies is widespread, have supported the inclusion of cooperative companies in the area of application of the Directive, so they can benefit of its favorable regime. Finally, the German delegation and the Southern countries' delegations reached a compromise, resulted in a Community rule with disposition character.

system, achieving such an operation could still be possible if the national legislation of the other cooperative company permits such operations.

Conclusions

Cross-border mergers between commercial companies with headquarters in Member States are necessary in order to redesign their activity and to consolidate the internal market.

That is why the Directive 2005/56 regarding cross-border mergers of capital companies is considered to be "an important and necessary step to granting companies the freedom of establishment considered from the very beginning in the Treaties[18]".

The legal regime instituted through the Directive' dispositions is likely to remove the legal obstacles in achieving cross-border mergers. Its extended area of application makes cooperation possibilities and grouping between companies in different Member States attractive.

A modern restructuring modality, cross-border merges represent a genuine legal EU instrument, designed to facilitate the restructuring of European companies in terms of legal certainty.

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***The European Parliament and Council Directive no. 2005/53/EC regarding the cross-border merger of capital companies;

Convention Project regarding the international merger of the liability companies (2003).

[18] Report of the Reflection Group on the Future of EU Company Law, Brussels, 5 April 2011, p. 15.

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THE OFFENCE OF DECEIT AND MISLEADING ADVERTISING

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Abstract

This article analyzes the regulations pertaining to misleading advertising, detailing the situations where the offence of deceit can be considered for the sanctioning of misleading advertising.

Keywords: *misleading advertising, the offence of deceit, Article No. 215 of the Criminal Code*

Introduction

The danger of consumers being deceived and the risk of making decisions detrimental to one's property as a consequence of misleading advertising impose the application of preventive measures, through the establishment of a framework to regulate liberties in the area of advertising, with the observance of certain rules of conduct, conditions of application, and limits established by the bodies with jurisdiction in the field, as well as of certain repressive measures, which are provided both as sanctions regulated by special laws in the field of advertising, where disregard of the legal conditions of advertising is considered an offence, but also as criminal law sanctions, such as the sanctioning of misleading advertising as offence of deceit, according to Article No. 215 of the Criminal Code.

Starting with the regulations enforced within our legal system, which present situations in which advertising can be qualified as deceiving, and from criticisms of advertising, in the sense that there is an altering aspect to representations suggested through these channels, and the message of advertising inevitably enacts a deliberate reduction of reality[1], it is necessary to analyze the offence of deceit within a larger context, investigating the connection between this offence and misleading advertising[2], which in turn implies an act of deception, of misleading, through which the truth is altered.

Advertising means the making of a representation in any form, in connection with a trade, business, craft or profession, in order to promote the supply of goods or services[3]. From the premise that advertising enjoys more freedom to manifest itself in order to draw attention to the goods or services it offers, and to influence consumers so that they use them, the risk of exerting advertising in an abusive manner must also be taken into account, as it can lead to detrimental results for the consumers who can thus be deceived, being determined into choosing products or services that they do not use, or that even harm them.

[1] O. Căpățână, *Publicitatea înșelătoare*, "Universul Juridic" Publishing House, Bucharest, 2007, p. 31.
[2] See also Mirela Carmen Dobrilă *Corelații între infracțiunea de înșelăciune și reglementările privind publicitatea înșelătoare*, "Perspective juridice" Journal, no. 1/2011, pp. 5-14.
[3] O. Căpățână, *op. cit.*, p. 65.

Law 148/26.07.2000 on advertising[4], amended through Law 158/18.07.2008[5] on misleading advertising and comparative advertising, introduces regulations meant to provide protection against misleading advertising, as the law states that the individual advertising him- or herself must be able to prove the exactness of his or her statements, directions, or presentations in the advertisement (Art. 20), in order to eliminate abuses in the field of advertising, with the overarching purpose of protecting consumers and their interests.

According to Law 158/2000, misleading advertising is expressly forbidden, and it is defined as advertising which, in any way, including its manner of representation, misleads or can mislead the people it is targeted at, and which, by reason of its misleading character, can affect the economic behavior of these people, or which, for the same reason, damages or can damage a competitor[6].

Cases of misleading advertising can be marked by the use of such phrases as "best quality", "unique opportunity", even though the information related to the characteristics of a product differ from reality, by the use of such statements as "market leader", "20 years of experience", or by ensuring amazing results or complete transformations, through such phrasings as "miraculous treatment", "secret ingredient", or "amazing effect guaranteed", or through false witnesses presenting their experiences, who would claim to have obtained miraculous results, or as examples, in such situations when, for instance, phone network operators advertise new service packages, and make incorrect use of the term "free", even though the consumer is forced to meet certain requirements that he or she is not clearly told of in order to benefit from the advertised gratuity, which is how he or she is deceived.

Examples of misleading advertising, which is designed so as to deceive, may consist of, for example, a store advertising that their baked products are freshly made in front of the customer's eyes, even though the pastries in question are mass produced and delivered many days before their sale, or untruthful advertisements in brochures where footwear for children is claimed to be entirely made of leather, even though the insoles are polyester, or retail sellers who let consumers believe that the television sets they sell come with a total warranty time of five years, even though this period is only granted after paying an additional sum of money[7].

As to the typology of misleading advertising in terms of subjectivity, any message can deceive consumers if it specifies inaccurate personal information, attributing fictitious merits, credentials, titles, or distinctions, while a second category, dealing in objective terms, is constituted by inaccurate or altered descriptions of the products or services that are being offered, thus exaggerating the performances the potential consumer expects[8]; the deception can also be accomplished through inaccurate presentations of price or various contractual terms, assuring the target consumer that they are exceptionally advantageous

[4] Published in the *Official Gazette of Romania*, no. 359/02.08.2000.
[5] Published in the *Official Gazette of Romania*, no. 559/24.07.2008.
[6] This law transposed in its entirety Directive 2006/114/EC of the European Parliament and EU Council of 12 December 2006 concerning misleading and comparative advertising, published in the Official Journal of the European Union (OJEU) No. L 376/27 December 2006. According to this Directive, "misleading advertising" means any advertising which in any way, including its manner of presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behavior or which, for those reasons, injures or is likely to injure a competitor (Art. No. 2 a.).
[7] V. Pătulea, *Modurile de stimulare a activităților comerciale și practici abuzive în această privință. Publicitatea comercială înșelătoare(IV)*, "Dreptul" Review, no. 6/2008, p. 79-80.
[8] O. Căpățână, *op. cit.*, p. 74.

In order to protect the people advertising targets, the Code for Regulating Audiovisual Content[9] expressly states that advertising and teleshopping programs that feature deceptive marketing practices are forbidden (Art. No. 104)[10].

The Code of Advertising Practice, developed by the Romanian Advertising Council[11], shows that it is necessary to avoid any element capable of diminishing the consumers' confidence in communication, generally, of exploiting credulity, lack of experience or lack of information on the consumers' part, also to avoid any statements or depictions that might deceive consumers, which includes deceiving through omission, suggestion, ambiguity, or exaggeration.

Similar regulations concerning advertising for products and services exist in the Code of Consumption, regulated by Law 296/2004, republished in 2008[12], according to which advertising must be decent, fair, and designed in the spirit of social responsibility, advertising that is deceptive being forbidden.

Advertising is deceptive in such cases when it contains false information, which is to say it is untruthful or in cases when, through its general presentation, it misleads or can mislead the average consumer, even if the information is correct in itself, and can lead to a decision the consumer would not have otherwise made. Misleading advertising is forbidden, and in order to determine the misleading character of an advertisement, all its characteristics must be taken into account, which is to say any information concerning the characteristics of the goods or services (e.g. advantages, risks, execution, composition, accessories), the price or method of calculation, the nature, attributions and rights of the seller advertising said goods or services, the results that can be expected from use.

In order to ensure that the regulations concerning misleading advertising reach their purpose, aside from the purpose stated by Law 158, regulations concerning misleading advertising determine, beyond the protection of consumers, a further level of protection at an individual level, therefore at the level of individuals who are the targets of these advertisements, which can be deceptive. Thus, in order to prevent misleading advertising, natural persons, corporate bodies, associations and organizations which are entitled by law can notify the Ministry of Economy, Commerce and Business Environment, or, if the case is such, the National Audiovisual Council, in order to ascertain the breach of legal dispositions, and to enforce corresponding sanctions (Art. No. 7 of Law 158/2008). It is for this reason that we must make a series of connections between these regulations, that indirectly create protection for individuals that can be deceived through misleading advertising, and the offence of deceit, which is meant to create a direct protection framework for these individuals, as an offence which can encompass such actions, therefore meeting, under certain circumstances, the requirements for triggering criminal liability.

Thus, in cases when the seller who is advertising cannot produce documents that prove the exactness of the statements, directions, or presentations in the advertisement (according to the obligation stated in Art. No. 20 of Law 148/2000), as has also been noted in literature[13], in the case of misleading advertising, the action can constitute an offence of deceit, provisioned by Art. No. 215 of the Criminal Code.

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9 The National Audiovisual Council, The Code for Regulating Audiovisual Content, Decision No. 220/24.02.2011, in force starting with July 28, 2011, available online at http://www.cna.ro/Decizia-nr-220-din-24-februarie.html (20.08.2011).

10 According to art. no. 91 of the Law of Audiovisuals No. 504/11.07.2002, the breach of these dispositions constitutes an offence.

11 The Romanian Advertising Council, *The Code of Advertising Practice*, available online at la http://www.rac.ro/cod (20.08.2011).

12 *Official Gazette of Romania*, no. 224/24.03.2008, with the amendments of Law 161/2010.

13 V. Dabu, *Dreptul comunicării sociale*, SNSPA Publishing House, Bucharest, 2008, p. 243.

Misleading advertising can have harmful effects for the general public, which entails the severity of its repression, which, in some legal systems, such as the French one, is based on criminal law sanctions[14].

As to deceit through false advertising, French criminal law states that the lie itself, even when in written form, is insufficient for the existence of the offence of deceit, even though in practice it is admitted as sufficient if it can incur misleading[15]. In this sense, French criminal law shows that false advertising, of such nature that it can deceive, may even be considered a derivative of the offence of deceit[16]. On the other hand, it is claimed that the means required by Article No. 313-1 of the French Criminal Code concerning the offence of deceit can result from false advertising that in fact constitutes a simple lie which can't be punished, with the exception of cases of inexact advertising, with the purpose of misleading, which is incriminated by Art. L. 121-1 of the French Code of Consumption and false advertising can constitute an offence of deceit in the case when the advertisement is supported by means capable of deceiving a prudent consumer[17].

French criminal law considers in the case of false advertising that, in principle, the lies themselves are insufficient in order to sanction them as offences of deceit, but the situation differs in cases of false advertising which is broadcasted through advertisements in mass media, as this type of excessive advertising constitutes means through which the public can be deceived[18].

In this sense, French legal practice is eloquent: the respective courts of law have sentenced an artisan who had offered his services through written mass media, with the inexact mention that he was a painter; similarly, in the case when the appearance is created that the offered goods are self-made, even if they are purchased in part from other makers, or misleading through the presentation of a special offer with apartments for sale, which stated in the newspaper that it was made by the owner, while it was in fact sold by third-parties.[19]. The inexact mentioning of the provenance or ownership of the wares, the advertising which contains inaccuracies as to the nature or composition of the product, or as to the contractual obligations, can be qualified as false advertising: the sale of Beaujolais wines, even though the wares came from a local wine cellar; the use of labels for food products with the mention, "natural colorants obtained from fruits", even though they were synthetically produced, the use of the slogan "amazing limited price", even though the sale had prices greater than the

[14] O. Căpățână, *op. cit.*, p. 69.

[15] J. Pradel, M. Danti-Juan, *Droit pénal spécial: droit commun, droit des affaires*, "Cujas" Publishing House, Paris, 2010, p. 521.

[16] Corinne Mascala, *Répertoire de droit pénal: Escroquerie*, Dalloz Publishing House, Paris, 2001, p. 3.

[17] P. Conte, *Droit pénal spécial*, Lexis Nexis Publishing House, Paris, 2005, p. 251; In French legal literature, it is shown that, apparently, the incrimination of false advertising or of advertising meant to mislead does not come into conflict with the offence of deceit, but this issue requires nuanced distinctions. Caroline Carreau, *Répertoire de droit pénal: Publicité fausse ou de nature à induire en erreur – Publicité comparative*, Dalloz Publishing House, Paris, 2004, p. 30; Through the criminal sanctions applied to advertising, French law pursues the protection of the health, safety, and morality of consumers. G. Raymond, *JurisClasseur Commercial, Fasc. 934: Publicités interdites et réglementées*, LexisNexis Publishing House, Paris, 2006, p. 1; In French criminal law, deceptive marketing practices, especially those sanctioned by Art. L. 121-1 of the French Code of Consumption, can also constitute offences of deceit. Stéphanie Fournier, *JurisClasseur Pénal des Affaires. V Pratiques commerciales trompeuses, Fasc. 10: Pratiques commerciales trompeuses*, LexisNexis Publishing House, Paris, 2008, p. 40.

[18] Y. Mayaud, *Code pénal. Édition 2009*, 106e éd., Codes Dalloz, Dalloz Publishing House, Paris, 2008, p. 811.

[19] The Lyon Court of Appeal, Ruling on November 20, 1978, Cahier du droit de l'entreprise, 1980, p. 23, French Court of Cassation, Criminal Law Division, Ruling on January 21, 1981, in the Bulletin crim. 1981, p. 146, French Court of Cassation, Criminal Law Division, Ruling on December 7, 1981, in the Bulletin crim. 1981, p. 258, cited by O. Căpățână, *op. cit.*, pp. 75-76.

current ones; the use of the statement, "complete 5-year warranty", even though a series of risks were excluded through the stipulations of the sales contract[20].

As to the connection between the offence of deceit in Art. No. 215 of the Romanian Criminal Code and misleading advertising, through the ways in which the former is regulated, in view of preventing misleading advertising, those legally entitled can notify the Ministry of Economy, Commerce and Business Environment, or, if the case is such, the National Audiovisual Council, which have jurisdiction to issue appropriate sanctions for the breach of regulations against misleading advertising, such actions being qualified as offences, and sanctioned by fine, with the possibility for ruling that the misleading advertising be stopped or prohibited. However, it must be noted that, even though Law 158/2008 amended Law 148/2000, the dispositions of Art. No. 22 are still valid, according to which the breach of legal dispositions concerning legal advertising brings material, civil, penalty or criminal liability, according to case. Even though Law 158/2008, which currently regulates misleading advertising and comparative advertising, did not transpose Art. 23 par. (2) of Law 148/2000, according to which the actions through which misleading advertising is achieved constitute contraventions only if they were not performed under such conditions that, according to criminal law, they can be considered offences, we believe that these dispositions maintain their relevance, so that when acts of misleading advertising will meet the conditions required by Art. No. 215 of the Criminal Code, they will be qualified as offences of deceit.

For the offence of deceit in Art. No. 215 of the CC, the material element of the objective aspect is achieved through an act of deception, accomplished through the representation as true of an untruthful act, or as untruthful of one that is true, and thus the offender determines the victim to falsely perceive reality, irrespective of the means used to accomplish it[21].

According to the conditions in Art. No. 215 of the CC, in order for the offence of deceit to exist in the form presented in par. (1), when the material element of the objective aspect is accomplished through an act of deceiving, and respectively in order for the offence of deceit in conventions to exist, as stated in par. (3), when the material element implies an act of deceiving and/or of maintaining the deceit, it is necessary to analyze these dispositions, correlated with those concerning the conditions for existence of misleading advertising, as stated in Law 158/2008, according to which misleading advertising is advertising that, through any means, including the manner of presentation, deceives or may deceive the individuals it targets or that come into contact with it and who, due to its deceptive nature, can modify their economic behavior due to it, or for this same reason, harms or can harm a competitor. Thus, by corroborating these dispositions, it becomes clear that misleading advertising, in certain situation, can match the content of the incriminating norm in Art. No. 215 of the CC, as long as the deceptive character of the advertisement is given by the deception, or, possibly, the maintaining of the deceit accomplished through the representation of an untruthful act as true, or vice versa, which determines an individual to falsely perceive reality, in order to keep him or her from discovering the truth, and with the purpose of deriving benefits in this way, with the addition that this interpretation is allowed since the lawmaker does not limit the means used for the existence of the offence of deceit.

In the case when the activity through which deception is accomplished is so exaggerated that it would not be able to reach its goal, criminal liability cannot be applied. Exaggerated, untruthful advertising is not an offence of deceit (e.g. the medicine that heals all

[20] The Paris Court of Appeal, Ruling on March 16, 1972, The French Court of Cassation, Criminal Law Division, Ruling on June 28, 1985, Cahier du droit de l'entreprise no. 2/1980, p. 17, the Paris Court of Appeal, Ruling on April 15, 1971, La Gazette du Palais, 1972, part I, no. 407, The Correctional Tribunal in Wien, Ruling on January 23, 1979, Cahier du droit de l'entreprise 1980, p. 24, cited by O. Căpățână, *op. cit.*, pp. 78-82.

[21] T. Toader, *Drept penal român. Partea specială*, "Hamangiu" Publishing House, Bucharest, 2012, p. 214.

by itself, the best merchandise, the best food restaurant etc.), except for the case when these advertisements, that the general public knows to see for what they are worth, are supported by external acts and actions[22], which surpass people's normal prudence and foresight; the evaluation is thus to be made for each case individually, based on the situation, in order to establish whether these are means of deceit or not. In this sense, it has been argued in literature that the simple stating of an untrue fact or false advertising cannot be considered typical acts of deceit[23].

As for the possibility to sanction false advertising as an offence of deceit, we believe that the lie itself is insufficient to apply criminal liability if it is not supported by external elements of such nature that they grant it credibility. However, we can argue that within our criminal legal system, the protection against misleading advertising is also accomplished, together with the sanctions established in the specific corresponding dispositions, through the incrimination in Art. No. 215 of the Criminal Code.

Conclusions

Based on the premise that through advertisement one seeks to make a profit, it is necessary that this activity be subjected to clear regulations. In order to prevent the causing of damages, advertising, as a form of expressing opinions, implies specific responsibilities, and it is even possible that, when the conditions required by Art. No. 215 of the Criminal Code are met, it can be sanctioned as an offence of deceit.

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Corinne Mascala, *Répertoire de droit pénal: Escroquerie,* Dalloz Publishing House, Paris, 2001.

[22] C. G. Rătescu, H. Asnavorian, I. Ionescu-Dolj, Tr. Pop, I. Gr. Perieţeanu, M. I. Papadopolu, V. Dongoroz, N. Pavelescu, *Codul penal "Regele Carol al II-lea" adnotat*, Volume III, Socec Publishing House, Bucharest, 1937, p. 555.

[23] M. Udroiu, *Drept penal. Partea generală. Partea specială*, C.H. Beck Publishing House, Bucharest, 2011, p. 347.

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THE RULE OF LAW AS ENSHRINED IN THE ROMANIAN CONSTITUTION

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Abstract

The rule of law is rooted in constitutional provisions and means that the state is based on law and is organized on the principle of separation of powers. The rule of law must ensure the supremacy of the constitution and state authorities must act within the law. It is necessary that the law should be accessible, clear and precise so that its recipients know and understand its provisions and consequences of disrespecting it.

Keywords: *rule of law, law, legal certainty.*

Introduction

The rule of law is a basic rule currently recognized in all democratic states and due to the importance foreseen of the fundamental laws. This principle enshrined also in the new Constitution of Romania - adopted after the Revolution of 1989 which aimed, among other things, removing a totalitarian regime - stresses that all state activity must be subordinated to the right and take place in accordance with the and rules of law.

Romanian Constitution, in paragraph 3 of Article 1, states that Romania is a state of law, which means that the state is subordinate to the law. Constitutional provision which promote that Romanian State is governed by law is mandatory[1], which means that is obligatory for all its recipients.

Rule of law means that the state is based on the law, work and exercise their powers under the law. At the same time, the rule of law implies the existence of separation of powers, the principle that the three branches of government - legislative, executive and judicial - are entrusted to distinct and independent bodies to each other. Thus, a balance between states powers collaboration and mutual control, preventing these organs to abuse the powers which were vested.

[1] As Romanian Constitutional Court established, mandatory *erga omnes* of its decision finding unconstitutional a law or an ordinance, implies the existence of liability for breach of these decisions. Under this aspect, exists equivalence with that situation in which is not respected a law passed by Parliament or an order issued by the Government. Or, in more general terms, it is the problem of identifying liability when one state authority refused to implement the measures set out, within the powers conferred by the Constitution, by another state authority. In such a case identify legal liability arising from the mandatory nature of the provisions of art. 1 par. (3) of the Constitution, according to which "Romania is the rule of law [...]". Would otherwise reach by removing one of the state's powers of this fundamental constitutional principle, which is unacceptable. Also, regarding the art. 11 and 20 of the Constitution liability for infringement of a Constitutional Court judgment may consist, provided that the conditions laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms, in a judgment of the European Court of Human Rights against the Romanian state – Romanian Constitutional Court Decision no. 169/1999, published in Official Gazette of Romania, Part I, no. 151/12.04.1999.

The rule of law must be understood as a state organized on the principle of separation of powers and ruled by law aiming to promote the rights and freedoms inherent in human nature, ensures strict compliance with its regulations by all his organs in all their activities[2].

Rule of law, says the literature, remains a mere theory if not consisting of a system of warranties (including legal) to provide real employment of public authorities the right coordinates. Effective rule of law must be self-limiting by law and are considered to be in the presence of a democratic state where: the rule of law is clear, the content of this right to exploit their size real civil rights and freedoms, is achieved balance, collaboration and control of public authorities (public authorities) access to justice is done"[3].

Constitution compliance, its supremacy and its laws is a constitutional principle[4] which requires all recipients, individuals or legal entities, public or private, to conform his conduct to take appropriate legal provisions.

Rule of law requirements are concerning the major goals of state activity, foreshadowed in what is known as the rule of law, the phrase[5] which implies subordination to state law, those providing means to allow the right to censor political choices and, in this context, to ponder any abusive tendencies, discretionary of older structures.

The rule of law ensures supremacy of the Constitution, all laws and normative acts correlation, the existence of the regime of separation of public powers, which must act within the law, i.e. within a law expressing the general will.

The law must be accessible in the sense that its recipients must know its provisions and should be informed of the legal consequences of their acts or deeds. For public disclosure and in order to entry into force, the law is published in an official publication of the Romanian state – Romanian Official Gazette. After the entry into force the law begins to produce legal effects to its recipients.

Citizens must have sufficient information on legal rules applicable in a given case and be able to provide a reasonable degree consequences that may arise from an act determined[6].

Another condition is that the law must be understood and this requires that it be clear, precise and predictable.

In European law[7] is frequently pointed out that the law must be adequately accessible in the sense that everyone should be able to have information on the legal rules applicable in a given situation and the legal norm should be predictable, which means that should be formulated with sufficient clarity to enable a person to regulate their conduct. The law should determine with some degree of accuracy when it is applicable and the consequences of its violation.

The expression provided by law is not only a specific legal basis in domestic law, but also the quality of the law in question, requiring that it should be accessible for each person and also predictable[8].

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[2] T. Drăganu, *Constitutional Law and Political Institutions - Basic Treaty*, vol. I, Lumina Lex Publishing House, Bucharest, 1998, p. 290.

[3] Muraru I., Elena Simina Tanasescu, *Constitutional Law and Political Institutions*, Volume II / Issue XIII, C.H. Beck Publishing House, Bucharest, 2009, p. 85.

[4] Article 1.5 of the Constitution states that: "In Romania, the Constitution, its supremacy and the laws shall be mandatory".

[5] See *Constitutional Court Decision no. 70/2000*, published in Official Gazette of Romania, Part I, no. 334/19.07.2000.

[6] ECHR, *Plenum, Sunday Times v. the United Kingdom judgment* of 26 April 1979, 6538/74

[7] ECHR, Plenum, *Sunday Times v. the United Kingdom judgment* of 26 April 1979, 6538/74, ECHR, *Case Petra v. Romania*, published in the Official Gazette of Romania, Part I, no. 637/27.12.1999 etc.

[8] *Amann v. Sweden* (GC) no. 27.798/95 par. 65, ECHR 2000, in the case of *Rotaru v. Romania*, published in the Official Gazette of Romania, Part I, no. 19/11.01.2001.

Romanian legislator has developed for this purpose a set of rules[9] which provide that: legislative text should be made clear, fluent and understandable without syntactic difficulties and obscure or ambiguous passages[10], in the proposed legislative solutions must be realized an explicit configuration concepts and concepts used in the new regulations, which have a different meaning than common, to ensure their correct understanding and thus avoid misinterpretations[11]; normative documents must be written in a language and style specific of legal regulation, concise, sober, clear and precise to exclude any doubt, in strict compliance with rules of grammar and spelling, is forbidden to use neologisms, if there is a widespread synonymous in Romanian drafting is done by using power words in their meaning in Romanian language, avoiding regionalisms, writing is subordinate goal easily understand the text by its recipients[12].

However, the European Court of Human Rights, as shown above, and the Constitutional Court of Romania[13], stated on several occasions, the lack of accessibility and predictability of legal provisions.

Another very important principle for the rule of law, enshrined in art. Article 15. 2 of the Constitution, is that "the law provides only for the future, with the exception of the criminal or contravention more favorable law"; constitutional principle that gives legal rules of law and requires another principle, namely the non-retroactivity of laws.

Consequences of non-retroactivity principle sign-up in the Constitution – as the Constitutional Court[14] observed - are very severe and perhaps that is why this solution is not found in many countries, yet raising the rank of constitutional principle is justified by ensuring conditions better legal certainty and confidence in the legal system and because the separation of legislative power locks disregard on the one hand and the judiciary and the executive, on the other hand, thereby contributing to strengthening the rule of law.

Legal certainty requires that the right not retroactively. Rollback is a violation of law by applying a rule certainty that could not be known by the subject at the time of the legal situation[15].

Legal certainty presupposes the existence of a mechanism to ensure a consistent jurisprudence resulting from an interpretation of the law.

Divergence of jurisprudence which is by nature inherent consequence of a judicial system based on a set of first instance having jurisdiction within the county, must be resolved by a supreme court, whose role is precisely to regulate the contradictions of jurisprudence[16].

Principle of legal certainty is a fundamental rule of law and gives citizen (when is respected) trust in justice. Lack of legislative coherence and existence of a unitary judicial practice contrary, in the sense that the same law interpretation leads to different solutions pronouncement by the courts creates a framework of legal uncertainty resulting in lack of trust of citizens in court.

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[9] Law no. 24/2000 on rules of legislative technique for drafting laws, republished in the Official Gazette of Romania, Part I, no. 260/21.04.2010, amended by Law no. 29/18.03.2011.

[10] Article 8. 4 of Law no. 24/2000.

[11] Article 25 of Law no. 24/2000.

[12] Article 36 par. 1 and 4 of Law no. 24/2000.

[13] See in this regard the Constitutional Court Decision no. 189/2006 published in Official Gazette of Romania, Part I, no. 189/05.04.2006; Constitutional Court Decision no. 453/2008 published in Official Gazette of Romania, Part I, no. 374/16.05.2008; Constitutional Court Decision no. 710/2009 published in Official Gazette of Romania, Part I, no. 358/28.05.2009.

[14] Constitutional Court Decision no. 9/1994, published in Official Gazette of Romania, Part I, no. 326/25.11.1994.

[15] D.C. Dănişor, *The Romanian Constitution commented, Title I. General principles* Legal Universe Publishing, Bucharest, 2009, p 40.

[16] ECHR, *Case Beian against Romania*, published in the Official Gazette of Romania, Part I, no. 616/21.08.2008.

As pointed out in European law "court action, which are guarantors of justice and have a basic task in a state law requires public trust"[17].

Unfortunately, the problem of inconsistent jurisprudence of Romanian courts has already become chronic as retain the European Court of Human Rights jurisprudence has sanctioned inconsistencies that exist in the same issue at the same court, forcing the Romanian government to pay monetary damages in many cases against Romania. European Court held that once a state has adopted a solution, it must be implemented with reasonable clarity and consistency to avoid, if possible, uncertainty and ambiguity among those referred measures for its implementation. In this context, it should be stressed that uncertainty - be it legislative, administrative or arising from practices applied by the authorities - is an important factor to be taken into account in assessing the State's conduct[18].

In his recent practice[19], the Constitutional Court held that the interpretation of laws is a rational operation used by any subject of law, the application and observance of the law, aiming to clarify the meaning of a legal rule or its application field. The courts interpret the law, necessarily, in the handling of cases with which they were invested; interpretation is indispensable stage of enforcement process. Complexity of cases - shows the Court - can lead sometimes to different application of the law in practice courts. In order to eliminate possible errors in the legal characterization of the facts and circumstances to ensure uniform application of law in the practice of all courts, the legislature was established institution appeal on points of law. Given the position of the High Court of Cassation and Justice in the court system and its role foreseen in art. 126 par. (3) of the Constitution, the legislature established, by the provisions of art. 329 of the Code of Civil Procedure, the interpretation of this obligation in order to ensure uniform by the courts of a legal text. Establishment of mandatory character of the legal law issues adjudicated in appeal on points of law only serves to give effective constitutional role of the High Court of Cassation and Justice, helping to strengthen the rule of law.

The Court noted in this regard that profound differences jurisprudence are likely to create a general climate of uncertainty and insecurity legal aspect emphasized by the European Court of Human Rights jurisprudence.

The idea of the rule of law is inseparable from justice role of promoting legality in government activity, the strong defense of rights and liberties[20].

Justice is not only a guarantee but is one of the most effective ways to protect the rights and liberties against any abuse, regardless of the guilty.

Conclusions

Constitutional principle according to which Romania is a state law requires the legislature to adopt appropriate regulation of judicial activity, not only respecting the general interests of society and defend the rule of law, but at the same time to respect and protect fundamental rights and freedoms of citizens.

Also, the legislature must notify if a law or provisions of a law does not comply with supreme values - human dignity, rights and freedoms, the free development of human personality, justice and political pluralism - or do not meet the realities of a society and to amend or take other legal provisions be placed at the bottom of the rule of law.

[17] ECHR, *Case Cornelia Popa against Romania*, published in the Official Gazette of Romania, Part I, no. 13/06.01.2012.

[18] ECHR, Case Tudor Tudor v. Romania, published in the Official Gazette of Romania, Part I, no. 778/13.11.2009.

[19] See Constitutional Court Decision no. 303/2011, published in Official Gazette of Romania, Part I, no. 497/12.07.2011.

[20] Constanţa Călinoiu, V. Duculescu, *Drept constituţional şi instituţii politice*, Fourth Edition, "Lumina Lex" Publishing House, Bucharest, 2010, p. 232.

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THE INSTITUTION OF LEGAL GUARDIANSHIP IN THE NEW CIVIL CODE. BRIEF CONSIDERATIONS

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Abstract

The present article seeks to outline the main improvements brought by the Civil Code of 2009 to the field of protection of minors through legal guardianship. Although not changing the fabric of this legal institution, the stipulations of the Civil Code introduce new notions, such as: family council, or the appointment of a legal guardian by the child's parents.

Keywords: *Romanian Civil Code, instituting a guardianship, family council, termination of guardianship*.

Introduction

In the words of John Locke, "Childhood is a trial we must all go through before we can become adults". "It is the time of prejudice and mistakes, because the child has neither reflexive conscience nor judgment", added Descartes. The modern concept of legal infancy was built mostly on this type of philosophy about childhood. Taking into consideration the fact that children become rational beings, they are our equals. It is this lack of reason that characterizes them and imposes the need for legal guardianship. Thus, the protection of a child has always been at the core of philosophical and legal preoccupations.

1. The Notion of Guardianship, Legal Characteristics and Principles

The institution of the legal guardianship has remained essentially the same throughout the history of Romanian law and it may be described as a complex mechanism. From a terminological point of view, the phrase "legal guardianship" comes from the idea of protecting and has two meanings: a legal means of protection and a legal institution, the totality of legal norms which constitute it and which regulate the protection given to children by another person than the parent.

At present, it is the Civil Code[1], in force since the 1 October 2011, which regulates this institution and which has a whole chapter in Tome I, Persons, Title III, Protecting the Physical Person, Chapter II, beginning with article 110 and ending with article 163. Starting with the aforementioned stipulations from the current legal doctrine[2], the legal guardianship was defined as a "the legal means of protecting a minor deprived of parental protection, which is instituted in cases and conditions stipulated by law". The guardianship constitutes a means of protecting a child lacking parental protection. It is a responsibility for the guardian, as expressly stipulated by article 122, paragraph 1 from the Civil Code: "Being a legal guardian

[1] Forward Civil Cod used as Romanian Civil Code.
[2] E. Chelaru, *Drept Civil. Persoanele*, C.H. Beck Publishing House, Bucharest, 2012, p. 150.

is a personal responsibility". Seen from the guardian's point of view, it has the following legal characteristics: it is legal, obligatory, personal and unpaid.

Guardianship is a legal duty because its content is regulated by imperative norms. It is principally a mandatory role since a person named to be a guardian cannot refuse to fulfill this task, unless so precluded by the stipulations of the law. Thus, article 119, paragraph 1 from the Civil Code states: "The guardian must give his consent to act in this role before the guardianship authority that concludes the procedure in the family council room. Once this is concluded, the guardian cannot decline his appointment except for the reasons given by article 120, paragraph (2)". Also, in accordance with article 123, paragraph 1 of the Civil Code, legal guardianship is a non-remunerated. Exceptionally, the court may grant the guardian remuneration if the minor is materially sound. The sum shall be established by the family council depending on the work done by the guardian to administer the legacy, the material situation of the minor and the guardian, without surpassing 10% of the income yielded by the minor's material resources. Depending on the context and the approval of the family council, the court can suppress or modify the established sum. Legal guardianship is also a personal responsibility. The guardian's personal qualities must be considered before his appointment, because he may not entrust his ward to another person, not even partially[3]. However, the court may appoint a specialized natural or legal person to administer a part or the whole legacy of a minor, given its size and content and with the approval of the family council.

With respect to the principles or general rules of legal guardianship, they result from legal regulations and are meant to act as an extra-guarantee for the support of the child and the protection of his rights as a person and of his legacy. The first principle states that the guardianship must be exercised in the best interest of the child (article 133 of the Civil Code) and it must guide any action of the public or private authority. The principle of patrimonial independence between the ward and the tutor, as stipulated by article 140 of the Civil Code, results from the principle of patrimonial independence between parents and children. Also, the activity of the legal guardian must be overseen by the family council and under the actual and continuous authority of the court, so that the minor can have all that is necessary for a good and proper upbringing and development. Therefore, we can easily notice that the stipulations of the Civil Code maintain the general outline of the legal guardianship as it was sanctioned by the Family Code and Law no. 272/2004 concerning the protection and support of children's rights.

2. Beginning the Legal Guardianship. The Cases Appointments and the Procedure to Assign a Guardian

Article 110 of the Civil Code stipulates that all cases in which legal guardianship is necessary: if both parents are dead, unknown, they have lost their parental rights, they have been legally denied contact with the child, they are missing presumed dead, the child is deprived of both his parent's care, also if the court decides to appoint a guardian during adoption proceedings. Therefore, we are considering two types of situations which are similar to those stipulated by the Family Code[4] and Law no. 272/2004: cases in which the guardian is appointed irrespective of the parent's will or fault (parents are deceased) and cases which are determined due to the improper exercise of their parental rights (loss of parental rights and interdictions to come into contact with the child as a complementary measure). Other situations may depend or not on the fault of the parents[5].

[3] *Ibidem*, p. 151.
[4] Forward Family Code used as Romanian Family Code.
[5] T. Bodoaşcă, *Contribuţii la studiul condiţiilor în care poate fi instituită tutela copilului în reglementarea Legii nr. 272/2004 privind protecţia şi promovarea drepturilor copilului*, in "Dreptul" Review, no. 3/2005, p. 57.

The lawmaker has left the obligation to inform the competent authority in the Civil Code, which is also present in the Family Code. According to the legislation in force, this duty belongs to: persons close to the minor, the administrators or residence of the house where the minor lives, the civil registry in case someone is declared deceased, the notary public in order to start probate proceedings, the courts in case of a criminal conviction or interdiction of parental contact, the local public administration authorities, child protection services as well as any other person. However, the five-day deadline stated in article 115 from the Family Code, within with any case that requires the appointment of a legal guardian must be reported, is not mentioned in the Civil Code. Instead, it is substituted by the phrase "as soon as it is learnt that the child lacks parental care". The absolute need for fast action in any case that involves a minor is therefore underlined. It becomes a principle at article 6 letter J from Law 272/2004 because "the reason for any measure of alternative protection is to ensure the security of the child throughout his childhood, so no matter the circumstances, he must not be deprived at any moment of assistance or protection. Useless or pointless delays, hesitations or passivity may annul any protective measure if the response comes late"[6].

Pursuant to the stipulations in the Family Code, the legal guardianship could be held by a single person. Now stipulations grant this role to a person, a family, since it uses the phrase "husband and wife together" which meets the conditions set by the law, and if they do not fall in any of the cases of incompatibility presented in the legislation. In principle and has doctrine[7] has shown us, "the appointment of the legal guardian is not conditioned by the existence of certain special qualities. It is sufficient that the person have the right to exercise the full capacity of their rights, not fall into one of the categories of persons that, pursuant to the law, cannot have the role of guardian, must have the necessary material condition to fulfill his obligation and must give the necessary moral guarantees for the child's harmonious development".

Unlike the previous legislation, the Civil Code expands on the number of cases of incompatibility with the activity of being a guardian. Therefore, article 113 Civil Code states that the role of guardian may not be entrusted to: a minor, a person prohibited by law or that is the ward of a conservatorship; a person whose parenting rights have been revoked or declared unfit to be a guardian; a person whose civil rights have been limited, either by law or a court decision as well as any person of unsound moral character; any person who held a guardianship which has been revoked under article 158; any person that is insolvent; any person whose interests contravene those of the minor; any person prevented from acting in this role by a formal document or in the last will and testament of the sole parent which held parenting rights before their death.

The Civil Code brought an element of novelty by the fact that it borrowed from the common law the possibility of the parent to name the guardian, thus confirming the parent's rights and obligations and keeping to the principle of protecting the child's best interest.

The parent may assign the guardian in accordance with article 114, paragraph 1 from the Civil Code through a unilateral act, by contract of mandate or even in their will. The parents therefore have several possible legal avenues through which they can properly assign the person who is to act as guardian of the minor in case they cannot ensure parental care. In order for it to be valid, the legal document, either unilateral or bilateral, must have the authentic *ad validitatem* form, except in situations where the will is written my hand or is a privileged. The appointment can be annulled by the parent at any time, even by a simple signed document. In order to make this public, this annulment writ will be registered pursuant to article 1046 of the Civil Code, if the guardian was assigned through an authentic will or in

[6] Emese Florian, *Dreptul familiei*, C.H. Beck Publishing House, Bucharest, 2010, p. 428.
[7] E. Chelaru, *op. cit.*, p. 152.

the National Registry of Notaries, in the hypothesis that the appointment was made by contract of mandate.

The parents also have the possibility to assign several people as guardians, as stated by article 115 of the Civil Code. In case of an order of preference or if there are several relatives or friends of the minor's family who are capable to act in this role and who have shown themselves willing, the court will decide, depending on their material capabilities and the moral guarantees they offer. If the parents designate an order of preference then the court is obliged to respect it. Also, the court is obliged to respect the parents' decision in the assigning of the guardian because article 116 paragraph 1 C of the Civil Code stipulates that: "the person assigned as guardian in accordance with article 114 may not be replaced by the court without their approval, unless they fall into one of the categories mentioned in article 113 or if the interests of the minor are in danger by their appointment". In case the guardian assigned by the parents is temporarily prevented from fulfilling his obligations, the court may appoint another guardian for a period of 6 months. If within this time the former does not request that the court appoint them, the latter will continue in the role of guardian until the court has appointed a new one.

In case the parents have not chosen a legal guardian, the court will appoint a parent or friend of the family who is capable of fulfilling this obligation, taking into consideration the personal relations, the distance between homes, the material situation and the moral guarantees of the appointee, as stated in article 118 of the Civil Code. Therefore, only if the parents have not exercised their right to choose the guardian, can the court intervene.

With respect to the assigning procedure, it hinges on the approval of the future guardian, with the exception of the case where the guardian is named through a contract of mandate, in which case the future guardian may not refuse unless under the conditions in article 120 paragraph 2 of the Civil Code and if the minor of 10 year of age also rejects them. The appointment is made in the council room. The appointment is definite and will be communicated to the guardian in writing; it will be registered at the court and at the town hall of the township where the minor resides.

Another new improvement of the Civil Code which must be stressed is the fact that in case no guardian has been assigned, the court must consult the family council, if it has been convened, in order to appoint one.

3. The Family Council

The Civil Code of 2009 has reintroduced the legal institution of the family council which was also mentioned in the Civil Code of 1864, which was repealed by the Family Code. The family council, as regulated by article 124-132 from the Civil Code in force, must not be mistaken with the institution that goes by the same name which is mentioned in Law no. 217/2003 concerning the prevention and combating of family violence. This family council is defined as "an association without legal personality and without financial purposes, formed of family members who have full legal rights" and whose role is to prevent and to mediate conflicts that may arise among the members of a family.

As presented in the Civil Code, the family council is a body meant for consulting purposes, without a legal personality. It can be convened by the court in order to oversee the way the guardian exercises his rights and fulfills his duties to the minor and his legacy[8]. It is made up of 3 members and 2 substitutes, which were selected from among the friends and family. The degree of kinship and the personal relations with the minor's family must also be

[8] Please see: A. Bacaci, Viorica Claudia Dumitrache, Cristina Codruţa Hageanu, *Dreptul familiei*, C.H. Beck Publishing House, Bucharest, 2009, p. 342; Diana Anca Artene, *Tutela - câteva din noutăţile aduse de Noul Cod Civil*, in vol. "Justiţie, stat de drept şi cultură juridică", "Universul Juridic" Publishing House, Bucharest, 2011, p. 509.

taken into consideration. If there are no relatives or close friends, other persons who have maintained friendly relations to the minor's parents or who show an interest in the minor's situation will be appointed.

The law also established the categories of persons that can form the family council. Thus, husband and wife cannot be together members of the same family council. Also excluded are: the guardian, any person prohibited by the court or that has a conservator; any person deprived of their parenting rights or declared unfit to be a guardian; any person whose civil rights have been restricted by the court; any person, who while acting as a guardian was rejected under the conditions of article 158 from the Civil Code; any person who is insolvent; any person whose interests go against those of the minor; any person prevented through an authenticated writ or will by the parent.

The family council is convened only when the minor is place under legal guardianship, but not when the minor has parental care, or is placed in a foster home, or protected in any other way sanctioned by the law.

In order to convene the council, the persons meeting the conditions are called by the court to the home if the minor, either officially, at the minor's request, if the minor is 14 years of age, at the request of the appointed guardian or of any other person who is aware of the minor's situation. The members may only be appointed to the family council of their own accord and only if the minor, having reached the age of 10, not rejected them.

The attributes of the family council are regulated by article 130 of the Civil Code. Thus, it can give opinions (at the request of the guardian or of the court) and even make decision (in cases stipulated by law). The opinions and decisions are made by a majority vote of the members. The oldest person of the council is appointed its president. The decisions made by the family council must be explained and committed to a special register, which is kept by one of the members assigned by the court. Also, the family council may complain to the court with regard to the guardian's actions, if they harm the minor; it may begin proceedings to annul the guardian's actions that pertain to the minor's patrimony; it may make requests to the court to have the guardian offer actual or personal guarantees at the moment of appointment of during the period of guardianship.

With reference to the functioning of the family council, we mention that it is convened at least 10 days before the set date by the guardian, out of his own initiative or at the request of any of the members, at the request of the minor of 14, or by the court. The persons convened must be present at the place of meeting. If they are unable to come, they may be represented by relatives or close friends of the minor's family, if these persons are not properly designated or convened by members of the council. Spouses may represent each other. In principle, the meetings are held at the minor's home except when the request was made by the court, in which case the meeting will be held there.

If the court has definitively decided against the complaints of the family council at least twice, then the guardian may request a new council be formed. In case a new council cannot be formed, or if the interests of all council members and substitutes go against the minor's interests, the guardian may ask the court the authorization to act alone, as stipulated by article 132 of the Civil Code.

4. Termination of the Guardianship

The termination if the guardianship should not be mistaken with the termination of the guardian's role. The role of the guardian ends as a result of circumstances that pertain exclusively to the person of the guardian, while the guardianship as a protective legal measure stops when the circumstances that require it exist no longer. Therefore, the role of guardian end in the following situations: the guardian's death, replacement or removal from this role. In case of the guardian's death, his heirs or any of the persons stipulated in article 111 of the

Civil Code are obliged to notify the court as soon as possible. If the heirs are minors, an interested party must then notify the court. The heirs will take on the duties of guardian until a new one is appointed, if they are not minors themselves, in which case the court will appoint an emergency special guardian.

To be removed from the role of a guardian is a penalty administered by the court to the guardian who is guilty if abuse, gross negligence or any other action that render him unworthy of the role or if he does not fulfill his role correctly, as well as in any of the cases stated by the law[9]. The replacement of the guardian may be requested in the circumstances stated in article 120 par. 2 of the Civil Code. The request is made to the court who must reach an immediate decision. Until the request is resolved, the guardian must continue in this capacity. We also mention that the guardianship ends in the following situations: the minor is emancipated; the minor has once more a filial relationship with at least one of his parents; the parents' rights are reinstated; the judicial interdiction is lifted for at least one of the parents of the minor; the minor is deceased.

Conclusions

The present article tries to highlight two of the main new elements that the Civil Code of 2009 has brought in the field of legal guardianship: the reintroduction of the family council and the possibility of parents to assign the guardian for their child either by a unilateral act or by a contract of mandate, in registered form, or in their will, thus creating the conditions for the effective protection of the minor.

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[9] See: E. Chelaru, *op. cit.*, p. 158.

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THE ROLE OF LEGAL CONCEPTUALISM IN THE TECHNICAL CONSTRUCTION OF THE LAW

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Abstract

In the case of any intellectual endeavor, such as lawmaking, there is the problem of concept. The law is the result of thinking and it requires a high degree of standardization and conceptualization. Thus, juridical conceptualism appears indispensable to the development of laws.

Keywords: *law, legal conceptualism, legal constructs.*

Introduction

The process of thinking requires reflecting on various concrete phenomena through the use of notions, concepts, reasoning which are all abstract. The law is seen as a whole formed by legal norms, which show a high degree of standardization.

In order to create the legal norm, the legal drafter uses the resources of modern language. Usual, everyday words change in nature once they are used in the text of a law, becoming legal concepts. Their meaning forms an important part of the laws they help to constitute.

1. The Notion of Legal Conceptualism

Legal conceptualism, which is defined in the doctrine as the "totality of intellectual procedures used in the development and expression of juridical rules"[1], is useful, even indispensable to the construction of legal provisions. The concept cannot be separated from the process of developing the foundation of juridical norms because their precision and effectiveness need to reflect properly the realities which the law must regulate. This would not be possible without the use of conceptual means[2].

Concepts are essentially a means of grasping the dimensions of a social reality, whereby we become aware of the general facts contained in reality. A juridical concept must meet the following characteristics which are also mentioned in the recently published

[1] D. C. Dănişor, I. Dogaru, Gh. Dănişor, *Teoria generală a dreptului*, C.H. Beck Publishing House, Bucharest, 2008, p. 228.
[2] Anita M. Naschitz, *Teorie şi tehnică în procesul de creare a dreptului*, "Academiei Române" Publishing House, Bucharest, 1969, pp. 255-256.

literature[3]: they are formal, normative and operational; they evolve and have no value of content in itself.

In order to establish the nature of these concepts, we use a series of procedures which, when logically interlinked, offer the legislative authority the main tools for obtaining an optimum legislative solution, which is accessible to those for whom it is meant. These concepts include definitions, classifications, juridical constructions and special procedures of legislative technique (suppositions and fictional representations of reality).

2. Correctly Defining Legal Concepts – a Condition for an Effective Legal Norm

Defining concepts is both a condition of scientific precision, but also of social effectiveness of the law. This consists of giving a clear and precise meaning to the notions used in the legal text which increase its intelligibility. To this end, it has been said that "the first condition to ensuring the practicability of the law is its sufficient definition"[4].

Well defining the terms we use helps us to discover the limits of the regulations, understand the nature of legal institutions and as such ensure the applicability of the norm. However, this does not mean that every term used in conceiving the concepts must be defined. The law texts are not works of doctrine or didactics, which means that we must not overuse them[5]. Unfortunately, there is a tendency to use this method more and more. What is more serious is the fact that quite often, the legislator uses drafting technique wrongly, by defining a term through itself, by using purely negative or descriptive expressions. It has been shown for this reason, quite justifiably, that "this procedure sometimes leads to absurd even ridiculous legal formulas"[6], which have nothing to do with the required precision of this procedure.

In the situation where the legal definition of a concept does not appear necessary, the task of undertaking it falls to jurisprudence or doctrine. In the process of developing a definition, a series of rules should be adhered to, rules resulting from the characteristics of the legal concept. Unfortunately, the practice of this show a crass ignorance of the techniques used to give a definition. By criticizing the way in which the definitions of legal concepts are written, it has been shown that "the problem in Romanian jurisprudence and doctrine is that they too often define legal concepts by explaining them. This sort of method of decision or analysis does nothing but render any argument stereotypical or ineffectual"[7]. The author we quote has shown that in the end "defining a legal concept must always be normative, constructive, systematic and autonomous, and the proximate genus and specific difference used in defining such a concept must be juridical, not factual"[8].

3. Using Numbers and Enumeration in Constructing the Juridical Norm

Other methods used in the development of laws are numbers and enumeration, whereby different phenomena of a quantitative and qualitative sort are recorded. Thus, using numbers is an element of precision employed quite often in lawmaking to establish the duration, dimension and reach of the juridical effects of laws.

Doctrine[9] has shown us that depending on the degree of precision that the legislator seeks to give the new regulation, the numbers can be more rigid (absolute figures) or more flexible (by indicating limits, either maximums or minimums), this solution is more

[3] D. C. Dănişor, *Juridicizarea conceptelor*, in "Dreptul" Review, no. 3/2011, pp. 53-63.
[4] J. Dabin, *Théorie générale du droit*, Dalloz, Paris, 1969, p. 268.
[5] Anita M. Naschitz, *op. cit.*, pp. 256-257.
[6] P. Pescatore, *Introduction à la science du droit*, Centre universitaire de l'État, Luxembourg, 1960, p. 214.
[7] D. C. Dănişor, *op. cit.*, p. 65.
[8] *Ibidem*, p. 69.
[9] Anita M. Naschitz, *op. cit.*, pp. 261-262.

susceptible to help individualize a law and therefore preferred in cases where this is wanted (for example, in case of sanctions). The use of numbers in lawmaking proves to be a useful procedure for the stability of either procedure or prescription terms, in order to establish the value of taxes owed, to determine incomes, punishments, sanctions etc., however it has its disadvantages, for example in case of hyperinflation, to establish the legal monetary quantum for certain rights generates the need for more prescriptive changes.

With regard to enumeration, it is characterized by "the dismantling of an abstract idea, which is considered too vague to allow to be used in practical applications"[10]. The use of enumeration makes it possible to understand certain very abstract concepts, and its practicability is established by the lawmaker depending on the purpose of the regulation.

There are two kinds of enumeration used by the lawmaker: demonstrative and restrictive. The former follow a general principle, showing which situations, in the lawmakers' opinion, are under consideration by the law. In this hypothesis, the lawmaker sanctions the principles of regulation and uses words such as "especially" or "for example", or any expression which show the intent to exemplify without exhausting the cases considered by the principle. However, the latter are those used in case of situations which detail the set general principle and exhausts its content. To over-interpret any opposite situation is excluded. The restrictive or demonstrative nature of the enumeration must clearly result in the way the text is drafted. However, the legislator does not respect this principle, allowing for a diverging interpretation. In order to determine the nature of the enumeration in these cases, we must follow the reasoning for the norm and the way in which it correlates with the legal system[11].

There is a notorious fact that the system of law cannot render in detail all the changes of the social reality, all the inexhaustible diversity of practical situations, and therefore it must use certain procedures of rational simplification. Such methods are standardization, as used in the any technical field and classification. The typology represents a method whereby the legislator chooses the current types of relations from all possible relations and excludes all others[12]. Classification is a process of regrouping, subordinating, which is quite different from the meaning it carries in regular talk where is signifies diversity. The literature[13] has shown that the reason for using such methods of legal technique is motivated by the simplification of the legal system which can be applied in certain situations, goods or social relations or to establish the legitimacy of mixed situations which could not be classified under one clear heading. However, these methods should not be used excessively in order to protect the system of law.

4. Legal Constructs, Suppositions and Legal Fiction Used as Legislative Techniques

Legal constructs represent one of the most complex and elevated elements used in elaborating regulations. With reference to forming juridical constructs, F. Gény shows us that "after the concepts that dominate legal reality are identified through a process of standardization, they are subjected to certain analyses, combinations or modifications which ultimately lead to forming independent entities which are capable of accepting the facts of social reality in virtue of the ideas at their core. It is thus that legal constructs represented by

[10] *Ibidem*, p. 263.
[11] D. C. Dănişor, I. Dogaru, Gh. Dănişor, *op. cit.*, pp. 231-232.
[12] *Ibidem*, p. 232.
[13] I. Mihalcea, *Valenţele creatoare ale tehnicii dreptului*, "Conphys" Publishing House, Râmnicu Vâlcea, 2000, p. 207.

concepts and their results are translated into hypotheses or theories that tend to completely systematize the law"[14].

Legal constructs exist somewhere between technical processes of lawmaking and those supporting the interpretation and application of the law. Their specific function is to introduce an element of logical coherence in the complex system of laws, allowing the discovery of unity within regulations as well as the relations between them and the institutions[15].

Last but not least, suppositions and legal fictions are also specific means, "which share the ability to detach themselves from the variable and infinite characteristics of the facts which give purpose to the law, in order to highlight their main characteristics, presented in a coherent and logical structure, with the goal of properly carrying out the legislative policies in certain fields subjected to regulation"[16]. Legal fiction and suppositions are included in the framework of "methods of adaptation". It is through them that legal categories are thus adapted, redefining the reasoning and coherence behind the law[17].

As for suppositions, they are considered "the means used by the lawmaker in the process of conceptualization, due to the insufficiency and inadequacy of other categories or out of reasons of legislative policy"[18], and are generally defined as "technical methods whereby the lawmaker accepts or even imposes the existence of something without the need to research the facts"[19]. This supposition is founded on things that seem real but which do nothing more than generalize what is pervasive and common in certain facts or circumstances which will acquire a legal significance. The point of this is to transform a probability into certainty or, to admit coin a phrase, "probable certainty"[20]. At the same time, suppositions present a wide gamut of applications, as legal means of investigation as well[21], however, we will not mention this aspect her, but rather focus on their role of legislative technique.

In order to identify suppositions as a legislative technique it is necessary to distinguish if they are the base of legal rules or if they affect the reasons which underlie these rules. Their justification is often presumed. In the first case, supposition plays a special role in arguing for the regulating solution, and in the second case it has the role of applying the other processes of legislative technique. In the end, using suppositions is based on scientific data and is therefore not the result of an arbitrary attitude of the lawmakers[22].

However, legal fiction is considered "a complex method of legislative technique which is put to good use in the development of legal norms, which highlight the relative autonomy of the law, its flexibility and internal creative force. Essentially, this method has the effect of having a fact be considered a legal reality, even though it does not exist"[23]. The legal fictions "integrated in the system of general methods of legislative technique not only enrich the lawmaker's arsenal, but also ensures the flexibility of the legal categories integrated among the other techniques in relation to the need for flexibility in the law. At the same time, legal fictions also help fill in the gaps in the law, some of which have inevitably appeared. These

[14] Fr. Gény, *Science et technique en droit privé positif*, Tome III, Recueil Sireý, Paris, 1921, p. 191.
[15] Anita M. Naschitz, *op. cit.*, p. 275.
[16] I. Deleanu, *Ficţiunile juridice*, All Beck Publishing House, Bucharest, 2005, p. 90.
[17] J. Dabin, *La technique de l'élaboration du droit positif spécialement du droit privé*, Brusseles, Bruylant, Sirey, 1935, p. 168.
[18] I. Deleanu, V. Mărgineanu, *Prezumţiile în drept*, "Dacia" Publishing House, Cluj-Napoca, 1981, p. 26.
[19] I. Craiovan, *Tratat de teoria generală a dreptului*, "Universul Juridic" Publishing House, Bucharest, 2009, p. 414.
[20] I. Deleanu, *op. cit.*, pp. 90-91.
[21] In order to get a broader view of suppositions as a means of discovery, please read: Andreea Tabacu, Ramona Duminică, *Prezumţia ca mijloc de probă, potrivit noului Cod de procedură civilă şi noului Cod Civil*, in "Revista română de drept privat" Review, no. 6/2011, pp. 165-176.
[22] I. Mihalcea, *op. cit.*, pp. 210-211.
[23] I. Craiovan, *op. cit.*, p. 413.

fictions offer a solution to the discordance between the pace of law and that of reality, which is more alert and loose, even rebellious against the pre-elaborated and often fetishist canons of law, but also a solution to the inconsistencies in the law, some of which are most upsetting and hard to understand, even incomprehensible. The fictions can standardize legal contradictions and discard their undesirable effects"[24].

French doctrine[25] shows us that by using legal fictions, we seek to adapt or "bring up to date" certain legal categories, since it allows us to include new hypotheses among the existing legal categories, as if they belonged with them. Through the same process, new categories of law are created. Thus, fiction is considered not just a general method of technical legislation, but a specific one also. It is a method of creating the law through economy of means, a process of codification[26]. Indeed, this method is useful. However, it must be used carefully in the development of contemporary law because it could lead to unacceptable solutions.

Conclusions

Legal concept used a means to express modern laws, are abstract notions. The every diversifying social reality and the ever increasing complexity of the social life generate a higher level of conceptualization. The need to include all this complexity of individual and group decisions and facts into one legal system, in order to coordinate the subjects, renders the law more systematized and conceptualized. It is therefore, that we plead alongside other authors[27] for the necessary reforms in this field, so that the call for a "simplification of the law" may not remain unanswered as it is at present.

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[24] I. Deleanu, *op. cit*., p. 34.

[25] Anne-Marie Leroyer, *Les fictions juridique*, thèse, Université Panthéon-Assas, Paris II, 1995, p. 199 and the following.

[26] *Ibidem*, p. 227.

[27] D. C. Dănişor, I. Dogaru, Gh. Dănişor, *op. cit.*, p. 236.

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IDENTIFICATION OF COMMON LAW RULES APPLICABLE TO SECURITIES THAT ARE CLASSIFIED BY ECONOMIC FUNCTION AND METHOD OF ISSUANCE

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Abstract

We can identify in the legal literature and especially in the economic one several criteria for classification and analysis of the general category represented by securities[1].

From the perspective of civil law, these classifications allow multiple analyzes as we have decided to show in this study.

Keywords: *title, share, warrant, nominative title, security.*

Introduction

Commercial bills, also known as negotiable instruments, are considered as individual or single titles that appear due to separate commercial operations and are used to pay or guarantee the credit, and their common element is that they offer the holder the unconditional right to a debenture on short or medium term, consisting of a certain sum of money.

1. Classification of securities by their circulation. Depending on their economic function and how they were issued, securities are classified as*: commercial bills, bonds and securities*.

2. Analysis of the rules of common law regarding commercial bills

Commercial bills, also known as negotiable instruments, are considered as individual or single titles that appear due to separate commercial operations and are used to pay or guarantee the credit, and their common element is that they offer the holder the unconditional right to a debenture on short or medium term, consisting of a certain sum of money.

The bill of exchange, promissory note and check fall within the category of commercial bills, except that the first titles represent both debt securities and payment instruments, while the check is mainly a short-term payment instrument payable on demand.

[1] Aida Diana Dumitrescu, *Titlurile de valoare. Reglementare, doctrină, jurisprudenţă*, C.H. Beck Publishing House, Bucharest, 2011, p. 12.

Some commercial bills, such as the bill of exchange, may be used as means of payment for the international credit letter (lettre de crèdit stand-by). Thus, through simple techniques, the bill of exchange can be used as a mean of achieving discount and unintended, compensation of mutual debts held by customers of the same bank, collection at maturity in customer's benefit and making international payments.

Commercial bills are indirect means of payment, which create a new debt that will be used to settle an existing claim[2]. They are accepted in the regulation of claims because their negotiation is simple and fast but they also give the creditor specific warranties.

Issuance of commercial bills represents for a debtor a way of securing payment to the creditor without the debtor personally executing the promised performance.

If the bearer cashes in the actual amount contained in the title or the commercial bill has been credited to the account of the beneficiary, then the debt is extinguished, and the proof of payment is done by writing a receipt on the commercial bill and once the payment has been done the commercial title is out of circulation.

The right and obligation contained by commercial bills are formal and independent of the cause that gave them birth, giving them the quality of issued securities[3].

The significant formalism of commercial bills is due to their security features necessary for third parties. Both the validity and effectiveness of obligations assumed by the issuer are subject to the conditions of form and intrinsic elements for the qualification of the will expressed at issuance of the titles/securities/bonds.

3. Analysis of the rules of common law applicable to registered securities

Registered securities ascertain the contracts under which they were issued or to which they refer, being in fact documents which give the owner a real right (of property or mortgage) over some goods, or securities that incorporate a real right of property on pre-determined goods found in storage (warehouses, docks) or loaded on ships to be transported.

Experts' opinions are diverse: some argue that these securities substitute goods and the real rights existing on these goods are incorporated into these titles that are moving instead of the goods[4], while others, to whose opinion we affiliate, consider them to be the causes because in their text is indicated the cause of debt (causa debendi)[5].

The circulation of registered securities is provided by inserting the clauses *to order* or *to bearer*. These clauses have actually transformed the security into a legal document under which the issuer has the obligation to perform to his contractual partner or any other legitimate holder of this financial title.

What is specific to these titles is that, in order to remove evidence of the inaccuracy of some material facts, the debtor can not oppose to the legitimate holder the except of liberality of these titles.

The holder of a registered security/nominative title may invoke the mere possession of title without claiming enforcement of the obligations by the issuer. If the owner accepts the rights given by the title, obligations given by the same security shall be deemed as accepted and he cannot claim the divisibility of title's legal content so he personally becomes debtor for all obligations specified in it.

In the category of registered securities are included: maritime loading policy, insurance policy for goods, warehouse receipts (to order or bearer), warrants (promissory note secured by the pledge of goods), delivery order, etc.

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[2] Alba Iulia, Court of Appeal, Commercial Division, Decision 203/2000 on www.just.ro

[3] E. Florescu, *Regimul juridic al titlurilor de credit si valorilor mobiliare*, "Rosetti" Publishing House, Bucharest, 2005, p.69 ff.

[4] I. Turcu, *Operaţiuni şi contracte bancare*, "Lumina Lex" Publishing House, Bucharest, 1995, p.66.

[5] M. Bratiş, *Titlurile de valoare comercială*, "Revista de drept comercial" Review, vol. XVth, no. 5, 2005, pp. 26-33; T. R. Popescu, *Drept civil român*, U.N.S.R. Central Publishing, Bucharest, 1948, p. 303.

The essence of such securities resides in the opportunity created for the buyer or the creditor, secured with collaterals, to obtain either the desired goods or their values instead when those are destroyed, without having to move and actually hand over the goods in question.

To discuss the legal nature of these securities means, first of all, to point out that in reality these documents certify the contracts under which these securities have been issued or referred to, and to analyze afterwards each title's legal features.

4. The rules of common law applicable to securities

Securities give the holder ownership rights and / or personal and non-patrimonial rights on the issuer, as well as the right to negotiate securities which are incorporating the rights mentioned above.

These values preserve their legal nature of movables/chattels, even if the rights represented by the title refer to real properties owned by the issuer.

Their issuance allows the buyer to make an investment in an income producing capital which has resulted in their being regarded as "second degree goods" compared to "goods of first instance" which represent the issuer's capital[6].

Securities can be traded on the stock market since they have the ability to ensure investors the transnational mobilization of any claimable debt. The importance of these titles is therefore great, especially in terms of operations dealing with transfer of funds or mobilization of capitals.

In the specialized literature[7], it is shown that the creditor can execute (seize or sell) only shares, which is an exception from the nominative titles that represent the capital of any commercial company.

Common rights and the legal nature of a "share" Shares issued by a joint stock company are registered securities and represent in fact a fraction of the registered capital that gives to their owner the quality of partner, with all the rights and obligations related to this quality[8].

If the share is a fraction of the registered capital from the economic perspective[9], with nominal value, meant to provide commercial credit to third parties for joint stock companies and to bring economic benefits to all shareholders, from the legal point of view it is a title representative of the social contribution made by the associate/partner to the joint stock company's capital. [10]

The shares should not be considered only static, as written documents ascertaining the social contributions, but also dynamic because they interfere with the intra - company and inter - shareholders[11] circuit.

The doctrine states that the shares get more qualifications, depending on their role within the legal corporate report or outside of it, in terms of their legal and economic

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[6] E. Florescu – idem, p. 82.

[7] C. Gheorghe, *Garanţiile reale purtând asupra părţilor sociale şi acţiunilor societăţilor comerciale*, "Revista de drept comercial" Review, no. 5/2004, p. 55; S. Zilberstein, V. M. Ciobanu, *Drept procesual civil. Executare silită*, "Lumina Lex" Publishing House, Bucharest, 1996, p. 208; G. Boroi D. Rădescu, *Codul de procedură civilă comentat şi adnotat*, All Publishing House, Bucharest, 1994, p. 691.

[8] M. Bratiş, *Calificarea juridică a acţiunilor emise de societatea comercială pe acţiuni (I)*, "Revista de drept comercial" Review, no. 2/2006, pp. 30-43.

[9] I. Băcanu, *Capitalul social al societăţilor comerciale*, "Lumina Lex" Publishing House, Bucharest, 1999, pp. 36-38.

[10] C. Roşu, Maria Lavinia Tec, *Dreptul societăţilor comerciale, Curs universitar*, "Mirton" Publishing House, Bucharest, 2004, p. 214.

[11] Carmen Tean, L. Săuleanu, *Transmiterea dreptului de proprietate asupra acţiunilor nominative*, "Revista de drept comercial" Review, no. 5/2000, p. 51ff.; Elena Cărcei, *Regimul juridic al acţiunilor şi acţionarilor potrivit Legii nr.31/1990*, "Dreptul" Review, no. 2/1991, p. 16ff.; L. Bercea, *Acţiunile şi acţionarii băncilor*, "Revista de drept comercial" Review, no. 7-8/2003, pp. 356-366.

circulation, being successively considered to be documents of legitimacy, equity, securities, debt value stocks, corporate debts[12].

In order to discuss the legal nature of share we must start from the fact that a share is almost like a corporate debt title[13] which respects the condition of incorporating the right, but does not meet the other two conditions: autonomy and literalness[14].

Note that, in case of a share, the contents of holder's right is specified only incompletely in the share and the Articles of Association of the commercial company should be consulted to determine the rights and obligations of each shareholder. Thus, only taking into consideration these two documents satisfies the requirement of literalness, while the security itself is characterized by literalness without requiring the fulfillment of other conditions.

Moreover, the legal content generated by a security and its correlative rights and obligations remain the same while, when we talk about a share, the contents of holder's right varies in relation to modifications of the Articles of Association and the issuing company's financial results during its existence.

The formalism of the confirming document is partial and occurs only in the case of shares issued in material form. The share is usually represented as a document under private signature, but the law provides also for the situations where it is required that the share's form should be that of a document in original.

If the share is issued in a material form, the document must contain certain formal requirements - mandatory terms (company's name and duration, the Articles of Association date, the registered capital, the number of shares and their serial number, the nominal value of shares and payments made, etc.)

In legal circulation of shares, the subsequent buyer does not receive a new autonomous right, but only a right derived from the legal corporate report. Exceptions that the company can oppose to the first buyer are opposable to subsequent purchasers as well, but the new owner does not receive the unenforceability of personal exemptions that could have been claimed from the previous owner, to whom the right was first transmitted, so our conclusion is that a share is and remains a causal security[15].

The situation is different from the rules applicable in the case of a bill of exchange or promissory note, where independent rights and obligations are transmitted by endorsement and, from this point of view, the legal circulation of a share is more like legal circulation of a movable/chattel in terms of the common law than that of securities.

Finally, we conclude that the shares[16] issued by the joint stock company are part of securities category, but there is no identity of features, because the autonomy of an incorporated right lacks in the case of a share and its literalness is partial.

The category of imperfect securities includes corporate securities, including shares and bonds issued by limited liability companies.

The legal nature[17] of a share is complex compared against that of a security or other incorporeal movable, depending on the legal framework used during the analysis. The share is presented as *an imperfect security* because it does not offer the certainty (in the future) of an

[12] M. Bratiş, *Titlurile de valoare comercială*, "Revista de drept comercial" Review, no. 5 2005, p. 31.
[13] R. I. Motica, L. Bercea, *Drept comercial român*, "Lumina Lex" Publishing House, Bucharest, 2005, p. 169.
[14] M. Bratiş, *Titlurile de valoare comercială*, "Revista de drept commercial" Review, no. 5/2005, p. 29; I. L. Georgescu, *Drept comercial român*, Socek&Co Publishing House, Bucharest, 1948, vol. II, p. 487; I. Turcu, *Teoria şi practica dreptului comercial român*, "Lumina Lex" Publishing House, Bucharest, 1998, Vol. I, p. 463.
[15] M. N. Costin, C. A. Jeflea, *Societăţile comerciale de persoane*, "Lumina Lex" Publishing House, Bucharest, p. 41.
[16] M. Bratiş, *Calificarea juridică a acţiunilor emise de societatea comercială pe acţiuni (I)*, "Revista de drept comercial" Review, no. 2/2006, p. 37.
[17] Elena Cârcei, *Societăţile comerciale pe acţiuni*, All Beck Publishing House, Bucharest, 1999, p. 17.

incorporated right, its existence and the extent of its changes, because it can undergo positive or negative modifications, depending on the company's financial results during its existence.

On the other hand, we can observe that not all company titles are corporate securities; the certificates of social shares issued by the limited liability company at the request of its partners are not securities and, even though they were issued by a company with the legal nature of corporate securities, they are declared non-negotiable by law and have no intrinsic value[18], so the shares and bonds issued by corporations are the only titles that are part of corporate securities category[19].

The share materializes in written the rights of any partner on an indivisible part of the registered capital, and this right is incorporated into the title and cannot be exercised by the holder, transmitted or modified. It includes in the written title the right it expresses but it is however debatable whether it can be characterized by literalness and autonomy, this being possible only when a broader sense is given to the concept of literalness and the contents of a share is completed with the terms of company's Articles of Association[20].

The term "share" indicates either the ideal rates in which the company's registered capital is divided or the document specifying those rates, i.e. securities incorporating the rights derived from the quality of partner and also equity titles[21].

A clear advantage[22] of the shares, in the dynamics of their circulation, on the impediments posed by the need for a material existence of the document, is that shares do not need a written document to confirm their goal.

The specific features of shares determine in turn the applicable legal rules. Thus, *the indivisibility of shares (specifically established by Law 31/1990)* makes the alienation of shares possible only in full and by consideration of a just value for them, determined in a uniform manner, but that does not mean that a share cannot be object to claim of ownership from many people. Also, regarding *the transmission of shares by assignment of debts*, the character of shares' assignment is established by the legislator (Law 31/1990) by regulating the transfer of rights of ownership from one owner to another owner as the assignment can have for object registered shares, bearer shares or shares issued in dematerialized form traded on a capital market.

5. Improper debt securities and common law rules

Improper debt securities are documents prepared following the model of debt securities, but they may not receive this qualification[23]. The category of improper debt securities includes transport tickets, entrance fees to museums and theaters, lottery tickets, etc.

We must emphasize the opinions expressed in the doctrine, under which it is stated that these documents contain the stipulation or promise of a provision of service, participation in a lottery or a bet, an obligation to return things or money and, therefore, they show a record made or payment received[24].

Improper titles are used to legitimize and are found under the names of documents of legitimacy and countersigns of legitimacy. By legitimacy, the possession of such a document

[18] M. Bratiş, *Titlurile de valoare comercială*, "Revista de drept comercial" Review, no. 5/2005, p. 27ff.; M. N. Costin, C. A. Jeflea, *Societăţile comerciale de persoane*, "Lumina Lex" Publishing House, Bucharest, 1999, p. 38ff.

[19] M. Bratiş, idem, p. 36.

[20] R. I. Notica, L. Bercea, *Drept comercial român*, "Lumina Lex" Publishing House, Bucharest, 2005, p. 170, Ş. D. Carpenaru, *Drept comercial român*, "Lumina Lex" Publishing House, Bucharest, 1998, Vol. I, p. 463.

[21] M. Capiluppi, *Diritto commerciale*, "Taramontana" Publishing House, Milano, 1998, p. 278.

[22] Ph. Merte, *Droit commercial, Sociétés commerciales*, Precis Dalloz Publishing House, Second edition, Paris, 1990, p. 220.

[23] I. Dogaru, L. Săuleanu, A. Calotă Ponea, *Teorie şi practică în materia titlurilor comerciale de valoare – Cambia, biletul la ordin şi cecul*, "Didactică şi Pedagogică RA" Publishing House, Bucharest, 2006, p. 10.

[24] D. Gălăşescu Pyk, *Curs de drept bancar*, "I. C. Parhon" Publishing House, Bucharest, 1950, pp. 85-87.

represents the legal proof of ownership right (a proof based on a simple assumption, which take effect until proven otherwise).

Characteristic for these titles is to be used as documentary evidences, because they lack the character of incorporation of the right in the document, the literalness character and the character of autonomy. Improper titles are not meant for circulation, the right specified in it being intended to be exercised only by the person to whom the document is assigned.

The Supreme Court issued a decision[25] to apply the principles governing the bearer debt securities and specified: "the character of bearer security therefore results especially from an external element embedded in the title, by its express reference in the issuing law, according to which the receipts issued for the subscription to the business loan and medals are to bearer"[26]. While in the judicial court practice it is stated that what is characteristic for a title of legitimacy as opposed to a bearer share is its restricted (limited) existence, the lack of speculative element and minimum value, the doctrine points out that these signs are only discriminatory external signs, and the titles' value is not always an external sign.

Judicial Court practice also ruled the differences between bearer debt securities and documents of legitimacy, and such a resolution was determined by the National Recovery loan from 1945.

Conclusions

Identification of common law rules applicable to the securities classified by function and economic issue of how useful both in theoretical and in practical terms, considering civil legal nature of these documents and the applicable regulatory framework (Code civil[27] and special laws[28]).

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[25] "*Pandectele Române*" Review, no. 4/2001, p. 237-247.

[26] I. L. Georgescu, *Notă la Decizia nr. 342/26.03.1946 a Curţii de Casaţie*, in "Pandectele Române" Review, no. 4/2001, pp. 240-247. A. Bruschettini, *Trattato Dei Titoli Al Portatore*, Nabu Press, Italy, p. 326; U. Navarrini - *Trattato teorico-pratico di Diritto commerciale*, "Fratelli Bocca Editori" Publishing House, Milano, 1920, p. 75; Ascaretii, *Titoli di credito impropri*, Temi emiliani, 1929, I, Vol. 144.

[27] Civil Code was republished in the Official Gazette of Romania, Part I, no. 505 of 15.07.2011 and amended by Law no. 60/2012 approving Government Emergency Ordinance no. 79/2011 for regulation of certain requirements for entry into force of Law no. 279/2009 of the Civil Code.

[28] Law no. 58/1934 law on bills of exchange and promissory notes and the Law no. 59/1934 on checks. Published in the Official Gazette of Romania, Part I, no. 100 of 01.05.1934.

C. Gheorghe, *Garanţiile reale purtând asupra părţilor sociale şi acţiunilor societăţilor comerciale*, "Revista de drept comercial" Review, no. 5/2004;

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THE IMPORTANCE OF RELIGIOUS BELIEFS IN MAINTAINING LIBERAL DEMOCRACY. TOCQUEVILLE'S CONCEPT OF RELIGION ROLE IN DEMOCRACY

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Abstract

In this article I am trying to resume and interpret the relationship between religion and democracy as it was presented by Tocqueville in "Democracy in America". The topic is very actual and it worth our consideration giving the fact that we live in times when moral, faith and religion principles aren't present (as it should be) in Romanian democracy.

Key words: *religion, democracy, state, American democracy, Alexis de Tocqueville*

Introduction

Alexis de Tocqueville is the theoretician of the democracy as form of government. This is why John Stuart Mill affirms that "Democracy in America"[1] is "the first philosophical work ever written regarding the democracy as it exists in the modern world".

In "Democracy in America", published in 1835, Tocqueville wrote of the New World and its burgeoning democratic order. Observing from the perspective of a detached social scientist, Tocqueville wrote of his travels through America in the early 19th Century when the market revolution, Western expansion, and Jacksonian democracy were radically transforming the fabric of American life. He saw democracy as an equation that balanced liberty and equality, concern for the individual as well as the community.

In a voyage to a masterpiece in political sciences

When Tocqueville first thought of writing a book about America and why he had chosen America has never been entirely clear. Neither the facts known, nor the existing documents can help us to answer these questions. The facts are clear but they highlight only the shallow side of this journey: the ambition of two young scientists to research the penitentiary system in America.

In 1831, two young Frenchmen - Alexis de Tocqueville and Gustave de Beaumont - received permission to travel to the U.S. for the purpose of studying the U.S. prison system. Both were at odds with the new government of Louis Philippe, and they were looking for an excuse to leave France.

Even before leaving France the two friends had determined to study more than criminal codes and penitentiary schemes. In a letter wrote to Eugène Stoffels (Paris, February 21st 1831) Tocqueville confessed: "We are leaving with the intention of examining in detail and as scientifically as possible all the mechanisms of this vast American society about which

[1] A. de Tocqueville, *Despre democraţie în America*, "Humanitas" Publishing House, Bucharest, 2005.

everyone talks and no one knows. And if events allow us the time, we expect to bring back the elements of a "*bon ouvrage"*, or at least of a new work; for nothing exists on this subject".

They were also intrigued with the notion of American democracy and eager to see the country. So Tocqueville, then only 25, and Beaumont, 28, spent nine months travel throughout the U.S. in search of America's essence. They ventured as far west as Michigan where guides led them through the unspoiled wilderness. They headed south to New Orleans, risking their lives to travel during the worst winter in years. But the majority of their time was spent in Boston, New York and Philadelphia; they were warmly received by the elite and had little difficulty arranging meetings with some of the most prominent and influential thinkers of the early XIXth century.

Tocqueville interviewed presidents, lawyers, bankers and settlers and even met with Charles Carroll of Carrollton, Maryland - the last surviving signer of the Declaration of Independence. He also recorded his thoughts and observations on America's social and political institutions, and reported meticulously on the structure of government and the judicial system.

"Democracy in America", the book that resulted from his journey, set the stage for discussions about democracy that are still being carried on today. Tocqueville and Beaumont also fulfilled their original assignment: "The U.S. Penitentiary System and its Application in France", their assessment of the prison system (based on interviews with prisoners and prison officials) received wide acclaim and was influential among prison reform circles in Europe.

During their 271 days journey they visited 17 states and Tocqueville met two American presidents: Andrew Jackson (current at that date) and John Quincy Adams, (former).

As James Schleifer notes in his book[2], perhaps by temperament Tocqueville was more cautious: "I hope that we will do something good here. However we must not flatter ourselves yet. The circle seems to expand as fast as we advance... Besides we have not yet written a line; but we are accumulating a great deal of material... It is true that the said mission forces us to devote to prisons an enormous amount of time which would be better spent elsewhere. However that may be, we do not lack either ardor or courage and if some obstacle does not happen to stop us, I hope that we will finish by bringing forth the work that we have had in mind for a year". The travelers had evidently contemplated a mutual work on America since at least the summer of 1830.

Yet the predicted birth never took place. Between June and September 1831, their epistles ceased to mention the project, and when in October news of their plans finally reappeared, Gustave and Alexis had decided to write separate books. Perhaps a major reason for their decision was a growing awareness of the immensity of the original design, for the simplest way to make an overwhelming task manageable would have been to divide it. Whatever the causes, by late September 1831, the hoped-for *ouvrage nouveau* had become two studies.

The first two volumes of the "Democracy in America" were published in January 1835, less than three years after the return from America.58 Tocqueville had accomplished almost the entire task between October 1833 and the end of 1834. But circumstances had also favored the project. He had enjoyed almost a year and a half of relatively sound health and of freedom from both professional and family responsibilities.

In 1835 Tocqueville hoped that the final portion of his work would follow within two or three years, yet the last two volumes were not destined to appear until April 1840. In the next half decade circumstances turned sour, and one obstacle after another arose between the author and his goal.

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[2] J. T. Schleifer, *The Making of Tocqueville's Democracy in America*, 2nd edition, Indianapolis, Liberty Fund, 2000.

About religion and democracy in Tocqueville book "Democracy in America"

In "Democracy in America" Tocqueville, after the French Revolution, sustains an original point of view about the link between religion and democracy and he accomplish that by comparing America with Europe. Beyond French and European tradition, this great author is among first philosophers that take under consideration the American experience.

"Upon my arrival in the United States, the religious aspect of the country was the first thing that struck my attention; and the longer I stayed there, the more did I perceive the great political consequences resulting from this state of things, to which I was unaccustomed. In France I had almost always seen the spirit of religion and the spirit of freedom pursuing courses diametrically opposed to each other; but in America I found that they were intimately united and that they reigned in common over the same country".

For Tocqueville religion is considered as a political institution which powerfully contributes to the maintenance of a democratic republic among the Americans[3].

During his process of describing the causes that maintain the democratic republic, he reduces them to three: accidental or providential causes, laws and customs. As he points out "I here use the word customs with the meaning which the ancients attached to the word mores; for I apply it not only to manners properly so called - that is, to what might be termed the habits of the heart - but to the various notions and opinions current among men and to the mass of those ideas which constitute their character of mind. I comprise under this term, therefore, the whole moral and intellectual condition of a people. My intention is not to draw a picture of American customs, but simply to point out such features of them as are favorable to the maintenance of their political institutions".

The main concern is how to maintain liberty in a democratic regime, a regime that gives the opportunity to the people to expand their tendencies for equality. Who encourages liberty? The answer to this question is clear: "the religion teaches the art of been free". How?

Since the formation of it, America puts religion to a very important place among political institutions. "The greatest part of British America was peopled by men who, after having shaken off the authority of the Pope, acknowledged no other religious supremacy: they brought with them into the New World a form of Christianity which I cannot better describe than by styling it a democratic and republican religion. This contributed powerfully to the establishment of a republic and a democracy in public affairs; and from the beginning, politics and religion contracted an alliance which has never been dissolved. About fifty years ago Ireland began to pour a Catholic population into the United States; and on their part, the Catholics of America made proselytes, so that, at the present moment more than a million Christians professing the truths of the Church of Rome are to be found in the Union. These Catholics are faithful to the observances of their religion; they are fervent and zealous in the belief of their doctrines. Yet they constitute the most republican and the most democratic class in the United States"[4].

These been said, we can conclude that religion had been a very important issue in forming the Republic and democracy and continues to maintain them.

Since the beginning Tocqueville is mentioning that he doesn't talk only about Protestant Christianity but mainly about Irish Catholicism that has equality in its essence. When he refers to the Catholicism, in general, he adds: "I think that the Catholic religion has erroneously been regarded as the natural enemy of democracy. Among the various sects of Christians, Catholicism seems to me, on the contrary, to be one of the most favorable to equality of condition among men. In the Catholic Church the religious community is

[3] This is the title of the chapter 9, first volume of *Democracy in America*.
[4] A. de Tocqueville, *Despre democraţie în America*, "Humanitas" Publishing House, Bucharest, 2005, p. 317.

composed of only two elements: the priest and the people. The priest alone rises above the rank of his flock, and all below him are equal"[5].

The secret of this harmony is the separation between the altar and the politics. "It has not infrequently occurred that the Catholic priest has left the service of the altar to mix with the governing powers of society, and to take his place amongst the civil ranks of men. This religious influence has sometimes been used to secure the duration of that political state of things to which he belonged. Thus we have seen Catholics taking the side of aristocracy from a religious motive. But no sooner is the priesthood entirely separated from the government, as is the case in the United States, than it is found that no class of men is more naturally disposed than the Catholics to transfer the doctrine of the equality of condition into the political world"[6].

It is true that Christianity introduced equality in the Western World and this is why Tocqueville thinks that we can't oppose to this millenary trend.

All the people that he questioned (especially catholic priests) approve, in general, the separation between Church and State. "I learned with surprise that they filled no public appointments. I did not see one of them in the administration, and they are not even represented in the legislative assemblies. In several States, the law excludes them from political life, public opinion in all. And when I came to inquire into the prevailing spirit of the clergy, I found that most of its members seemed to retire of their own accord from the exercise of power, and that they made it the pride of their profession to abstain from politics".

Although politics and religion are separated, they both concur to the public wellbeing.

How the religion is put in the service of freedom? The paradox is that the religion in fact limits liberty. The religion influence upon politics is an indirect one: "Religion in America takes no direct part in the government of society, but it must be regarded as the first of their political institutions; for if it does not impart a taste for freedom, it facilitates the use of it. Indeed, it is in this same point of view that the inhabitants of the United States themselves look upon religious belief. I do not know whether all the Americans have a sincere faith in their religion, — for who can search the human heart? — But I am certain that they hold it to be indispensable to the maintenance of republican institutions. This opinion is not peculiar to a class of citizens, or to a party, but it belongs to the whole nation and to every rank of society"[7].

When talking about liberty, is Tocqueville making wordplay? What kind of liberty he agrees? A liberty based on mores and beliefs or a liberty founded on the limitless self-sufficiency of human choice? In fact he puts forward a controlled, limited kind of liberty. But to get the analysis to the end, Tocqueville believed that is the equality the most important quality met in a democracy because the liberty derives from it[8].

As Joshua Mitchell points out[9], Tocqueville is unequivocal about what will be necessary for us to live under an equality of freedom rather than equality under tyranny: for that, intelligence will be needed. In this regard, even the casual reader of "Democracy in America" will be struck by his elevation of the New England colonies. The reason is clear: he thought that the success of the American effort must have been due, in large part, to intelligence. If America had succeeded in bringing about equality in freedom, it is partially attributable to the substitution of knowledge for mere instinct.

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[5] Alexis de Tocqueville, *op. cit.*, p. 318.
[6] Idem.
[7] Idem, p. 322.
[8] N. Popa, I. Dogaru, Gh. Dănişor, D. C. Dănişor, *Filosofia dreptului. Mari curente*, All Beck Publishing House, Bucharest, 2002, p. 517.
[9] J. Mitchell, *The fragility of freedom: Tocqueville on religion, democracy, and the American future*, The University of Chicago Press, 1999.

The superiority of American democracy is avouched by the fact that here, on this land, never took place a revolution (understood as a brutal change from a social form to another), and that even from the beginning things were put in the service of democracy. In America democracy has comprised not only the material sphere but it conquered the souls too, both having contributed to the consolidation of democratic relations. In Europe, the situation was very different - "In no country in Europe has the great social revolution which I have just described made such rapid progress as in France; but it has always advanced without guidance. The heads of the state have made no preparation for it, and it has advanced without their consent or without their knowledge. The most powerful, the most intelligent, and the most moral classes of the nation have never attempted to take hold of it in order to guide it. The democracy has consequently been abandoned to its wild instincts, and it has grown up like those children who have no parental guidance, who receive their education in the public streets, and who are acquainted only with the vices and wretchedness of society. Its existence was seemingly unknown, when suddenly it acquired supreme power. Everyone then submitted to its caprices; it was worshipped as the idol of strength; and when afterwards it was enfeebled by its own excesses, the legislator conceived the rash project of destroying it, instead of instructing it and correcting its vices. No attempt was made to fit it to govern, but all were bent on excluding it from the government. The consequence has been that the democratic revolution has taken place in the body of society, without that concomitant change in the laws, ideas, customs, and manners, which was necessary to render such a revolution beneficial. Thus we have a democracy, without anything to lessen its vices and bring out its natural advantages; and although we already perceive the evils it brings, we are ignorant of the benefits it may confer"[10].

Conclusions

Certainly, Tocqueville in his writings he was a great friend to religion. The Catholic historian Christopher Dawson held that Tocqueville was a greater historian than Thiers or Guizot, owing "to the breadth of his spiritual vision and to the strength of his religious faith". Tocqueville linked religion with liberty, believed the former a necessary encouragement to the latter, and believed further that the philosophers may have struck their most powerful blow for revolution and against order and tranquility in their attack on religion[11].

Historically, there is no doubt that religion played an important, perhaps indispensable, part in the development of democratic ideas and institutions, first in Europe and then in America. Some political theorists argue, however, that once these institutions are in place, they can be maintained on the basis of purely secular values. Others contend that if values derived from religion are removed, the moral pillars on which democracy stands will crumble.

Since there are in history relatively few instances of extended democratic politics, with or without the moral guidance of religion, evaluating these conflicting claims through examination of empirical evidence is difficult. Also, many factors besides religion are simultaneously at work in all democratic societies.

Religion and democracy will always be to some degree in tension: religion claims to reveal universal moral truths, binding in some sense on every human will; while democracy requires compromise, serving partial interests and accommodating differences of opinion that may appear logically irreconcilable. The two, nevertheless, have crucial complementary needs. Religion, as Alexis de Tocqueville observed long ago, is nurtured by the atmosphere of social freedom promoted by republican government. Democracy, for its part, depends, now and for the foreseeable future, on values that have no reliable source outside religion.

[10] A. de Tocqueville, *Despre democraţie în America*, "Humanitas" Publishing House, Bucharest, 2005, p. 46.
[11] J. Epstein, *Alexis de Tocqueville: Democracy's Guide (Eminent Lives)*, Harper Collins, 2006.

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THE PROCEDURE OF DETERMINING THE PATRIMONIAL LIABILITY WITHIN THE EMPLOYMENT RELATIONSHIP

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Abstract

Through the hereby survey I have tried to explain the judicial ways of the parties of a judicial employment relationship in order to settle the litigation arisen between them and created by the production of a prejudice because of one of the parties' guilt, taking into consideration the legal boundaries in which an agreement between the parties can interfere in, given the latest modifications brought to the Labor code through Law no. 40/2011[1].

Key words: *patrimonial liability, payment commitment, parties' consent, caducity of the proceeding in determining the patrimonial liability.*

Introduction

The Labor code[2] – Law no. 53/2003 regulates the patrimonial liability in a different chapter – the third chapter with the title: "Judicial liability" comprising the art. 253-259 from the Labor code republished in May 2001, following the issuance of Law no. 40/2011.

In the specialized literature, the patrimonial liability was defined as being a form of the judicial liability which resides in its obligation to make good the material damages brought to the employer because of and in connection with their work[3].

The procedure of determining the responsibility of the employee towards its employer for the prejudice caused due to the wrongful non-observance of the duty obligations has gone through many modifications.

The common life confronts us with many conduct deviations that are not equal as importance and in a way or another, break what is considered to be the ordinary course of things[4].

Therefore, according to Labor code from 1950 (Law no. 3/1950[5]) when the material liability of the employee was regulated, the way to recover the damage was for the employer to issue a withholding order with enforceable title.

Subsequently, on one hand, in accordance with the Labor code from 1972 (Law no. 10/1972[6]) the withholding order was entitled imputation order, and, on the other hand, such

[1] Published in Official Gazette of Romania, no. 225/March 31st 2011.
[2] Forward Labor code used as Raomanian Labor code.
[3] Al. Ţiclea, *Tratat de dreptul muncii*, "Universul Juridic" Publishing House, Bucharest, 2007, p. 798; I.T. Ştefănescu, *Tratat de dreptul muncii*, vol. I, "Lumina Lex" Publishing House, Bucharest, 2004, p. 680; Ş Beligrădeanu, I. T. Ştefănescu, *Prezentare de ansamblu şi observaţii critice asupra noului Cod al muncii*, "Revista română de dreptul muncii" Review, no. 4/2003, p. 72.
[4] L. R. Popoviciu, N. C. Popoviciu, *Comparative study regarding the delinquent criminal and civil responsibility*, Agora International Journal of Juridical Sciences, Agora University Press, Oradea, 2008, p. 234.
[5] Published in Official Gazette of Romania no. 50/June 8th 1950.
[6] Published in Official Gazette of Romania no. 140/December 1st 1972.

an order could be issued only if the employee-debtor didn't consent to a "written payment commitment" that represented an enforceable title.

The current Labor code (Law no. 53/2003[7]) has dramatically changed the possibilities of the employer to recover the prejudice, the only regulated way being the conceiving of a demand on this line before the labor jurisdiction bodies within 3 years from the appearance of the right of action, pursuant to art. 286(1), letter "c", previous to the republication.

Following the modifications in the Labor code interfered in through Law no. 40/2011, it was expressly established to the employer a new way of recovering the prejudice through the consent between the employer and the employee.

Thus, to the text of art. 270 from the Labor code (the current art. 254 from the republished Labor code) were added the new 3 and 4 paragraphs whose content is the following:

"(3) In the situation in which the employer notices that the employee has caused damages because of or in connection with his work, the first will have the right to demand from employee - through a fact-finding and damage assessment report - the recovery of its counter value - through the parties' consent - in no more than 30 days since its communication.

(4) The damage's counter value recovered through the parties' consent, according to paragraph (3) cannot be higher than the equivalent of 5 national gross minimum wages."

Consequently, in accordance with the current legislation, the methods of determining and recovering the prejudice brought to the employer, as well as in the case of the patrimonial liability as in the case of the return bond, are the followings:

- parties' champerty;

- legal action.

1. Parties' champerty

Previous to the additions brought to art. 270 through Law no. 40/2011[8], it is considered to be admissible the prejudice's redress by the parties' agreement through the extinctive intendment of the rules for the contractual civil liability by bringing the following points[9]:

- the provisions of art. 295(1) from the Labor code – in its form previous to the republication – order that there can be applied with common law title the stipulations of civil legislation (which, of course, allows the conclusion of any agreement as long as the mandatory directions and the good morals are not breached – art. 5 from the Civil Code[10]);

- even the Labor code admitted the possibility for the parties to reach an agreement concerning the compensations because - in the content of art. 269(2) - it established that in the case where the employer refused to compensate the employee, the latter could lodge a complaint to the instances;

- the Constitutional Court itself pronounced on the same matter through the resolution no. 24/2003[11], which - in grounding the constitutional nature of interdiction of any wage stoppage without the existence of an irrevocable court order - considers that, on one hand, it is not infringed the contractual freedom of the contracting parties that can conjunctly agree on the methods of execution or redemption of mutual obligations. Likewise, it is not confined the employee's right to willingly consent to the recovery of possible damages caused by him, without waiting the pronouncing of a court order". The hypothesis regulated by art. 164(2)

[7] Published in Official Gazette of Romania no. 72/February 5th 2003.
[8] Published in Official Gazette of Romania no. 225/March 31st 2011.
[9] I. T. Ştefănescu, *op. cit.*, p. 505.
[10] Forward Civil Code used as Romanian Civil Code.
[11] Published in the Official Gazette of Romania, part I, no. 72 from February 5th 2003.

"makes reference only to the situations where the employee doesn't willingly cover up the damage caused to the employer".

The parties' agreement must be set down in a record (art. 1705 from the Civil code) because it prevents a lawsuit that can occur (art. 1704 from the Civil code).

But from their champerty – regardless of its denomination: agreement, addendum, convention, etc. – it must undoubtedly result[12]:

- that the employee admits to have provoked damages to the employer, including by cashing a non-owed amount;
- the description of the damage (in what resides);
- the quantity of this damage and the determination method;
- the ways of recovering the prejudice (its cover through a single payment and on what date or through installments when receiving the wage or on different dates).

Surely the "champerty" must be signed by both parties and registered to the employer; thus given the situation, the instance could no longer be referred to by the injured one in order to establish the quota of compensations and the way to recover the damage. If however such an apprehension does interfere in, the instance will have to record the parties' champerty and, as it was decided – truth be told it was years ago, but the solution suits well for this time also – "to verify if these champerties don't pursue an immoral or illicit goal, if they are not adverse to laws, state or parties' interests and if they are not the result of a vice of consent".

Judicially, it was noticed that within the agreement - in terms of the employee's obligation to compensate the employer - the first couldn't tie himself up but by stoppage of a maximum third share of his wage and for a period of rewriting of payments for 3 years because the employee is not allowed to abdicate to the rights stipulated by the work legislation[13].

Nowadays, as I've shown above, the admissibility of determining the patrimonial liability by agreement is stipulated expressly in the content of art. 254 (3), (4), from the republished Labor code.

In this situation too, the agreement must naturally meet the substantive and formal conditions of the instrument, and the mentions that have to be included in such an agreement are the already-indicated ones, by mentioning that previous to the demand of the employee's consent, the employer has the obligation to draw up a fact-finding and damage assessment report, a report that represents the talking point in view of carrying out an agreement.

Being about an agreement, *i.e.* a concordant consent of the parties, and having in view that the consent's condition is to be free and non-corrupt, the employee's refusal to conclude such an agreement with his employer cannot constitute a ground for applying measures against the first one, and the employee, by his refusal to sign a payment agreement for the damages, doesn't commit any law misuse.

Concerning the form of the fact-finding and damage assessment report, respectively the agreement concluded between the employer and the employee, can only be under written form, firstly in order to display the proof of the employer's initiative for recovering the damage by agreement which can be done only by issuing a fact-finding and damage assessment report, and, on the other hand, the agreement must be in written form in order to present full proof pursuant to art. 1191(2) from the Civil code, if the damage value surpasses the amount of 250 RON (approximately 50 Euro) .

The content of this fact-finding and damage assessment report is not regulated and we consider that it must make reference to the following aspects:

- Description of the employee's tort;
- Designation of the working duties non-observed by the employee;

[12] Al. Țiclea, *op. cit.*, p. 830.
[13] I.T. Ștefănescu, *op. cit.*, p. 506.

- Description of the prejudice and showing the calculation method of its quota;
- The term within which the damage has to be completely covered up which – according to law – cannot be less than 30 days.

This fact-finding and damage assessment report must be communicated to the employee in every possible way in which it was made sure that the employee took cognizance of its content.

Thus, the employee has the possibility to conclude an agreement with the employer for covering up the prejudice brought within a period that cannot be less than 30 days from the communication of the fact-finding and damage assessment report. A maximum duration for the recovery of the prejudice by agreement is not stipulated; this fact leads us to estimate – along with other authors – that it is possible to surpass the 3-year period stipulated by art. 259 from the republished Labor code which is not a period favorable to the employee.

Whereas the mandatory nature of the rules regulating the work privities, we consider that the absence of the fact-finding and damage assessment report at the conclusion of the agreement triggers its invalidity; this fact leads to the impossibility of using it – during a possible lawsuit – as evidence in proving the employee's patrimonial liability.

It was asserted that by concluding the agreement, the compensation payment can be carried out as well as by stoppage of pay as by full voluntary payment[14].

It is considered that if however the payment of compensations is carried out by stoppages of pay, these stoppages cannot surpass the limits stipulated as well as by art. 409 from the Code of civil procedure as by the art. 164 and 257(2) from the Labor code.

It was clearly ascertained that by concluding an agreement concerning the payment of compensations it is called off the term of limitation stipulated by art. 268(1), letter "c" from the republished Labor code[15].

We must add that for the period in which the employee observes the payment agreement by stoppages of pay or by voluntary partial payment, the term of limitation is suspended, following to develop again the term of limitation starting with the employee's first day of payment delay of the quota from the owed amount. Being about the installment of a known debit we'll have distinct terms of limitation for each non-paid rate.

It is to be noticed that the law imposes a maximum limit of compensations that can constitute the agreement between the parties, *videlicet* 5 national gross minimum wages which – during the enforcement of this stipulation – means a share of 3,350 lei, which is a share pretty reduced towards the average level of the damages produced by the employees.

Naturally, it is possible the conclusion of the agreement for the maximum amount stipulated by law, and in terms of the difference, the employer must address to the competent labor jurisdiction body in view of binding the employee to bear the makeup payment, and the payment agreement and the employee's knowledge of guilt may constitute a competent evidence in settling the lawsuit.

The employee's agreement cannot constitute a competent evidence in establishing the prejudice's quota as it was defined in the doctrine[16] (but only in establishing the employee's guilt) because the employer must also prove the quota of the actual suffered prejudice *i.e.* the loss of profit, falling on him the burden of proof in demonstrating the outlet of the required values from his patrimony.

It was properly noticed in the doctrine the fact that nothing hinders the parties to conclude the agreement only on the part from the prejudice's quota which was agreed upon,

[14] Ş. Beligrădeanu, *Principalele aspecte teoretice şi practice rezultate din cuprinsul Legii nr. 40/2011 pentru modificarea şi completarea Legii nr. 53/2011 – Codul Muncii*, published in "Revista română de dreptul muncii" Review, no. 3/2011, p. 39;
[15] Ibidem.
[16] Ş. Beligrădeanu, *op. cit.*, p. 41.

following for – in terms of the difference – the employer to address to the trial court in order to prove the existence of the prejudice and for the remaining difference non-acknowledged by the employee[17].

From the interpretation of art. 38 from the Labor code, it clearly results that the employee will not be able to conclude validly an agreement for compensations in connection with which the caducity interfered in because it would amount to the remission to the right of refusing the freely execution of the natural obligation.

We don't see any inconvenience for the agreement's procedure - stipulated by art. 254(3), (4) from the Labor code - to be applied to the other forms of patrimonial liability, such as: return bond, subsidiary liability, obligation of bearing the professional training expenses, etc., but with the following clarifications.

As regards the return bond - stipulated by art. 256 from the republished Labor code – this is a form of the patrimonial liability that doesn't suppose the employee's guilt, and for this reason we consider that it must not be covered the agreement's procedure stipulated by art. 254(3), (4) from the republished Labor code and will not be applicable either the agreement's maximum threshold of 5 national gross minimum wages.

This conclusion comes off from the fact that the text of art. 254(3), (4) from the Labor code makes reference to the damages produced because of and in connection with the employee's work. Or, the return bond arises independently of the employee's guilt, being about the gratuitous action of the employer who – mistakenly – gives the employee undeserved rights or goods.

It is to be noticed the fact that unfortunately neither the lawmaker's intervention from 2011 through the law of modifying the Labor code no. 40/2011 hasn't settled the issue concerning the absence of the agreement with executory title nature concluded between the employee and the employer.

Hence, if the employee refuses to fulfill his payment bonds within the terms and quota established through the agreement, the employer has free way to legal action where – as I've shown above – must prove not only the employee's guilt – which is easy to prove given the existence of the compensation payment agreement – but also the prejudice's quota – an aspect that implies the proof of actual outlet of the required values from the employer's patrimony.

If hypothetically the prejudice was caused through the action of more employees, the agreement stipulated by art. 254 from the Labor code can be concluded either with each of them or a single agreement with all the guilty employees and as far as several refuse to conclude the agreement or don't acknowledge their fault, the employer has free way to legal action for their part of damage.

As a conclusion, the institution of damage payment - through the parties' agreement pursuant to art. 254 from the Labor code - represents a waiver from the provisions of art. 169(2) from the Labor code according to which "The withholdings with damage title caused to the employer cannot be performed unless the employee's debt is overdue, liquid and due and it was ascertained as such through a final and irrevocable judgment"[18].

2. Legal action

In the situation where the parties don't agree *i.e.* the employee doesn't acknowledge his guilt in producing the damage or, though acknowledges his guilt, but he does not agree with the compensation's quota or when he plainly refuses to conclude the agreement stipulated by art. 254(3) or doesn't observe the concluded agreement, the only way - within

[17] I. T. Ştefănescu, *Repere concrete rezultate din recenta modificare şi completare a Codului muncii*, "Revista română de jurisprudenţă" Review, no. 2/2011, p. 24.
[18] A. Ţiclea, *Codul muncii comentat*, "Universul Juridic" Publishing House, Bucharest, 2011, p. 281.

the injured employer's reach - is that of referring to the competent jurisdiction (the court belonging to his office or residence).

The same legal action is the only possible way and on the supposition that the misdeed causing the prejudice represents the outcome of an infraction or it's not linked to the work of the person in question, thus the incidents become rules from the civil liability in tort[19].

It is obvious that in the absence of the parties' agreement, that action is one for performing the right because the employer has in view to bind the employee in redressing the damage caused.

The parties' possibility of going to the instance in order to determine the patrimonial liability is regulated expressly as well as by the provisions of art. 268(1), letter "c" from the republished Labor code (where it is regulated the term of limitation for determining the employee's patrimonial liability towards the employer); art. 268(2) from the republished Labor code that regulates the general term of limitation of labor disputes – other than the ones from (1); art. 211, letter "a" from law no. 62/2011 that regulates the possibility of challenging the payment commitment of amounts of money within 45 days from the date "when the interested party took notice of the ruled measure"; art. 211, letter "c" - from the same Law no. 62/2011 – stipulates that the requests for compensation payment, respectively the return of the amounts standing for undue payments, can be drawn up within 3 years from the date of occurrence of the damage.

Towards the regulations inscribed above, it is ascertained a regulation overlap, a concurrence of regulations that must be explained in order to know certainly which is the term of limitation – in the matter of patrimonial liability – and especially since when does it develop.

In the first case, we notice a first regulation parallel with the one from the Labor code, *videlicet* the one comprised by art. 211, letter "a", IInd sentence from Law no. 62/2011 that regulates a period of 45 calendar days where the ones considering that their rights were broken can challenge the payment commitments of certain amounts of money.

In some opinion, it was asserted that this legislative text has in view only the situation of militaries and public servants who – according to the special law – can engage for the compensations produced due to their misdeed[20]. This legal text doesn't apply – as it asserted in another view – to the parties' agreement regulated by art. 254(3) from the Labor code[21], because the payment commitment and the fact-finding report are documents with different purpose.

In the first place, we consider that the text of art. 211, letter "a", IInd sentence from Law no. 62/2011 it is confusing as it establishes that the period of 45 days starts to develop from the date when the interested party took cognizance of the ruled measure.

Or, in the case of a payment commitment we can't speak about the existence of a ruled measure, the payment commitment being univocally accepted in the doctrine as representing the employer's deed poll through which he acknowledges the due debt for having generated the damage and binds himself to return it within a certain period[22].

In relation to the judicial nature of the payment commitment, we can't agree that the text of art. 211, letter "a" from Law no. 62/2011 also applies to "parties' agreement" stipulated by art. 254 from the republished Labor code. The directions that regulate as well as the employment legal relationship system as the legal actions system derived from these are

[19] A. Țiclea, *Tratat de dreptul muncii*, "Universul Juridic" Publishing House, Bucharest, 2007, p. 832.
[20] Monica Gheorghe, *Consideraţii privind termenele de sesizare a instanţei judecătoreşti în materia conflictelor individuale de muncă*, "Revista română de dreptul muncii" Review, no. 5/20111, p. 75.
[21] A. Țiclea, *Codul muncii comentat*, "Universul Juridic" Publishing House, Bucharest, 2011, p. 298.
[22] S. Ghimpu, I.T. Ștefănescu, Ș. Beligrădeanu, Gh. Mohanu, *Dreptul muncii. Tratat*, vol. I, "Științifică și Enciclopedică" Publishing House, Bucharest, 1978, p. 215.

mandatory, of severe interpretation and considered as such. That is why as long as the legal text makes reference only to the payment commitment of amounts of money, it can't be introduced in this notion the new judicial institution of the "parties' agreement" which – by contrast – represents a reciprocal deed, transactional and non-provided with executory title.

In terms of the payment commitment referred to in the art. 211, letter "a" from Law no. 62/2011 we consider that it can't be other than the one regulated by Law no. 188/1999 concerning the Status of public servants. Thus, in the matter of public servants' civil liability, the establishing of their civil liability can also be performed by assuming a payment commitment by the public servant. The special law of the status of public servant doesn't regulate a special attack method against this payment commitment as it does in the case of the imputation order that can be issued by the manager of the public authorities against the public servant responsible of having committed the prejudicial deed.

For this reason, we consider that - in the absence of a special regulation of an attack way against the payment commitment - the provisions of art. 211, letter "a" from Law no. 62/2011 become applicable; law that establishes a term of limitation of 45 days.

In the silence of law, we must establish the moment from which this term of limitation begins to develop. We consider that in the absence of a text, it becomes applicable the regulation of common law concerning the development of prescription when are invoked nullity grounds issued from vices of consent, *videlicet* the provisions of art. 9 from Decree no. 167/1958, continued by art. 2529 from the New Civil Code, whereas a payment commitment could be challenged by the employee only on grounds belonging to vices of consent, such as the error concerning the extension of prejudice, surely not being excluded *de plano* the other situations of vitiation of consent.

On this line, the provisions concerning the development of the term of limitation stipulate that the term will develop from the date when the duress ended or the deception has been discovered, respectively from the date when the employee took cognizance about the error's existence, but not later than the completion of 18 months from the date of concluding the payment commitment.

We consider that in the case of issuing a payment commitment, the active locus standi - during its challenging - can be owned only by the public servant because the public authorities - discontent with the prejudice's share acknowledged by the public servant – can at all times issue an imputation order covering the prejudice difference non-acknowledged by the public servant[23].

Returning to the incidence of art. 211, letter "a" from Law no. 62/2011, we ascertain that it can't be applied to militaries – based on the Government Ordinance no. 121/1998 – as this legal text establishes a special period for challenging the payment commitment, a period that is applied with priority according to *specialia generalibus derogant* principle, the law regulating the determination and recovery of the prejudice caused by the militaries (O.G. 121/1998) being special in relation to the overall law concerning the challenging of payment commitments (art. 211, letter "a", Law no. 62/2011).

Thus, according to art. 30 from O.G. 121/1998, the person considering that the imputation or stoppage were carried out groundlessly or with breach of law, as well as the one who – after having signed a payment commitment – ascertains that in fact doesn't owe – partially or totally – the amount demanded by the unit, can bring challenge no longer than 30 days from the date of communicating - against signature - the imputation order or from the date of signing the payment commitment.

[23] S. Ghimpu, I. T. Ştefănescu, Ş. Beligrădeanu, Gh. Mohanu, *Dreptul muncii. Tratat*, vol. I, "Ştiinţifică şi Enciclopedică" Publishing House, Bucharest, 1978, p. 218.

Afterwards, the law establishes the competence of different bodies within the military institutions that settle these challenges; a dispute that, in the end, can be brought in front of the law courts.

As a conclusion, we consider that the text from art. 211, letter "a", from the IInd sentence - concerning the 45 days period during which the payment commitment can be challenged - it is applied only to public servants; the specification concerning the moment of development of the 45-days period which is established by appealing to the dispositions of common law in the matter of limitation.

In terms of the regulation comprised in the art. 211, letter "c" from Law no. 62/2011, it only apparently overlaps with the regulation stipulated by art. 268(1), letter "c" and (2) from the republished Labor code.

Therefore, according to the dispositions of labor code, as well as in the case of determining the employee's patrimonial liability, as in the case of the return bond, respectively in determining the employer's patrimonial liability, the term of limitation is of 3 years that develops from the date of conceiving the right of action.

Until the apparition of Law no. 62/2011, the moment of development of this term of limitation was established by appealing to the provisions of common law concerning the development of the civil liability limitation. Therefore, according to art. 8 from Decree no. 167/1958, the limitation for repairing the damage caused through a misdeed begins to develop from the date when the injured knew or had to know about the damage and about the person responsible for it.

Thus, we were in the presence of a subjective moment that depended on the moment in which the employer or the employee found out or had to find out about the existence of the damage and about the person responsible for having caused the damage[24].

After the enforcement of Law no. 42/2011, we find ourselves in the presence of special directions derogatory from the common law establishing unequivocally that the moment of development of the term of limitation is the one of performing the deed. Thus, we are in the presence of an objective moment that only depends on the moment in which the injured found out about the existence of the damage and about the person responsible for having caused it.

3. The issue of notice of default of the debtor in order to draw patrimonial liability

In the specialized literature it was stated that in the matter of patrimonial liability it is "possible" the notice of default of the debtor by applying directions of common law[25].

Along with other authors[26], we consider that the institution organizing the notice of default doesn't present usability in the matter of patrimonial liability for the following reasons.

The notice of default is an institution of common law that intends to ascertain the non-execution or the non-corresponding execution of contractual liabilities by the debtor; establishing the time since when standstill damages can be requested; the transfer of the risk of fortuitous ruination of the personal good determined when the latter stands for the obligation to give[27].

In terms of employment relationship, it would represent certain usability only the period from which one could demand standstill damages.

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[24] A. Țiclea, *op. cit.*, p. 832, I. T. Ștefănescu, *op. cit.*, p. 508.
[25] I.T. Ștefănescu, *op. cit.*, p. 507
[26] A. Țiclea, *op. cit.*, p. 833.
[27] L. Pop, *Teoria generală a obligaţiilor*, "Lumina Lex" Publishing House, Bucharest, 2000, p. 345; C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligaţiilor*, "Hamangiu" Publishing House, IXth Edition, Bucharest, 2007, p. 336.

As a general rule, in terms of patrimonial liability, the object of the obligation of relief of the prejudice resides in paying the counter value of the caused prejudice *i.e.* the payment of compensatory damages.

It must be taken into account the fact that in the content of the compensation bond's extension enters the actual suffered loss (*damnum emergens*) and the lucrum cessans (the loss of profit), so that it can be said that the loss of profit is mistaken for the standstill damages.

Consequently, the prejudice consisting of the loss of profit will be fixed as an attachment when the object of the action - within the patrimonial liability - is represented by the return bond of a good that arrived unrightfully in the defendant's possession.

On the other hand, when the actor's obligation is to return a certain amount of money - being about pecuniary liabilities – it becomes contingent the text of art. 1088 from the Civil code according to which the legal interests (and the loss of profit due to the absence of money from the patrimony of their holder) are due only from the date of the writ of summons.

The procedure of notice of default - in terms of patrimonial liability - is all the more inadequate as specific to the particularity of work privities is the subordination of the employment legal relationship parties, by reason of which the employer gives instructions and precise orders for the fulfillment of job duties.

Given the context, we can say that the work privities are framed in the situations of immunity from the creditor's incumbency to put in default the debtor, an incumbency stipulated by art. 1079 from the Civil code.

Even though – according to common law – the notice of default is also carried out through the writ of summons, the judicial nature of work privities – based on the abovementioned points – is incompatible with the institution of the notice of default, which means that the loss of profit – in the case of compensatory damages (not pecuniary liabilities) – can be demanded starting with the date of producing the prejudice, without being necessary the notice of default.

Conclusions

Unfortunately, the modifications brought to the Labor code - in terms of determining the patrimonial liability and the prejudice's recovery – fail to represent an essential evolution of the regulation in that matter.

Among the shortfalls, we have to mention here the fact that the parties' agreement introduced by the Law no. 40/2011 doesn't have an executory title, and the maximum limit of remedies – of which payment can be carried out through an agreement between the parties – is fairly reduced.

Therefore, in most cases, for the settlement of litigations in relation with the determination of patrimonial liability it will be needed to refer to the law courts.

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OPINIONS ON MEDICAL MALPRAXIS INSURANCE, CONSIDERING THE ACTUAL LEGAL PROVISIONS AND THE PROPOSALS OF CHANGING THE ACTUAL HEALTH LAW

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Abstract

This study has as object a juridical problem quite controversial, namely: the legal framework regarding malpraxis insurances in medical domain and the way in which they are actually applied. The study regards both the juridical framework existing at present in this domain, and the legislative proposals that were outlined for improving the actual legislation.

The author of this study presents also a series of personal opinions regarding this problem of medical malpraxis insurances and the changes that should be performed so that the purpose of these insurances to be achieved.

Key words*: insurance, medical domain, fault, physicians*

Introduction

In the social life, there are certain categories of professions for which the Romanian legislator provided the necessity to compulsorily conclude liability insurances, by the persons that perform them. It is about those professional civil liability insurances and the persons that are forced to conclude them are the ones that perform interesting and complicated professions such as: physicians, technical experts, lawyers, accountants, architects, building contractors, evaluators, etc.

We mention that these professions, although beautiful, are quite complicated, implying a series of risks and great responsibility for those that perform them. We consider that this is the reason for which the legislator considered as being absolutely necessary to conclude some mandatory professional civil liability insurances for the persons that perform them, in order to be covered for these risks. Accordingly, in our opinion, it was desired to protect the practice of the profession of the persons concerned and, at the same time, also the protection of the persons that could be somehow injured by this practice. Through these types of insurances, it is desired to fulfill a social protection role. They have the role to protect the person insured – physical or juridical – as against the prejudices that might be produced to some third parties following to practicing some professions, as well as to guarantee covering those damages brought to third parties through this practice.

From Law no. 95/2006 regarding the reform in health domain, it indirectly results the compulsoriness to conclude medical malpraxis insurances by the entire medical personnel. At the same time, in Order no. 346 as of 8th August 2006 for approving the Norms regarding establishing the insurance limits for the suppliers that enter into contractual relations with Health Insurance Houses, it is presented in Annex 1 that the civil liability insurance in medical domain is mandatory for all providers of medical services, medical appliances and

medicines that enter into contractual relations with the Health Insurance Houses. Practically, Law no. 95/2006 defines the "medical staff" in art. 642, para 1 of Chapter 1, as being represented by physicians, doctors of dental medicine, pharmacists, nurses and midwives, that provide medical services. In other words, this law states also who can conclude such an insurance as insurant, namely:

- physicians, doctors of dental medicine
- pharmacists
- nurses and other categories of medical staff (midwives, lab technicians, medical technicians, etc)
- medical units (hospitals, maternity hospitals, policlinics, sanitarian, private practice) for their representatives.

In this study, our attention was drawn only on the physicians that have to conclude this type of civil liability insurance.

In our opinion, there are contradictions between the provisions of the health law and the provisions of Order no. 346 as of 8th August 2006 due to the following: in the Order, it is provided that this medical malpraxis insurance is mandatory for all medical services providers that entire into a relation with Health Insurance Houses, while in Law no. 95/2006 modified, it is provided the compulsoriness of this insurance as a condition necessary and essential for becoming a member of Romanian College of Physicians and thus, in order to be able to actually perform the profession of physician in Romania, even without concluding a contract with a Health Insurance House (to this extent, art. 379 para 1, point d and art. 3 para 1 from Law no. 95/2006). The contradiction appears due to the fact that from the Order it can be understood that concluding such a contract is not mandatory for any member of this College, but only for those that have contracts with Health Insurance House. But, in order to be recognized the quality of College's member and implicitly, in order to be able to act as physician in our country, it is mandatory to conclude this medical malpraxis insurance, according to the legislation in force.

As a matter of fact, employing the civil liability in this domain means the compulsoriness of the offender to incur the prejudice suffered by the beneficiary of the service, which, in this case, is the patient.

The object of the malpraxis insurance consists of those indemnifications that the insurant (the physician in this case) owns as against a third party to which he/she provoked a prejudice, when exercising the profession.

Mainly, these indemnifications may refer to:

a) material prejudices bore by the patient;
b) moral prejudices suffered by the patient;
c) court fees.

It is important that these indemnifications to be known by the insurant at the moment of concluding the contract, having in view also the reality that not all medical malpraxis civil liability insurance contracts cover also the moral prejudices. There are some companies that do not include them in such an insurance and some companies that require for above either to conclude a separate contract, or an insurance premium with a higher value and with the express specification to this extent in the insurance contract.

A series of contractual clauses are met also, through which the insurer obligation to grant to the patient indemnifications is removed (excluded). Accordingly, the insurant will have to cover on his/her own the indemnification, not being able to force the insurer to do it. From analyzing many contracts proposed by the insurance companies, we observed that one of the situations that remove the insurer obligation is the one that refers to the damage claims formulated by third parties, other than the patients, claims whose coverage the insurers exclude.

This clause we do not appreciate as being just, due to the fact that in the regrettable situation of the patient's decease, the family or the next of kin are able by right to claim damages. Due to this, we consider that the medical persons should not accept it as an exclusion clause of the insurer's responsibility, not being just or legitimate.

Obviously, as in the case of any legal contract concluded, the contract of medical malpraxis compulsory insurance will generate rights and obligations for both parties, respectively for the insurer and for the insurant. In practice, one of the express obligations included in the contract, which is for the insurant (in this case the physician), is the obligation to refrain from admitting against the third parties – including against the prejudiced person – his/her responsibility in producing the prejudice / event that could lead to granting the indemnity. In case he/she would breach this obligation, that is he/she practically admits his/her error or guilt in producing the undesired event, the insured physician would not receive any indemnity from the insurer, even though he/she complied with all other contractual obligations and mainly, with the basic one, of payment up to date of the insurance premiums. We consider that this condition expressly imposed by the insurer is at least abnormal, due to the fact that this insurance is concluded just so that the person that is insured to protect him/herself for the eventual situation when by error or fault he/she commits a malpraxis act. Due to this reason, we consider that this contractual clause is also not legal. However, the insurers used it freely, without being noticed or sanctioned in any way because they do it. We cannot see the reason for this express stipulation in the medical malpraxis insurance contracts, having in view the reason for which such insurances are concluded.

In our opinion, insurance companies profit from the fact that the physicians are forced by law to conclude such type of professional civil liability insurance, no matter if the clauses of the insurance contract meet their requirements or not, if indeed they protect them or not, in order to perform their job. More so, unfortunately, in actual practice it can be found[1] the unfortunate reality – in our opinion – that both insurers and hospital managers embrace as preferred tactics "deny and defend yourself". Their legal advisers warn the physicians that any admission of any error, or even simply expressing the regret, is equal to an invitation given to the patient to make a claim.

We consider that this practice is at least aberrant and not natural. In our opinion, it comes from the lack of trust which the medical personnel has on one hand on the real protection which is granted by the actual legislation in case of producing a medical malpraxis act, and on the other hand, on the judgement, maturity and civic education of their patients.

We consider that these concerns are somehow justified, having in view the actual situation met in practice from which it is observed that actually there is no real legal protection of this professional category – which is the medical personnel.

At the same time, it is equally true that we, as patients, are not sufficiently informed regarding the rules that a medical act implies in general, both for the person that benefits from the medical care and for the persons that perform it. We consider that at present, we still did not receive the necessary education regarding this aspect, although we must admit that it is of major importance for us all.

The patients should give the adequate respect to the medical act and to the medical personnel that performs it, and the latter should also treat with the same professionalism and respect each and every patient.

More so, it would be desired that in case of being produced some medical errors, the medical personnel in discussion should inform the patient as quickly as possible on the situation occurred.

We consider that this behavior would have a positive effect regarding the patients and could lead to not starting any civil, disciplinary or penal judiciary proceedings, as case may be, which would be extremely unpleasant for the image, activity and existence of both parties

involved. We think that the actual legislation in what concerns the professional civil liability insurances for the medical personnel should be improved.

Due to the fact that it is a mandatory civil liability insurance, it would be useful that this insurance to be concretely performed without the insurance companies searching ways to exonerate themselves from their obligations. As it was stated in the doctrine, the insurance contract has generally at its basis the reciprocal trust of the parties that has to be also total.

Actually, we reach to the conclusion that only one of the parties – namely the insurant – has to exactly comply with the contractual clauses imposed by the other party, on contrary, he/she will not be able to practice his/her profession for which he/she trained and obtained a university degree.

We appreciate that this fact is not right and that the insurance companies should comply with their contractual obligations belonging to them and not simply transforming themselves into persons that collect money funds. On contrary, we cannot see which will be the reason and the benefit of concluding such an insurance (mandatory) for the medical act; in these conditions, we put the question what is the role of insurance companies? What happens with the insurance fund created by accumulating these premiums, taking into consideration that one of their destinations is just the one to cover the damages suffered by the persons that had the bad fortune to meet with the insured risk?

From the study performed, we observed that, by law, the medical personnel that concludes a professional civil liability insurance contract and totally complies with its clauses, paying the insurance premiums to which he/she committed, must receive from the insurer the adequate indemnity. However, in the practice from our country there were recorded very few cases (more exactly 5 cases) in which such indemnities were granted, although the insurant complied with and fulfilled his/her obligations.

In the last century, the total amount paid to the patients from the European Union as compensation for the medical errors increased, while in Romania, only 5 patients were compensated for medical errors. It is clear that this difference is not due to a decrease of the quality of the occidental medical services, but that there is a legislation friendly with the patient in the most of the countries of the European Union. It is not the case of Romania, where the health ministry acknowledges that “it is very hard to identify the moment when the medical error occurred”. This fact we do not consider as being natural in the actual stage of human society.

Almost 80% of the European Union citizens perceive the medical errors as being a serious problem in their countries and in 2011, the European Commissioner for Health, John Dalli, stated that each of the 10^{th} treatment ends by unpleasant medical consequences for the patient, consequences that could be avoided.

Although the number of claims against hospitals increased in the last century in Europe, it increased also the number of claims considered as without cause. The phenomenon is due mainly to applying in most countries of the European Union of a legislation friendly with the patient found in front of a possible medical error. Accordingly, the procedures of claiming the malpraxis simplified, and the maximum limit of the damages that can be required in case of a proven medical error increased in the European Union countries.

In our country also it is tried to change the legislation in health domain in order to come to the aid of the medical personnel, but also of its beneficiaries, we hope. In the view of the new project of the health law, malpraxis is the professional error done in performing the medical act, generating prejudices on the patient, involving the civil liability of the medical personnel and of the hospital.

What it is desired to be changed as against the actual situation?

1. Actually, the malpraxis acts are prescribed after 3 years from producing the prejudice, except for the facts that represent offences. Through this project of changing the health law, it is proposed that this interval to be reduced to 1 year.
2. Practically, at present, in all cases, the compensation of the prejudiced patients was established by the court. It is proposed to introduce the possibility of amiable negotiation, fact that is, in our opinion, to the advantage of both parties.
3. It is desired that in the future, the insurer will be the one which will take over the argument produced between the patient and hospital or physician.
4. According to the project, the medical malpraxis insurers will be put in the situation to cover both the material prejudice and the moral one requested by the patient, a new element that it is desired to be brought into the new legislation.
5. The maximum limits of the amounts that can be required by the patients as moral damage for the malpraxis causes will be established by the Ministry of Health and by the Ministry of Justice. At present, there are provided minimum limits so that most physicians are insured to these minimum limits in order to pay a malpraxis insurance as reduced as possible (this limit excludes the moral damages). Due to this, it is very possible that the value of the malpraxis insurance to increase
6. Public or private hospitals will answer for, in the view of the project, the prejudices brought to the patient due to nosocomial infections, to using medicines after their expiring date or to known defects of medical appliances.
7. Both medicines producers and medical appliances producers will have to be liable for the prejudices produced to the patients by the hidden flaws of their products[2]
8. It is desired that the medical personnel answers also for the errors that include negligence, imprudence or insufficient medical knowledge, as it is provided in the proposals of changing the actual law**.**

Conclusions

In conclusion, we consider that the actual legislation in what concerns the professional civil liability insurances of the medical personnel should be improved.

In what concerns the insurance companies that conclude such insurances of medical malpraxis, we think that there should be, at national level, a more rigorous system of controlling their activity, especially that they receive yearly the necessary authorization to do it. It could be that they do not receive this authorization, if they do not comply with the legal conditions necessary and it is observed their attempt and effective exoneration without reason of responsibility.

Also, the legislator would have desired to pay better attention to and to issue a legislation through which to give the same importance both to medical personnel and to physical persons that can be prejudiced through certain medical acts to which they were submitted to. We consider that it would be desirable that both the latter and the medical personnel to feel really protected by law.

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THE RELATIONSHIPS BETWEEN THE FRENCH POWER LEVELS AND THEIR RELATION WITH THE EUROPEAN UNION

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Abstract

France is one of the European countries with a complex administrative organization due to its large number of territorial collectivities type. The aim of our study is to highlight the way in which the French state is organized from the administrative-territorial point of view, following the administrative reform which took place in 2010, the competences of territorial collectivities, as well as the relations between them and the European Union.

Keywords: *state, territorial collectivities, competences, the European Union.*

Introduction

The analyze of constitutional and legal provisions concerning the way in which France is administrative-territorially organized showed us a complex system, with a large number of organization forms both in the Metropolis and overseas territories, which make this country a unique example of administration among the European Union states. The political, constitutional, administrative as well as economic evolutions determined the French Constituent to reshape territorial collectivities, giving them a new shape in 2010.

French local and regional diversity

France is an unitary state, with a complex administrative-territorial organization. According to the provisions of the Constitution, we clearly distinguish between: collectivities located in the Metropolis, which include the Hexagon and Corsica. These collectivities are regulated by Art. 72, Art. 72-1 and Art. 72-2 of Title XII of the Constitution; overseas collectivities, regulated by Art. 72-3, Art. 72-4, Art. 74 and Art. 74-1 of Title XII of the Constitution; New Caledonia, regulated by Title XIII of the Constitution.

According to Art. 72 of the Constitution, the territorial collectivities of the Republic are the communes, departments, regions, sui generis collectivities and overseas collectivities provided by Art. 74.

In France, there are a total of 26 regions in which: there are 22 regions in metropolitan France, including Corsica, which enjoyed a special statute ever since 1982 and 4 regions overseas (ROM). The regions correspond to administrative territorial units, which differ from the ancient historical provinces. Since 1972, the region has been acknowledged as a legal entity but not as a local collectivity, but as a public institution whose purpose was to bring a contribution to economic and social development of the region. The region has a Regional Council and an Economic and Social Committee. The Regional Council is entitled to make decisions over the budget, while the Economic and Social Committee has a consultative role. The Regional executive also comprises an Office, consisting of the president of the Regional Council and several vice-presidents charged with specific competences in a certain area of

expertise. Alongside the Regional council, there are several commissions. The region also has administrative services designed to apply the politics decided by the chosen ones.

French departments are administrative divisions, run by a Prefect and administered by a General Council. The General Council is an elected department assembly. Today, in France there are 96 metropolitan departments and 4 overseas departments (Martinique, Guadalupe, Guyane Réunion and Mayotte). Metropolitan departments are given numbers based on their alphabetical order (01 Ain, 02 Aisne etc.). Corsica has 2 departments (20A – Corse-du-Sud and 20B – Haute-Corse).

The basic collectivities of local administration in France are the communes. In France, we distinguish between the following categories of communes: a) rural communes, which also divide into communes with a population below 3500 inhabitants and communes with a population of more than 3500 inhabitants and b) urban communes. At the commune level there are two representative authorities: the Municipal Council and the Mayor. The Municipal Council is the deliberative authority, with a general competence, that works through public meetings. The municipal advisors are elected by direct universal suffrage, for a 6 years mandate. The General Code of Local Collectivities appoints in Art. L2121-2 the number of advisors for each commune, depending on the population number.

In France, there is a distinct category of collectivities that is overseas territorial collectivities. These overseas collectivities (DOM) have been created by Law of 19th March 1946, while the overseas territories (TOM) have been appointed by the Constitution of 1946.

Appointed by the Constitutional Law of 28th March 2003, Art. 72-3 presents the new constitutional architecture of the overseas entities. The new constitutional provisions try to reconcile the entire affiliation to French Republic with the territories' diversity and the populations' aspirations, taking into account their identity and distinctiveness. The provisions of Art. 72-3 aim to acknowledge within the French people some overseas populations: "The Republic shall recognize the overseas populations within the French people in a common ideal of liberty, equality and fraternity. Guadeloupe, Guyana, Martinique, La Réunion, Mayotte, Saint-Barthélemy, Saint-Martin, Saint-Pierre-et-Miquelon, the Wallis and Futuna Islands and French Polynesia shall be governed by article 73 as regards overseas departments and regions and for the territorial communities set up under the final paragraph of article 73, and by article 74 for the other communities". Concerning the French Austral and Antarctic territories, they have their own regime, regulated by Law of 6th August 1955. French Polynesia and New Caledonia make the so-called overseas countries (Pays d'outre mer au sein de la République"). By means of local referendum, which is going to take place in 2014, these two entities will decide if they continue to part of the French Republic.

In the overseas departments and regions, laws and regulations are legally applicable. They can be subject of certain adjustments related to particular features and constraints of these collectivities. The Overseas territorial communities to which the 74th article applies shall have a status reflecting their respective local interests within the Republic.

In 2010, there was a serious administrative reform. Thus, Law no. 2010-1563 aimed to reorganize the territorial collectivities on two axes: 1. departments-regions; 2. communes and inter-communality. The law put forth the following new elements within the organization of French collectivities:

Law no. 2010-1563 focused on the reorganization of territorial collectivities and introducing the following new elements within the French administration:

- to create the institution of territorial advisor who will be part of both the general council of his department and the regional council. The territorial advisor will facilitate a better coordination between the actions undertook by departments and regions, in compliance with their competences, particularities and trumps: the proximity to department and the future

strategic perspective for the region. The territorial advisor will be the one and only interlocutor between different territorial actors, the mayors in particular;
- to reinforce the exercise of local democracy by appointing the universal direct suffrage in order to elect the communes' delegates within the communitarian councils;
- to adapt the structures to territorial diversity by means of applying a new device for commune merging and a procedure designed to regroup departments and regions, by means of introducing metropolitan poles and creating metropolis;
- these new communes will stand as a new device for commune merging. These new communes will be created only with the consent of all municipal advisors or with the consent of people in each commune;
- to build Grand Paris. Grand Paris is an urban, social and economical, of national interest project, which integrates the strategic territories in Île-de-France region. The aim of the project is to strengthen the economic activity of the region, regarded as a leading horse for the entire country development;
- to develop and reduce inter-communality, by means of regrouping the collectivities on volunteering basis and by means of suppressing the levels of inter-communality that became useless. Law no. 2010-1563 related to the Reform of the Territorial Collectivities makes distinction between EPCI and the territorial collectivities groups;
- to build a single collectivity in Martinique and Guyana. The single collectivity is a new category of territorial collectivity, which resulted from the fusion between the regions and departments in Martinique and Guyana.

The relationship between the levels of powers in France

Territorial collectivities can't be really governed unless they exercise their own competences, which differ from those of the state. Free administration depends on the existence of certain devices meant to properly carry out these competences. Those devices consist of three categories: human (the administrative staff), financial (financial resources) and material (goods).
In the manner provided for by an Institutional Act, except where the essential conditions for the exercise of public freedoms or of a right guaranteed by the Constitution are affected, territorial communities or associations thereof may, where provision is made by statute or regulation, as the case may be, derogate on an experimental basis for limited purposes and duration from provisions laid down by statute or regulation governing the exercise of their powers.

The constitutional provisions expressly state that whenever powers are transferred between central government and the territorial communities, revenue equivalent to that given over to the exercise of those powers shall also be transferred. Whenever the effect of newly created or extended powers is to increase the expenditure to be borne by territorial communities, revenue as determined by statute shall be allocated to said communities. Equalization mechanisms intended to promote equality between territorial communities shall be provided for by statute). The regional and local authorities are legally based on the General Code of Territorial Collectivities (GCTC).

Regions, departments and communes have only administrative competences.

Regions have no legislative competences. Their main functions are exercised through the execution of their budget – for which they have a broad autonomy within the parameters set by national law. There is no hierarchy between regional and local government. Possible conflicts on the scope of competence of the regions or the conformity of their decisions with the law and Constitution are solved by independent administrative courts, based on actions brought by any person having standing, or by the regional prefect. The budget and its

implementation are subject to the control of independent regional financial courts. The Regions have competences in areas such as: education (high schools and establishments for specialized education), regional planning, transport (school transport and road transport, rail transport – TER, TGV), economic development (management of EU Structural Funds, economic aid), environment (regional air quality plan), cultural affairs (regional museums).

The departments have no legislative competences. Possible conflicts on the scope of competence of the departments or the conformity of their decisions with the law and Constitution are solved by independent administrative courts, on the basis of actions brought by any person having standing, or by the prefect. The Departments have competences in areas such as: education (secondary schools), economic development (direct economic aid complimentary to that of the region), town planning, environment (departmental waste disposal plan), etc.

Like regions and departments, communes have no legislative competences. The communes have competences in areas such as: social welfare (shelters for the homeless), planning (preparation of territorial consistency schemes), education (primary schools), school transport, environment (drainage, distribution of drinking water, collection and processing of household waste), culture (municipal museums, artistic teaching schools, municipal archives).

Municipalities, departments, and regions are financed principally by central government transfers, by autonomous taxation, by other sources of financing, and by borrowing. The collective interests of local and regional governments are represented vis-à-vis the state by three bodies: The Association of French Regions; The Assembly of French Departments; The Association of French Mayors. At national level, the French Senate represents the interests of territorial authorities. But, the minister of the interior, the General Directorate of regional and local government has an important role in issuing circulars for the interpretation of state legislation relevant to regional and local government. The national government appoints regional and departmental

Prefects and sub-prefects to represent the state at the departmental and regional levels.

The relationships between the French collectivities and their relation with the European Union concerning the relations between the French territorial collectivities and the European Union, they are carried out through specialized societies. Most French regions have opened offices in Brussels, either one per region or by grouping themselves. The ARF has a mandate to represent the interests of French regions and to promote their actions in several EU institutions such as the Commission, the European Parliament, and the Committee of the Regions.

The AMF nominates the mayors to the Committee of the Regions and is represented in the technical assistance group of the French Delegation to the Committee of the Regions. The association has a European Committee specializing on EU issues, which provides information to the regional associations represented by a mayor in the Committee. The AMF also has an office in Brussels that provides a contact with various EU institutions. Since December 2005, the European House of French Local Powers has performed a liaison and lobbying function between local authorities as a group, and the EU. The Maison provides information to its members by processing news, participating in meetings, completing minutes and notes, and issuing a bi-weekly electronic newsletter. It also supports the activities of the French delegates to the Committee of the Regions by participating in the meetings of the commissions inside the Committee and eventually helping to prepare the plenary sessions. In its role of representing the interests of local authorities in the EU, the Maison enters into relations with several EU institutions and expresses its opinions on several matters. In October 2007, it was decided that the General Secretariat for European Affairs (SGAE) would

establish a closer relationship with the ARF, AFD, and AMF. The SGAE will meet regularly with the delegates of the territorial associations responsible for European affairs.

Conclusions

1. Despite the administrative reform in 2010, France is still a unitary state, strongly centralized. The territorial collectivities share with the State the territorial administration and facilitation, the economic, social, cultural and scientific development, but they also cooperate for environmental protection, improve the quality of life, and fight against the greenhouse effect through a rational use of energy resources.

2. The assignment of competences between the State and local collectivities is clearly defined by legislation, so each competence area and the necessary financial resources for their accomplishment are totally assigned the State, the communes, departments or regions. Only by way of exception, certain competences are shared by several territorial collectivities.

3. French territorial collectivities do not establish direct relations with the European Union; they act only through the agency of specialized societies that advocate for the interest of communes, departments or regions at the European institutions.

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SOCIO-INTERCULTURALITY APPROACH: THE CASE OF INDIGENOUS AUTONOMOUS UNIVERSITY OF MEXICO

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Abstract

This paper presents socio-inter-cultural as a methodological construct for analyzing the complex phenomena that occur in education for cultural diversity, specifically in the case of the Indigenous Autonomous University of Mexico, the oldest university in the intercultural universities system in Mexico. It is studied through its history and specific cases the influence of different political spheres and microspheres of gender, class and ethnicity and the intertwining of intra-sociality, the intra-cultural and inter-cultural that allows understanding what happens in this institution.

Keywords: *Socio-inter-cultural, inter-cultural, intra-cultural, intra-social, Indigenous Autonomous University of Mexico.*

Introduction

Currently, in this globalized world it is observed that major changes are being given invariably, in a complex skein in which intertwine economic, political and social macro spheres and microspheres of gender, class and ethnicity that weave the social tissue.

1. Socio-intercultural

Currently, in this globalized world it is observed that major changes are being given invariably, in a complex skein in which intertwine economic, political and social macro spheres and microspheres of gender, class and ethnicity that weave the social tissue.

Civil wars in the Middle East, student protests and cultural globalifobics, restructuring of global economic blocs, re-emergence of the Eastern powers and decolonization movements in Latin America are just some of the most visible facts from Mexico in recent years. These

and other phenomena are linked synchronously or asynchronously with the dynamics of the cultural, intra-cultural, intercultural and intra-societal processes. The analysis of these processes, from the macro and microspheres, leads to the proposal socio- inter-cultural approach addressed in this work and shown schematically in figure 1.

Figure 1. Sociointercultural analysis scheme

DIMENSIONS	INTRASOCIAL	INTRACULTURAL	INTERCULTURAL
MACRO SPHERE Politic, social, economic	SOCIOINTERCULTURAL		
MICRO SPHERE Gender, class, ethnic			

Source: Authors' construction

To this end, one of the first analyses to be done has to do with the distinction between ideal theoretical issues and practical realities that are happening. To analyze ethnic and cultural diversity in global and local contexts inevitably leads to consider and combine 1) utopias, having or not hidden agendas, for some perverse and ideals to others and 2) what many forget: the realities reflected in the practices, however raw they are. Both aspects are sometimes so excluding and other intermingled, juxtaposed and superimposed, but it is undeniable that the results are part of the dynamics that societies cannot control.

Another aspect to consider is that in societies not only are observed intercultural processes as there are inter-cultural, intra-cultural, and intra-societal dynamics that could be more intensive at some point in the relationships between cultures. In other words, when caring for society or culture in isolation, it can be committed a regrettable mistake. From a bourdian perspective, the first ones are structured with the two types of relationships: the force, based on the use and exchange values covering, so interwoven, other type of sense relationships, responsible of organizations for relations of meaning in social life. This last one is referred to the cultures participating in them (García Canclini, 2004: 32).

Thus, there are two concepts that have been worked on extensively and concretely defined. For García Canclini (2004: 32) society is conceived... as a set of more or less objective structures that organize the distribution of the means of production and power between individuals and social groups and that determine social, economic and political practices (García Canclini, 2004: 32). On the other hand, from the many existing definitions of culture, it is taken the formulation that Gasché (2004) develops around the interaction of indigenous cultures with the involving national society, i.e. he presents a concept of culture considered as the observable result of human activity, and not as a series of elements, representations and values simply available and according to some authors, determine human action.

Our concept departs from the fact that the current context of the interaction [...] often puts people at several possible alternatives - traditional ways, conventional ways of acting observed in and adopted from the surrounding society. This situation gives to the person the freedom to reproduce their culture in identical way or modified and inspired by foreign models or external examples to their society. Culture considered as a result of the activity is

therefore not a stable entity, but evolutionary whose realization and particular aspect depends on the choices that its members take in every moment of their act (Gasché, 2004: 3).

Thus, the socio-inter-cultural is the dynamic relationship of various societies, with their cultures by attending regional, national or institutional events, as part of their political history. It poses as a hologram with dynamic effects between the microstructures and macrostructures, in totally interdependent aspects. Needless to say that this proposal is now considering the concepts of society, culture and ethnicity beyond indigenous peoples and it is now taking place in a dilemma where dynamic macro sociolinguistic boundaries, religious and territorial factors are no longer defining cohesion.

2. Political, social and economic macro spheres

Studies of ethnic and cultural diversity involve aspects that come from the political, social and economic macro spheres. Many of them correspond to inter-culturalism or multiculturalism of every nation that is the public policy related to what a country wants to do with their ethnic and cultural diversity at the time. It also has to do with the dynamics of the globalization's phenomenon in turn, which the forces of economic outlook cause changes because they are handled by interests beyond the local. Neoliberalism and the paradigms of late capitalism are often attempts to dominate the social economy in local contexts.

A. The microspheres: class relations, gender and ethnicity

Ethnic inequality is a complex and multifaceted phenomenon that meets structural and cultural features at the same time and says that at least three dynamics can be distinguished: class, ethnicity and gender, which make up the trilogy of structural principles of collective identities that are vital to understand schools and other educational institutions. In this context it is necessary to understand ethnicity as an ethical-political organization whose symbols give meaning to the ordering of life (Rubinelli, 2002: 268). Ethnicity refers to a group with a political project that based on a cultural heritage, becomes a social reality and forges a historical process (Korsbaek and Alvarez Fabela, 2002: 198).

As for the class, in this context is necessary to note that Bordeau and Passeron (2001:20) classes not only differ in relation to production, ownership of certain assets, but also for the symbolic aspect of consumption. In this sense, the production and consumption of higher education for cultural diversity structure different social classes. With regard to gender, even if what there is to discuss the same is very broad, brief reference is made, for Brigida García Guzmán (2000): …Gender refers to the socio-cultural construction of sexual difference, thereby alluding to the set of symbols, representations, rules, norms, values and practices that each society and culture collectively made from the bodily differences between men and women. The sex / gender system establishes guidelines governing the social relations between men and women, who generally at a disadvantage to the latter, define what is considered masculine and feminine and establish models for each sex at different levels of social reality (García Guzmán, 2000: 23).

In this section it is necessary to include the issue of racism, which does not consider it an anthropological universal, for its historical expressions have been as diverse as their definitions. However, in this case it is important to note that their specificity is in the time and space in which people live (Castellanos Guerrero, 2001: 165). As mentions Apple (2002) "…race is not a stable category. Issues such as what it means, how it is used, who uses it, how it moves in public discourse and its role's performance in educational policy and social policy in general are contingent and historical (Apple, 2002: 247). The social practices of racial classification are elaborated and contested by society and within institutions for personal and collective actions.

In Mexico, the milestones of its manifestations are colonial domination, the formation process of the nation, the influence of nineteenth-century racist theories developed in the

United States and its relationship to revolutionary nationalism and neoliberalism (Castellanos Guerrero, 2001: 166).The rejection of the Indian found immersed in the Mexican educational policy and even if it seems contradictory, racism exists in various forms and sometimes more raw in the institutions that are called intercultural.

B. Intra-social

A lot of aspects in higher education for cultural diversity have to do with intra-societal issues, participation or not of new information and communication technologies (NICT), issues of poverty of communities, participation in political parties, community development, good living, monitoring of constitutional law, among others, are of great importance in the analysis of ethnic and cultural diversity. In this area there are also studies on the laborers, hired labor force, labor markets and all matters related to economic prospects, political and social, macro and micro level to determine the orientation of the Institutions of Higher Education. The issues largely intra-societal show to a certain extent, the complexity of intercultural relations and highlight the uncertainties and difficulties in determining any aspect of society.

C. Intra-cultural

Societies are composed of men and women who in society produce and eventually renew their culture, influenced either by the collective memory and the new intra needs, as well as the influence of the periphery. That is, ethnic groups and cultures are not a uniform whole, therefore the analysis of cultural diversity necessarily leads to study the dynamics of internal changes, the intra-cultural, as intra-ethnic, referring to the different ways the members of an ethnic groups or culture manifest or not their identity, trying to make changes or not, whether trivial or structural, motivated or not by other ethnic groups or cultures.

Hence, the intra-cultural take a larger role in the study of the phenomenon of ethnic and cultural diversity. Now more than ever, it is difficult to conceive of ethnicities and cultures as homogeneous and static entities for analysis.

D. Inter-cultural

It is important to consider in this area, that the socio-intercultural dynamics not always are reconcilable differences between cultures and sometimes the world views of each one are immeasurable. Hence, it is found in these cases that their members live in different worlds. Some relationships can lead to interactions with certain types of rationality, but either the dominant culture tends to prevail or to demand that dominated culture gives up in its perspective.

Thus, intercultural processes can be observed in many different ways. It depends on the symmetries, balances or imbalances of the cultures involved and the intentions in relationships. Many of the inter-cultural proposals are based on ideal targets and to ensure the character with which they are expressed have been added adjectives that define their context. There is talk of real inter-cultural, scientific, unidirectional, between the indigenous, critical, functional, in fact, desirable, of paper, cosmic, equitable, productive, positive, internal, and so on. In practice it is found that inter-cultural processes are rather aculturals and as fair acts, symmetrical, consistent and responsible not only a great intention - seemingly innocent - and a purpose in the present circumstances, is a distant goal to reach (Ochoa Zazueta, 2002).

Often the educational proposals that are limited to inter-cultural processes eventually involve actual violence they face daily to culturally dissimilar, which always occur in circumstances unfavorable to someone because it favors the integration processes, submission, contingency and in the event of termination is detriment of the ethnic societies involved. These processes may be more or less intensive in their relationship until the case of multiculturalism, where autonomy and respect for cultural values outweigh the exchange.

3. Indigenous Autonomous University of Mexico

On December 5, 2001 was founded the Indigenous Autonomous University of Mexico (UAIM, the acronymic in Spanish), an inter-cultural institution of higher education with legal personality and its own assets. Currently, UAIM has three locations, the first, headquartered in Mochicahui in the municipality of El Fuerte, another in Los Mochis in the municipality of Ahome and third in the town of Choix, all located in urban areas in the northern state of Sinaloa in Mexico.

Its origin is the outcome from a series of political agreements that occurred in the State of Sinaloa, but originated mainly thanks to the vision, tenacity and perseverance of the anthropologist Jesús Ángel Ochoa Zazueta and a group of people who invested much of their life in what was initially a project, and is now a reality very different from the dream of its founders. "It's a crazy dream, for sensible people," Ochoa mentioned at the beginning of the project.

The emergence of UAIM is significant in many ways. It is the first institution of higher education oriented to the attention of indigenous peoples recognized by the Mexican federal government. It is the oldest among all other that are now recognized as Inter-cultural universities in Mexico, so that its operation is a reference taken as positive or negative for the other. It originates when the economic globalization processes is fully implemented, in the period of political change and it is part of the new Indigenous approach that was formed starting in 2000 in this country.

UAIM is an institution that originated being innovative and motivated the search for alternative education models in order to address cultural diversity in higher education, but the clash with the structures of state and federal government, especially with those of education led to its inverse transformation to be at this time with the same practices and vices of the other institutions of public higher education in Mexico.

The initial educational model was dismantled bit by bit. It was based on self-managed learning where the Academic Holders (students) building the knowledge, supported by research techniques, advice from facilitators, information and communication technologies like the Internet and other informative scenarios. Now, it has become an institution with a conventional academic framework returning to the focus of students attending to teachers and from learning to teaching. This aims to be accredited by the relevant bodies of the Secretariat of Public Education (SEP) according to the current staff members.

The aims of the UAIM have changed over time. The initial aims were aimed at "…influence the development of rural communities, given the human resources, regional natural vocation, research and application of science, revitalization processes supported by social development, in which education plays a leading role (Gobierno del Estado Sinaloa, 2001:2). Now its interest is no longer anthropological but its central purposes are their academic accreditation, as the current vision states: Indigenous Autonomous University of Mexico is a cultural institution with accredited educational programs, graduates socially recognized, certified systems and processes; consolidated academic bodies that generate and apply research and knowledge to solve relevant social problems (Universidad Autónoma Indígena de México (UAIM), 2011).

It is emphasized here that despite the lofty goals that has haunted this institution since its founding, the relationship with indigenous nearer communities, the *yoreme mayo*, has been subdued, with few political concessions to indigenous people and reducing their cultural identity to a mere cultural folklore aspects. The UAIM offers four educational programs in engineering: computer systems, quality systems, forestry and sustainable development and five undergraduate programs in social sciences: rural sociology, community social psychology, law, tourism business and accounting. All educative programs have duration of four years after high school. It also has some graduate programs.

The institution has a current enrollment of about 1,250 students, who are called the Academic Holders from a cultural melting pot of more than 15 ethnic groups in Mexico. 45% of them are low-income mestizos while 55% are ascribed to some of the ethnic groups. Table No 1 shows the distribution of enrollment excluding indigenous mestizos.

Table No. 1. Indigenous origin of students at the UAIM in the cycle 2011-2012

Ethnic Group	%	Ethnic Group	%	Ethnic Group	%	Ethnic Group	%
Yoreme	42%	*Jia'ki*	4%	*Mame*	2%	*Trique*	1%
Ch'ol	8%	*Zapoteco*	3%	*Mixe*	1%	*Mazateco*	0.5%
Mixteco	7%	*Cora*	2%	*Nahuatl*	1%	*Mocho*	0.5%
Raramuri	6%	*Zoque*	2%	*Tzotzil*	1%	*Totonaca*	0.5%
Chatino	5%	*Tepehuano*	2%	*Tzeltal*	1%	*Guarijío*	0.5%
Huchol	5%	*Chinanteco*	2%	*Mazahua*	1%	*Otros*	1.5%

Source: Construction of the authors from conducting surveys and additional data provided by the school administration of UAIM in 2010. Note that the percentages between indigenous people are calculated without taking into account the mestizos. Data from 2010.

According to historical data, coverage of the institution is very broad because the academic holders are coming from over 10 Mexican States. The conventional language spoken at the Institution is Spanish. However, it is noteworthy that, even when oral and written domains are widely dispersed, about 75% of Indigenous Academic Holders are bilingual, while the facilitators (teachers), only 5% is indigenous and speak Spanish and *yoreme mayo*. The organization currently has about 100 facilitators, 75% hold full time and 25% cover subjects for hours.

The challenge of UAIM continues and is to solve how to make the institution a generator of symmetric socio-inter-cultural practices and dynamics between indigenous cultures and Western culture that goes beyond the training of individuals for the labor market of capital, without the isolation of their communities or their ethnicity. The imminent danger is that, contrary to their aspirations, it becomes one of the institutions of advanced esophageal existing process (Díaz Polanco, 2006).

4. The policy in UAIM macro sphere

The ethnic map of Northwest Mexico is quite complex, in which it was observed records of native expressions that are not confined to the geographical boundaries of the Mexican states. In Sinaloa, the *yoreme mayo* inhabits a dispersed way mainly in the northern region, but their people are also in Sonora. In this area referred to there are Younger's with great potential and interest in training as academics, who by the historical conditions of its economic subjection to 1998, did not have a realistic chance of joining a higher-level educational program.

This year, neoliberal education policies had made significant progress towards the consolidation of the "quality education", as it has been implemented in public universities a

number of strategies seeking to align with the settled objectives. Among them were the implementation of the admission test and the increase in tuition fees for the state to decrease a portion of its responsibility to finance university. Local universities of Northern Sinaloa were no exception and begin to implement faithfully the institutional arrangements promoted by the Secretary of Public education (SEP, by the acronymic in Spanish) generated significant changes in the conformation of enrollment.

This meant that all the indigenous students remain out of the possibility of entering any college options for two main reasons: first, examination of the National Center for Higher Education Assessment (CENEVAL by the acronymic in Spanish) designed by and for predominantly middle-class mestizo and urban location, does not give any possibility for indigenous youth to resolve satisfactorily because the test has been found far from their worldview and its cultural profile. Second, the increasing of tuition fees significantly increased family costs in education because universities are located in the main cities, students from the small villages and rural communities have to pay daily transportation, food and school fees, they were directly disadvantaged.

The education policy of "quality", uncovered then, social and cultural asymmetries in relation to young people from indigenous communities. It also evidenced unequal opportunities for access to higher education programs, inequality with which they were treated and exclusion to which they were subjected. Here it was observed it became clear how the dynamics in the political education clearly marked the destiny of young *yoremes* left then, excluded and out of higher education. In the same year 1998, a mixed group of academics attached to the University of West (Universidad de Occidente, UDO), observing this and other adverse events to the indigenous communities in the region, proposed the project "New Frontiers Mochicahui" that led to the founding of UAIM.

The dynamics in the political macro sphere gives rise to beginning of the Institution, as this came at the beginning of the administration of Governor Juan S. Millán who saw in it a new form of relationship between the State towards the people *yoreme mayo*, which had traditionally been given through the promotion of social programs that had little impact on communities and previously only had enriched some officials and indigenous leaders. This also coincided with a new generation of Indigenous peoples who one way or another had completed his studies through high school but also had the opportunity of being bombarded by the media. That is, there was a demand from these young people for higher studies.

These demands had been clear and there were even many failed attempts before the UAIM was created in December 2001. In Mexico, it had been difficult to create these educational options although there have been many projects, applications, petitions and representations that indigenous across the country have been made to establish education centers according to their ethnicity, the response was unfavorable (Sandoval Forero, 2002: 17). Thus, the UAIM was forged in the macro political sphere of Sinaloa State Government, not without internal political groups offered resistance, as many critics of the project criticized the opening of this institution having other universities in public character in the region. By August 1999, UAIM still being the Institute of Anthropology at the University of the West, admitted the first 350 students, mostly *yoreme may* that gave birth to the first university activities.

5. Federal policy and the CDI

The emergence of UAIM also coincided with the political change in the Mexican Federal government, because after 72 years in power by the ruling Institutional Revolutionary Party (PRI) monopolizing power, for the first time in 2000 it took power other political party, the National Action Party, becoming President of México Vicente Fox Quesada. The

administration changed, among other things, policies and ways on how the Mexican state was related to indigenous peoples.

So once the UAIM started, the first representative of the Commission for the Development of Indigenous Peoples (CDI), Xóchitl Gálvez Ruiz also conducted a campaign targeting the youth from different ethnic groups in the country to entering it. It was thus from 2002 that the UAIM had the participation of students from ethnic groups in other states of Mexico, such as *ch'ol, mam, zoque, chinanteco, tzeltal, tzotzil, mazahua, zapoteco, rarámuri,* and also from some Latin American countries such as for example, Nicaragua, Ecuador and Venezuela, which screened and ranked this university as the first of its kind and the one that have the higher presence of ethnic expressions around the whole country (Guerra García, 2008).

It is noteworthy that this situation has changed structurally for the first goals raised in the planning document of UAIM, as if originally intended to attend the *yoreme mayo* culture, the arrival of students from diverse ethnic groups left completely out of any prevention the type of education it was intended to impart and deliver. It is not the same to address to specific culture and problems of the indigenous communities closer to the institution, that to attend an entire Latin American ethnic and cultural diversity with students who would go great periods of time and seasons out of their distant homes. The dynamics of political macro sphere reformulated the goals and purposes of the University.

A. The difficulties with the Undersecretary of Higher Education and Scientific

However, not all organs of the federal government agreed to the creation of the UAIM and their educational purposes. The officials that were more reluctant to accept the original proposal were those of the Secretariat for Higher Education and Scientific (SESyC) that in 2001 was led by Dr. Julio Rubio Oca. This meant the delay and conditioning the granting of the budget that led to the severe initial financial shocks of the institution. Under pressure, SESyC officials in 2001 led the creation of the General Coordination of Higher Education and Bilingual (CGEIB) and the initiative of a series of intercultural universities to meet in a controlled and bounded higher education the demands of the indigenous people.

These institutions, including UAIM, should follow the intercultural public policies subordinated to the intercultural education model that the CGEIB defined for this purpose and refrained budget that would grant permission. Hence the University, from 2004, after much political infighting, reoriented its policy toward definitive care of indications of CGEIB and application of institutional inter-culturalism understood by the state.

Currently UAIM destinies is forged in a continuous struggle of interests between the wishes of the State Government in turn, the orders directed by the Ministry of Education and Culture of the same state, the demands of CGEIB, different views and opinions of the Commission for the Development of Indigenous Peoples (CDI), the INALI and the results of the internal micro politics into the UAIM generated by the Executive Board, the Rector and his group of advisers and the approval of the Board of Education. Of course, there is resistance from below, some groups' *yoremes mayos*, academic holders and facilitators have presented continued resistance, active and passive. That is, the destinies of this institution are shaped in different policy areas and more than autonomy, the heteronomy that is divergent in many cases causes that the institution is constantly in turmoil.

6. Gender, class and ethnicity microspheres in the UAIM

A. Ethnic relations

It is noteworthy that the fact that the UAIM initiative arose from a mestizo group to educate indigenous, itself generates a tension that has stigmatized inter-ethnic relations within at the interior of this institution. The fact is that no representative of the *yoremes* or any of the ethnic groups representing the indigenous students has participated in the design, planning

and management of this University. Some of the *yoremes*, feeling excluded from the institution, have stated as follows: "…why I should send my child to that school of yoris (mestizos or whites), if after some time he/she will not want to return with us (Yoreme, Mochicahui, 2001). Relations between the mestizos and yoremes seems free of problems, but a good number of students from this ethnic manifest within their culture feeling discriminated by the facilitators that in the vast majority are mestizos.

Concretely the mestizos' relationship with the *yoremes* is based on domain because they are not given the slightest concession of power. Perhaps the clearest example is the struggle for the Rectory for the University, which has always been hold by mestizos despite requests from some of the indigenous natives to be considered. In general, decision makers from the state government have thought that *yoremes* are not ready yet, that they do not have the academic level or the UAIM in their hands would be a disaster. Also, if any of this ethnic group has expressed in favor of a different political party to the one in power, is justified not to grant any more support. The fear of giving them some power is imminent.

One of the initiatives that have recently been submitted to the State Congress is precisely the change of the Organic Law for the University to stop being indigenous oriented and becomes intercultural oriented, thus guiding the continued staying of non-indigenous would be legitimate. On the other hand, following ethnic relations, relationships between students of all ethnic groups are very diverse. Generally speaking students of Chiapas and Oaxaca have historically taken the political leadership within the institution; they are the ones who are organizing movements, strikes and protests. In a sense they are discriminated against, especially for its size, but at the same time they are feared for their ability to partnership.

B. Gender relations

Gender relations in the UAIM have taken various shades since its founding. It can start by saying that the organization has been following a patriarchal pattern, where the highest authority, the Rector (Chancellor), he has always been male and hardly has been thought that a woman may occupy this post. This gender discrimination has not occurred in other posts that eventually have been occupied by men and women without distinction. It draws the attention to gender balance that has always had indigenous enrollments of this institution with approximately 6% difference between men and women (Table 2). This is because conventionally has been considered that in indigenous communities there are still persisting some forms of sexism favoring machismo that keep young females go out to study.

Table 2. Trends in enrollment by gender UAIM

AÑO	2001-2002		2002-2003		2003-2004		2004-2005		2005-2006	
Género	H	M	H	M	H	M	H	M	H	M
Inscritos	660	630	908	836	249	197	388	293	440	346
Total	1290		1744		446		681		804	
AÑO	2006-2007		2007-2008		2008-2009		2009-2010		2010-2011	
Género	H	M	H	M	H	M	H	M	H	M
Inscritos	680	607	712	638	715	670	714	654	607	543
Total	1287		1350		1385		1368		1123	

Source: Author's construction based on data from the school administration.

It has been found that despite this macho attitude, girls have opted to get out of their communities, i.e., access and retention in the UAIM has been more difficult for indigenous women than for men. In daily practice many different customs and behaviors intermingle between men and women students. It is observed that there are very conservative attitudes to the most liberal, from matchmaking in the same ethnic group but for the most prevalent inter-ethnic relationships. Among facilitators, the strongest discrimination have not been between genres, from one genre to another, but rather the constant tensions between their different marital status, couples of teachers eventually are discriminated by groups with frankly sexist attitudes.

The university community develops and re-produces constantly symbols, representations, rules, norms, values and practices from the differences between men and women, mostly of ethnic origin, their customs, their marital status and rearing condition. On the other hand there is no open discrimination on sexual preference. Homosexuality does not tend to be hidden in both men and women.

C. Class relations

The various classes are marked in different ways: In first term one way is established from the owners of supply education and provisions are the mestizo's people (mixed race) who are given the power from the state government to take over the institution. These are the ones receiving the highest marginal product of their work and have the authorization for the use of university resources.

The middle class is constituent by managers of lower hierarchy and educational facilitators, whose personal income is lower than the top officials but in better condition than the academic holders. These last ones are the indigenous students who mostly come from the poorest strata of Mexican society. Scholarships that academic holders receive are not enough to diminish in the least their plight and difficult economic situation. It is very common to find students receiving economic support of about $ 1,000 pesos per month (less than 80 US dollars) which the students have the need to send their money to their parents or siblings, who are in a worse situation than they are. Poverty leads to multiple health and social problems that are not easy to get around to a student UAIM.

In conclusion in this regard, class differences are marked in the institution that reproduces from its structure the class differences between mestizos and indigenous and does not provide any social mobility scheme.

D. Racism

Racist attitudes in the institution are a consequence of gender relations, class and ethnicity that are practiced on a daily basis. In addition, the last Rectores in turn have established certain ethic codes that discriminate roughly between the indigenous and mestizos privileges. The proof is that every time the registration, enrollment are becoming mestiza and the policy is to leave less indigenous students, just enough to add folklore to the institution and to legitimize and justify its budget.

This racism is expressed at the interior of the University within a variety of ways, from a particular type of bulling up to very marked harassments. It is still common to find within such terms as "the oaxaquitas", "the Indian" or self-derogatory expressions such as "I got out the Indian" or "se me salió lo indio". Racism within the UAIM exists and is more serious in the sense that, in theory this should not prevail in such academic institutions.

7. The intra-social in UAIM

One of the discussions that officials did CGEIB and Ochoa Zazueta, The first Rector, was on the issue of educational provision. While the former advocated by restricting the offer of carriers culturally oriented, the second thought it was necessary to expand the number of

programs as much as they could. This discussion takes on tremendous significance because it places the issue of education in the dialogue of society and cultures.

Contributing to the dialogue some of the Rectors in the first meetings of intercultural universities criticized the fact that UAIM had the carrier of computer systems, because for them, graduates would suffer a poor destiny marked by discrimination and underemployment. The problem with this situation is that the intra-societal issues are intertwined with inter-cultural, because one thing is ethnic discrimination and other problems are the structures in labor markets.

The first officials of the UAIM thought that the indigenous were entitled to be cosmopolitan. In this sense the university should create opportunities for the development of cosmopolitan citizens and communities, but in the sense of cosmopolitan decolonization (de Sousa, 2008). Even when indigenous are identified with their own culture and specifically recognize the existence of others, respect their existence and their right to flourish and develop according to their self-determination, and open to learn from them and incorporate, according to their discretionarily, items and features of them to their world. So once you put a sign on the doors of the institution showing the words of one of the *yoremes* in any of the meetings prior to the start of the UAIM: "We want to reach the moon, but we want to remain yoremes" (yoreme, Mochicahui, 1999).

Indigenous associations have often required the participation in global issues, their problems and resources. One example is that of new information and communication technologies (ICTs) that have become elements of the everyday landscape as part of the world population (Núñez and Liebana, 2004:40). The role of ICT is important for many reasons, among which highlights the changes that result in social, economic, labor, cultural, intercultural and individual (Núñez and Liebana, 2004:40).

Inequality in society observed through the digital divide is the gap that exists between people (or communities, states and countries) that use ICTs as a routine part of their daily lives and those without access to the same and even if they have access they do not know how to use them (Felicé, 2003:7). In fact as ICTs are today sources of social inequality and exclusion generating exclusion due to many people or communities lack the resources and skills to respond adequately to the needs and demands of the environment and society (Felicé, 2003:7-8). The paradox is that such resources today are essential to achieve not only greater possibilities of symmetrical communication between cultures, but to allow synchronous development of peoples (Nunez and Liebana, 2004:40).

This situation is perceived from the highest levels whose decisions affect the entire world and then the governing bodies in the international arena such as the World Bank (WB), International Monetary Fund (IMF) and Organization for Economic Cooperation and Development (OECD) suggest a strategy: "…all mankind but especially poor countries should have access to all information and knowledge that are already circulating on the Internet. It was decided that the underclass must be included in the "big" benefits provided information to the global economy. To include in the digital world at all, became one of the objectives of the new millennium..." (González, 2008:49).

Resolution 56/183 of 21 December 2001, the General Assembly of the United Nations approved the celebration of the World Summit on the Information Society (WSIS) in two phases. The first was held in Geneva from 10 to 12 December 2003 and the second took place in Tunis from 16 to 18 November 2005 (Unión Internacional de Telecomunicaciones, 2006). It should be noted that prior to the second phase took place the First Indigenous Workshop on Information and Communication Technologies in Mexico City from 28 to 30 November 2005, attended by indigenous representatives from 19 countries in Latin America. This fact shows the great importance of the intra-social issues to be cleared in relations between cultures.

Another example of an attempt of indigenous participation can be found in the treatment of poverty in their communities, which again can be solved as an intra-social issue inside the inter-cultural relations. One of the *yoremes* explained it more clearly: "We do not want to be as we are, but we want to remain what we are" (Yoreme, Mochicahui, 1998). It happens that the people *yoreme*, like the mestizos of the town, are subject to the ravages of economic forces in the middle of globalization and even more, they are part of the trenches where ideological struggles are more ferrea between individualistic and capitalist neo-liberal economic theories and indigenous economic theories, traditional, of barter and collaborative.

This fact was clear when the UAIM arose because without naively expect the institution could manage the social dynamics, it was thought that it was more important to emphasize that intra-social problems than the inter-cultural problems. Thus, for example, the approach to providing educational opportunities to workers, day laborers to the micro-and small-business and to the *yoremes* was a matter of vital importance. Education for cultural diversity in this sense becomes complex, although no institution can control the socio-inter-cultural dynamics, if it can participate. Given this, it must return to the differences between the ideals that posed and observed practices.

The aims, aspirations and objectives of the inter-cultural UAIM and any other inter-cultural institution, are only ideals that often clash with the harsh realities. To take one case, much has stated that the purpose of inter-cultural universities should be that its graduates remain in their home communities so that they support their development. In practice intra-societal and inter-cultural tensions make that graduates do have multiple options, some go back to the own communities and support the development or not, others look for opportunities to work and study in the city where they studied their degree, but others go further, to face globalization in other cities and in other cultures.

The problem for the design of plans and programs of study, at least in the UAIM, is that in practice: 1) it is impossible to determine the entrance profiles of the students what kind and how is the psycho-educational profile of a candidate *yoreme* by origin and every one of the origins of the students? For sure, it is not well known, 2). There is a significant level of uncertainty in the events and actions that develop during their stay in the institution, especially in the plans and programs of study. The history of the institution demonstrates the high dynamics of changes that have altered the methods of intervention and the curriculum in general and 3) it is impossible to determine the profile of graduates - you may think it up and dream, but not determine it - and what will do the Indigenous and mestizo's graduates. That is, in practice it is difficult any pedagogical prescription.

Given this, education for ethnic and cultural diversity is just a failed attempt at handling complex socio-inter-cultural. In practice, sometimes are found social reproduction schemes, but not always, as Apple says the problem with this affirmation is that "... the 'school' is not <only> a reproduction institution where explicit and implicit knowledge that is spread inexorably turns students into passive persons, needy and eager to join in an unequal society" (Apple, 1997: 30). For Apple (1997: 30) this argument fails on two basic aspects: first in the vision of indigenous students as passive recipients of social messages and second, that what the institution teaches, is not influenced by ethnic culture, class or gender, nor by the rejection of the dominant social messages. Obviously, he mentions, it should be considered that universities are more complex than just a reproductive mechanism.

The intertwining of the intra-social issues has been decisive to explain many of the practices at the UAIM, explaining that it becomes impossible to perform with the very structure of the inter-cultural proposals. From the perspective of what has been proposed, the institution is modified and changed continuously by the tensions in the macro and micro intra-societal relations, intra-cultural and inter-cultural, mixed in some way.

8. The intra-cultural in UAIM

The intra-cultural take a larger role in the study of the socio-inter-cultural phenomenon because now more than ever it is difficult to conceive ethnicities and cultures as homogeneous and static entities for analysis. In addition to the profound differences of gender, class and ethnicity of the UAIM´s educational facilitators, each of the ethnic groups involved in UAIM they do differently. Students' *yoremes*, for example, show tremendous cultural differences between themselves. After the defeat of Bachomo in 1915, many chose a strategy that their children speak better Spanish and handled mother tongue only in familiar areas, even some tried their children no longer speak *yoreme mayo*, their native language, to avoid possibilities of being discriminated.

In this way, it is now not only a very marked dyslalia phenomenon. The defeat forced the group to disperse, so the twentieth century marked a time of spraying the cultural life of the *yoremes* community. This is within the UAIM where not all speak the same way their language, not all profess the same religion, and even more the manners are distinct if their origin is rural or urban. The political interests, educational paths and vocations are also dissimilar among themselves. The same goes for each of the ethnic groups involved, even if their story is different. It is difficult to find students from an ethnic group originating from the same locality, who speak the same linguistic variable or level with their tongue, who are bilingual of the same languages, that share the same worldview. That gives proof that ethnic groups are increasingly less homogeneous in their beliefs and their practices.

A. The mother tongue as an element of intra-cultural tension

It has been found that not only the domain of mother language within each ethnic group in the UAIM is completely heterogeneous, but the choice and promoting their use is also distinct. Even when some students speak their language to a greater or lesser extent, not everyone wish that the educational processes were intensive in their language. Those in favor mentioned that the goal is to prevent loss and boost their rescue. However, the context of UAIM not necessarily is conducive to the implementation of educational practice in mother language. If the institution-building of the language *yoreme mayo*, which is the host culture, is in the making, thinking about other native languages produced in contexts away the land Sinaloa, means to enter into further complexities (Sandoval, Meza y Guerra, 2010).

The motives for indigenous students who believe that educational processes should not be carried out in mother tongue did not question the future of their language, but rather the operation of the UAIM. Their concern was the economic feasibility and the real possibility of combining teachers of the different languages of the communities the students belong. In itself, the problem is so complex that any analysis seems simplistic. The relevance of the mother tongue, in the end, due mainly to the rethinking of national policies, to inter-cultural, to the destiny that the state wishes for the indigenous peoples and the indigenous groups they want for themselves.

Inter-cultural in inter-cultural universities is expressed in the ethnic, cultural and linguistic diversity, but also in the pedagogical framework that guides educational practice in the institution. For the case of the idiomatic hegemony of Castilian as well as being imposed, it is exclusionary in practices on the indigenous languages, although the rhetoric to the contrary, continues hispanicising the indigenous peoples. It is thus the use of a tongue, one of many elements of tension within the intra-cultural UAIM. In general there are many aspects to be analyzed within each ethnic group and every culture that are so heterogeneous; to study these intra-cultural dynamics can help to understand more clearly inter-cultural relations.

9. Inter-cultural in UAIM

At 10 years after the creation of the indigenous university, the weighted weight of Western culture and the mestizos toward other ethnic groups, especially to the people *yoreme*

mayo, has been evident so that the results have been, as mentioned, adverse to those originally proposed in the document "Mochicahui, New Frontiers". In fact, most of the organizational structure is occupied by mestizos and from the beginning it was clear the not acceptance of *yoremes* in the decision-making bodies. Inequity in access to all positions is not momentary, and that from the beginning the institution has secured almost the entire structure to the mixed groups that have earned the benefit according to their partisan alignment on the dynamics of the election of Governor of the state in turn.

On the other hand, the continuing struggle in the university curriculum is between cultural relativism and utopian universalism, between preparation for economic competences and ethnic reanimation and development of ethnic communities, between individuality and collectivism, and among many other ethical and aesthetic aspects yet to be solved, where every day is imposed Western mestizo worldview over that of other cultures involved in the institution. But the fact that a mestizo group started the project to the attention of the natives originally transferred the ethics of inter-cultural conflict and strengthened in the most crude scenario that is one of education, as mentioned Giroux (1999: 180), pedagogy is partly a technology of power, language and practice that produces and legitimates forms of moral regulation and policy that build and provide to humans beings particular views about themselves and the world.

The act of teaching itself and the university continually expressed predominantly mestizo organization's role in acts of symbolic violence in relationships between cultures. This situation is detected and treated to prevent through educational innovation, but the weighted weight of the Western culture has continued to advance in the daily acts of inequality, inequity and exclusion. Currently the institution is attached to the proposed institutional inter-cultural CGEIB that regardless of ideals, in practice it is unidirectional, the mestizos for all indigenous and the hegemonic power for the marginalized. Inter-cultural is a 'fact' in the sense that although there are inter-cultural relations is primarily aimed at acculturation.

The proposal of inter-cultural avoids presenting critical positions in the curriculum, as it could lead to problems of governance with the presence of the EZLN insurgent. Overall the proposal speaks of ideals, i.e., a utopian inter-cultural desirable and even unreal, that only exists on paper. The proposal is only part of the imaginary of officials and some facilitators and it is applied even without a full understanding, as a duty be and ought to be. Even sometimes there are applied some educational and pedagogical schemes that are far away from the proposals for the attention to inter-cultural diversity but still are called inter-cultural education. That is the adjective inter-cultural is used politically to legitimize actions totally opposite. The UAIM manages an urban inter-cultural as most activities are in classrooms that are in the listed facilities in cities and towns of northern Sinaloa, in breach of their practices are not intensive in the rural practices, although most students come from the field in the countryside.

The model adopted by inter-cultural universities is functional in the sense that it seeks the usefulness of the educational proposal and in the latest trends is that their programs are geared to productivity and ecology. The ethnic and cultural diversity is now considered inward looking, to the interior or inside as part of biodiversity, so now the institutions give priority to programs oriented towards the ecology and sustainability. Although in practice there is indigenous inter-cultural in the UAIM, it is subordinated to the higher weighted categories: those for indigenous mestizos. Its practice is undemocratic and prevents the scientific positions to address the issue and instead is oriented from institutional policy positions. On the other hand, indigenous inter-cultural among ethnic groups is also asymmetric, all tolerate between each other among them, but in practice there is some kind of discrimination that is accentuated in females.

The people in power now understand indigenous inter-cultural as its colonial legacy, which justifies an ethnocentrism that entitles them to put the mestizo above other cultures. In this sense, it is not an inter-cultural that addresses the asymmetries, has no specific programs for rescue and inclusion of indigenous knowledge, and now does not intends to transform the relations of society towards indigenous cultures, but rather preserve them. Inside the UAIM, inter-cultural is understood only by the fact that matches people who come from different cultures and different ethnicities.

Conclusions

The socio-intercultural presented is a methodological construct to analyze the complex phenomena that occur in education for cultural diversity. In this paper it was demonstrated its application in the analysis of the UAIM, the oldest university system of inter-cultural universities in Mexico. Through this paper it is demonstrated that the proposed structures for inter-cultural analysis are not only insufficient, but can reduce and prevent further understandings in important aspects that fall outside of institutions.

It is concluded then that inter-cultural, in terms of methodology, cannot explain what is happening in practice in intercultural universities as there are other elements that have been exposed in this paper. Beforehand there is a tendency to be located only in utopian and unrealistic ideals and avoid the analysis of everyday practices from a critical perspective. While it is true that it must be distinguished the speeches, the rhetoric and imagery of the actions, processes and events experienced by institutions, practices are crucial to characterize the phenomenon of ethnic and cultural diversity in higher education. Specifically methodological elements that make up the socio-inter-cultural analysis are: 1) The political, social and economic macro spheres 2) The microspheres structured by class relations, gender and ethnicity, 3) intra-social, 4) intra-cultural and 5) Inter-cultural.

In the case of UAIM it was found that the destinies of the institution are shaped in different policy areas. Heteronomy that the University lives described through history, so that educational processes have been outlined in a continuous struggle of interests between the wishes of the State Government in turn, the directions of the Ministry of Education and Culture of the same State, the requirements of the CGEIB, diverse opinions of the Commission DI, the INALI and the results of the micro politics at the interior of the UAIM generated by H. Executive Board, the Rector and his group of advisers, the adoption of H. Board of Education and the resistance, active and passive, from below, that of the *yoremes*, academic holders and educational facilitators.

Inside the microspheres of gender, class and ethnicity UAIM presents a dynamic in which ethnic relations remain the stigma that this institution arose by the initiative of a mestizo group to educate indigenous and that neither representative or any *yoremes* nor ethnic group of origin of students have participated in the design, planning and management of this University. Gender relations are not symmetrical because the discrimination that have been described. In terms of class relations, they are observed clearly, the upper class is formed by the stewardship members around the Rector, followed by educational facilitators and second level managers, while the lower class is integrated by the academic holders. The differences in this respect are very marked. This dynamic is summarized in characteristic racist attitudes of this institution.

As for the UAIM intra-social, it is emphasized by the design of plans and programs of study that have been due more to intra-societal interests, such as presenting community development schemes, access to ICTs, combating poverty and many other aspects ascribed not only to intercultural relations. Intra-cultural differences in UAIM are notorious, the most significant evidence is found in the use of mother language, as not all indigenous students

speak in the same way their tongue and not all profess the same religion, and even further, manners are further differentiated if their origin is rural or urban.

The political interests, educational paths and vocations are also dissimilar among themselves. It is difficult to find students from an ethnic group originating from the same locality, who speak the same linguistic variable or at the same level with their tongue, who are bilingual of the same languages and that share the same worldview. Inter-cultural in UAIM is institutional as it ascribes to the CGEIB, that regardless of ideals, in practice it is unidirectional, from the mestizos for all indigenous and the hegemonic power for the marginalized. Inter-cultural is a 'de facto' oriented acculturation.

Overall the proposal speaks of ideals, i.e., of a utopian inter-cultural desirable and even unreal that only exists on paper only is part of the imaginary of some officials and facilitators. There is not an inter-cultural that addresses the asymmetries, neither has no specific programs for rescue and inclusion of indigenous knowledge, nor now intends to transform the relations of society towards indigenous cultures, but rather preserve them.

To end it is necessary to note that the crossing of the tensions between the microspheres and macro spheres described in intra-societal, intra-cultural and inter-cultural relationships produce continuous changes in the UAIM; their daily practice falls within the scope of complexity, but not in the sense that it cannot be understood, but in one in which the analysis covers matters described that go beyond inter-cultural.

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EQUALITY BETWEEN WOMEN AND MEN AS A FUNDAMENTAL HUMAN RIGHT OF THE EUROPEAN UNION

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Abstract

Combating persisting gender inequalities in all spheres of society is a longer-term challenge, since it entails structural and behavioral changes and a redefinition of the roles of women and men. Progress is slow, and gender gaps persist as regards employment rates, pay, working hours, and positions of responsibility, share of care and household duties, and risk of poverty.

Equality between men and women is now indisputably recognized as a basic principle of democracy and respect for human rights.

Keywords: *fundamental rights, equality, gender, European Union*

Introduction

Combating inequalities between women and men is a constant challenge to the international community. This involves a long-term challenge in all spheres of society, including structural and behavioral changes and a redefinition of the roles of women and men. Progress is slow, and gender gaps persist as regards employment rates, payment, working hours, positions of responsibility, share of care and household duties, and risk of poverty.

Equality between men and women is now indisputably recognized as a basic principle of democracy and respect for human rights.

1. Conceptual delimitation

'Gender' refers to social and cultural differences between women and men who are learned in time and which changes over time. 'Sex' refers to the biological differences between male and female[1]. Sexual characteristics are acquired at birth, and the gender characteristics are gained through socialization.

Gender equality means offering equal rights to women and men. This is a de jure equality which doesn't lead automatically to a de facto equality.

Gender equality means that all human beings are free to develop their personal abilities and make choices without limitations set by strict gender roles[2].

Discrimination on the grounds of sex includes (according to EU legislation): direct discrimination, indirect discrimination, harassment and sexual harassment.

[1]Irina Moroianu Zlătescu, Mihaela Muraru-Mandrea, *Egalitate. Nediscriminare. Bună administrare*, I.R.D.O. Publisher, Bucharest, 2008, pp. 99-100.
[2] Idem p. 101.

2. Historical evolution of European discrimination legislation

Since the establishment of the European Economic Community emphasis has been placed on equality between women and men. Article 119[3] of the Treaty of Rome enshrined the principle of equal pay for men and women for equal work.

Initially, this principle was not adopted as a way of guaranteeing a civil liberty or a social value, but as an instrument for free competition[4]. Further, this principle has gained a social dimension[5]. The Court, in its case-law, concluded that the *economic aim pursued by Article 119 of the Treaty of Rome, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to its social aim, which constitutes the expression of a fundamental human right*[6].

Although Advocate General considered, in numerous cases, that the principle recognized by the Article 119 EEC is a fundamental principle and should not be interpreted strictly or narrowly[7], the Court held that the article cannot be interpreted as prescribing, in addition to equal pay, equality in respect of the other working conditions applicable to men and women[8].

As stated by the Court[9], Article 119 applies directly without the need for detailed implementing measures from the Community or Member States, to all forms of direct and overt discrimination, which can be identified solely by the criteria of identity work and equal pay under Article cited.

Furthermore, Article 119 applies directly in private agreements, both individual and collective[10].

Because of this character, Article 119 can be relied on before national courts. These courts have the duty to ensure the protection of the rights which that provision confers to individuals[11].

This Article as interpreted in Court case law it is the starting point in the evolution of gender equality legislation.

Subsequently, this provision has been supplemented by the adoption of some Directives:

★ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women;

★ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, which extend the application of the article 119;

★ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security;

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[3] Article 141 in TCE and article 157 of TFUE.

[4] Hélène Masse-Dessen, *The Place of Gender Equality in European Equality Law*, European Gender Equality Law Review, European Commission, Directorate-General for Justice, No. 1/2011, p. 7.

[5] Judgement of 10 February 2000, Schröder (C-50/96, ECR 2000, p. I-743).

[6] Judgement of 8 April 1976, Defrenne / SABENA (C-43/75, ECR 1976, p. 455), Judgment of 10 February 2000, Schröder (C-50/96, ECR 2000, p. I-743).

[7] Advocate General's Opinion in cases like C-399/93, C-409/95.

[8] Judgement of 8 April 1976, Defrenne / SABENA (C-43/75, ECR 1976, p. 455).

[9] Judgement of 8 April 1976, Defrenne / SABENA (C-43/75, ECR 1976 p. 455), Judgment of 27 March 1980, Macarthys / Smith (C-129/79, ECR 1980 p. 1275), Judgment of 31 March 1981, Jenkins / Kingsgate (C-96/80, ECR 1981, p. 911).

[10] Judgement of 9 February 1982, Garland / British Rail (C-12/81, ECR 1982, p. 359).

[11] Judgement of 8 April 1976, Defrenne / SABENA (C-43/75, ECR 1976, p. 455).

★ Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (amended by Council Directive 96/97/EC of 20 December 1996);
★ Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood;
★ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC);
★ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (amended by Council Directive 97/75/CE of 15 December 1997);
★ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

Treaty of Amsterdam[12], entered into force on 1 May 1999, contains important provisions on equality between women and men. Article 2 states that The Community shall have as its task to promote equality between men and women. Further, article 3 paragraph 2 states that the Community shall aim to eliminate inequalities, and to promote equality, between men and women. This provided for mainstreaming gender equality[13]. The EU and the Member States shall take into account gender equality when developing and implementing legislation, policy and activities. Article 13 gives the European institutions the possibility to adopt measures aimed to combat gender discrimination. So the Commission or the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament may take action to combat discrimination based on sex. Article 137 paragraph 1 states that the Community shall support and complement the activities of the Member States on equality between men and women with regard to labor market opportunities and treatment at work. Article 141 paragraph 3 refers to the implementation of equal opportunities and equal treatment in matters of employment and occupation, including equal pay for equal work or work of equal value. And Article 141 paragraph 4 allows the adoption of measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

2000 was an important year in the evolution of equal treatment legislation. In this year has been adopted the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

In 2002 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions has been adopted.

In 2006 were adopted Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

Treaty of Rome did not contain any reference to human rights or to their protection. In 2000 was promulgated the *Charter* of *Fundamental Rights* of the European Union. This

[12] Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts.
[13] An act of Committee of equal opportunities for women and men in 28.07.2009.

includes a list of human rights and is just a statement, not binding for EU Members States. This was amended in 2007 and with the Lisbon Treaty, the Charter of Fundamental Rights becomes legally binding for the 25 Members States, United Kingdom and Poland obtained derogation from the Charter.

Article 21 of the Charter contains a prohibition of discrimination on various grounds. The Charter makes a distinction between the prohibition of discrimination on grounds of sex provided in Article 21 and the gender equality provided in Article 23. With this, the equality between women and men was extended beyond the workplace, being applicable in all areas.

The principle of equality between women and men is one of the values of the Union (Article 2 of the Treaty on European Union) and promoting gender equality is an objective of the EU (Article 3 paragraph 3).

The Lisbon Treaty provides the EU to join the European Convention on Human Rights as part of its own, and the Convention, as amended by Protocol 14, allows this.

Article 8 of the Treaty on the Functioning of the European Union provides for gender mainstreaming in all EU policies. Article 10 provides for the definition and implementation of policies and activities, seeks to combat discrimination based on sex.

Bob Hepple[14] state that are four stages in evolution equality at work law:

1. Human rights in the new world order (1948-58)
2. Formal equality (1957-75)
3. Substantive equality (1976-99)
4. Comprehensive and transformative equality (2000-2004)

3. Equality between women and men as a fundamental human right of the European Union

The right to equality is as important for a civilized society as freedom of expression, freedom of religion or political conviction or the right to equality regardless of race. The whole community loses by being deprived of valuable resources or are not used. Legislation plays an important role in promoting the notion of gender equality, but is not enough since people's attitudes and cultural influences involved or otherwise, may prove to be important in a change behavior expectation[15].

Right of all persons to equality before the law and protection against discrimination constitute a universal right recognized by the Universal Declaration of Human Rights, by the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights respectively on Economic, Social and Cultural Rights and the European Convention on Human Rights and Fundamental Freedoms. Convention no. 111 of the International Labor Organization prohibits employment discrimination.

At European level this approach has been developed by adopting a specific legislation, but also through mainstreaming gender equality.

The Court has stated repeatedly that the fundamental human rights are part of the general principles of Community law and its mission is to ensure that these rights are respected[16].

The Court held that equal treatment between women and men is a fundamental part of the general principles of European law[17]. Thus, the Court determined that equal treatment between women and men is a fundamental human right but also a general principle of EU

[14] B. Hepple, *The Transformation of Labor Law in Europe*, Hepple and Veneziani, Oxford 2010, pp. 100-110.
[15] Evelyn Ellis, *EC Sex Equality Law*, Clarendon Press, Oxford, 1998, p. 1.
[16] For exemple in Judgement of 15 June 1978, Defrenne / SABENA (C-149/77, ECR 1978, p. 1365).
[17] Judgment of 15 June 1978, Defrenne / SABENA (C-149/77, ECR 1978, p. 1365).

law. Moreover, equality between women and men is considered a fundamental principle by recent legislation[18].

Right at anti-discrimination on grounds of sex is one of the fundamental human rights that the Court must ensure that is respected[19]. The Court is not empowered to enforce this principle in the relations governed solely by national law.

Elimination of discrimination based on sex is a general principle of Community law, binding on Member States and Community institutions cannot adopt regulations contrary to this principle[20]. Fundamental rights are a condition of legality of Community act. Therefore, equal treatment between women and men is a condition for the legality of any instrument of the EU or any action of EU institutions and agencies.

Conclusions

There are clear differences between men and women: social, defined by the term 'gender' and biological evidenced by the term 'sex'. Existence of gender discrimination involves the necessity of the principle of gender equality. Since the establishment of the European Economic Community, European law has moved in this direction. First important provision was Article 119 of the Treaty of Rome on Economic Communities, improved by some directives and reinforced by some provisions of other treaties: the Treaty of Amsterdam, the Treaty of Nice, and the Treaty of Lisbon. Equality between women and men was extended beyond the workplace and now is applicable in all areas.

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Evelyn Ellis, *EC Sex Equality Law, Clarendon Press, Oxford, 1998;*

**** Court of Justice case law;*

**** European Directives;*

**** The Treaties of European Union.*

[18] Point 4 in Directive 2002/73.

[19] Judgment of 15 June 1978, Defrenne / SABENA (C-149/77, ECR 1978 p. 1365) and Judgment of 20 March 1984, Razzouk şi Beydoun/Comisia (C-75/82 şi C-117/82, ECR 1984 p.1509), Judgment of 11 March 1997 Süzen / Zehnacker Gebäudereinigung Krankenhausservice (C-13/95, ECR 1997, p. I-1259).

[20] Judgment of 7 June 1972 Bertoni / Parliament (C-20/71, ECR 1972, p. 345).

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EUROPEAN JURIDICAL INSTRUMENTS OF TERRITORIAL COOPERATION – TOWARDS A DECENTRALIZED FOREIGN POLICY IN EUROPE?[1]

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Abstract:
Starting with a brief foray into the evolution of the legal framework and practice of the cross-border cooperation in Europe, the study proposes some reflections on the potential of the European legal instruments of territorial cooperation to shape a "local diplomacy" as a new way of exercising local powers in Europe and its relations with the traditional diplomacy.

Keywords*: local authorities, decentralization, territorial co-operation, international agreements, foreign relations.*

Introduction

Bastion of national sovereignty and traditional monopoly of the state, the foreign relations represented a field where the regional and local authorities' intervention was, if not excluded, at least strictly framed by the state. Despite the absence of a domestic or international legal framework to legitimize their external action, amid strengthening local autonomy and the role of the regions in most European countries, the cross-border co-operation, as a way of getting the communities on both sides of borders closer, has become a constant in Europe since the second half of the twentieth century. European integration strengthened the synergies between the territories and stressed the need for co-operation between local authorities. If the practice of cross-border co-operation got ahead law in this area[2], adopting such legal instruments of co-operation at European level represented a necessary step. European Grouping of Territorial Cooperation (EGTC)[3] inside the European Union and, more recently, Euro-regional Co-operation Grouping (ECG)[4] at the level of the Council of Europe, are two legal instruments which have a great development potential for the local foreign action of the sub-national collectivities.

[1] This work was supported by CNCSIS-UEFISCSU, project number PN II-RU, code 129, contract 28/2010.
[2] L. Malo, *Autonomie locale et Union europeenne,* Bruylant Publishing House, Brusseles,2010, p. 269.
[3] Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), Official Journal of the European Union, L 2010/31 July 2006.
[4] Protocol no. 3 in The Framework Agreement regarding the cross-border cooperation of the collectivities of territorial authorities concerning the *Euro-regional Grouping of Cooperation* (EGC), open for signing at Utrecht, on November 16, 2009, Series Treaties of the Council of Europe, no. 206.

The difficulties of recognizing a right to cross-border co-operation for sub-national collectivities

The interest of the European local and regional collectivities to develop co-operation relations with their foreign homologues is a phenomenon that started after the Second World War. In the absence of a specific legal framework, due to the state monopoly in the area of foreign relations, the external action of the local and regional collectivities appeared as a practice arising from the need to overcome the traditional boundaries to find common answers to common problems related to planning, local public services, environmental protection, cultural and economic or human exchanges. From the twinning arrangements between cities, mere statements of intent through which the communities affirm their willing to maintain friendly relations with foreign communities and the co-operation relations based on neighborhood that started in the early 1970's[5], one can notice the manifestation of an increasingly veritable "decentralized foreign policy"[6] by certain regional and local authorities. This tendency was encouraged by the recent development of the European Union system, characterized by the emergence of sub-national actors on the European scene and their transformation into "partners" of the European governance[7].

Considering the development of empirical practices of territorial co-operation in Europe, untrammeled by the absence of legal rules to legitimize it, the emergence of legal responses, taking into account both national and European rights that fit this form of local public action became necessary. The legal basis of the recognition of foreign competencies to sub-national entities cannot be found in international law because on the one hand, it only recognizes states as subjects of its legal order, thus excluding the sub-national entities. On the other hand, a fundamental principle of international law, that of national sovereignty, forbids the intervention in the internal affairs of the states and its division of powers. The responses should therefore be found in the domestic law of the Member States, by reference to their capacity of signing international treaties (*treaty making power*), an essential component of the state's power, recognized for sub-national entities only in a small number of federal states (Germany, Austria, Belgium), that employed international relations on behalf of the central state and not on its own. Territorial relations of the sub-national entities being signed in their own name, they were not subjected to international law – it only implies applying the national administrative law by recognizing the competency for external action as a way of exercising local powers.

Recognizing an international dimension to the local competencies faced a powerful resistance by the states and thus a legal framework of cross-border cooperation in Europe outlined, in the beginning, by the Council of Europe in the *Framework Agreement regarding cross- border co-operation of collectivities or territorial authorities*, adopted in Madrid on May 21st, 1980[8]. The institutional context of adopting this document and the reserved position of the participant states[9] lead to this convention being limited to encourage cross-border co-operation without conferring any right in this regard to sub-national collectivities and without giving putting a specific legal instrument at their disposal. Instead, it systematically makes reference to the internal law. Every contracting part is engaged to facilitate and to promote the cross-border co-operation and promote cross-border co-operation between the territorial

[5] These leg to the creation of cross-border inter-regional institutions, such as, for example, the Franco-German Intergovernmental Commission of Planning (1971), or some cross-border inter-regional organizations in the Pyrenees, the Western Alps, etc. that have some internal structure and methods of action.

[6] B. Jouve, *Collectivités locales et relations internationales: une émancipation délicate*, Swiss Political Science Review, 1-2, 1995, p.140.

[7] See The White Paper of the European Commission regarding the European governance, COM (2001) 428, Official Journal of the European Communities, no. C 287/2 from October 12, 2001.

[8] Series European Treaties (SET) no. 106, http://conventions.coe.int/Treaty/fr/Reports/Html/106.

[9] The majority of them had formulated reserves for the agreement.

authorities of collectivities from their jurisdiction and the collectivities and territorial authorities from other states' jurisdiction that were parties in the Convention, *in conformity with the constitutional provisions of each state that is part in the convention.* According to article 2 of the Convention, cross-border co-operation represents any concerted action aimed at strengthening and developing neighborly relations between territorial communities or authorities of two or more contracting parties, as well as agreements and arrangements necessary for this purpose. The convention recognizes the right of contracting states to freely decide on their administrative organization in the field.

The obvious limitations of the Convention led to the necessary adoption, in November 1995, of an additional protocol[10] that evokes, for the first time, the right of sub-national communities to undertake cross-border co-operation actions "in the common domains of competencies" (Article 1). While a cross-border co-operation agreement only binds the sole responsibility of territorial communities or authorities which have signed the agreement, the protocol requires the parties to give legal value in internal law to decisions and agreements adopted by local communities (Article 2). Article 3 states that cross-border co-operation agreements concluded by territorial collectivities or authorities may create a cross-border co-operation body, with or without legal personality. A second additional protocol, signed on May 5th, 1998, in Strasbourg[11], expands the article's field of application. This protocol establishes, besides the territorial co-operation based on proximity (cross-border cooperation), the *inter-territorial co-operation* as a form of co-operation between non-contiguous communities with common interests, recognizing what was an already existing practice on the bilateral relations level.

The documents of the Council of Europe have the merit to have boosted the development of territorial co-operation in Europe, its principles having been translated into inter-states[12], bilateral[13] or multilateral[14] agreements, defining specific ways of co-operation of the sub-national entities. Each of these Conventions had its own legal regime and its own patterns for bodies of cross-border co-operation. Consequently, a diversity of means of cross-border co-operation appeared, arising from the diversity of existent local entities on the level of European states and their different statuses in the national juridical orders.

Regarding the European Union system, although the European integration has strengthened the synergies between territories and stressed the need for co-operation between local authorities, it has been, until recently, extremely laconic and discreet co-operation between sub-national entities of the Member States. Obliged to respect the state' competencies and not having a direct communication channel with sub-national entities, the European Union could only indirectly support transnational co-operation, in a first phase, by providing financial support thanks to the European funds associated with its regional policy. Thus, once the FEDER was created in 1975, the direct actions of the European Commission on regional policy were oriented to support the development of territorial co-operation, these actions having to take into account the "border character of the investments, more precisely that the investment should be localized in one of the contiguous regions of one or more

[10] Series European Treaties (SET) no. 159.
[11] SET, no. 169.
[12] In fact, countries like France and Spain have conditioned the implementation of the Framework Convention by signing an agreement between the states, before any cooperation action of their sub-national collectivities.
[13] For example: the Agreement of Isselburg-Anholt, signed by Germany and Holland in May 1991 and entered into force in January 1993; the Agreement of Rome, signed by France and Italy in November 1993 and entered into force in October 1995; the Agreement of Bayonne, signed by France and Spain in March 1995 and entered into force in February 1997.
[14] The Benelux Convention, signed by Belgium, Luxemburg and Holland, in September 1986 and entered into force in April 1991 or the Agreement of Karlsruhe, signed by Germany, France, Luxemburg and Switzerland, in January 1996 and entered into force in September 1997.

Member States"[15]. The European cohesion policy will bring more and more financial support to co-operation initiatives, mainly through the communitarian initiative program INTERREG, developed at the beginning of 1990. Especially created to incentivize border areas from the perspective of unique market, this program was aimed to help overcome the specific development problems resulting from their isolation in national economies and in the Community as a whole[16].

Although the implementation of certain cross-border' financing instruments has shown the concern of the European Union in this respect, the development of a real co-operation was hampered by the absence of a specific legal frame on the European level that would harmonize national systems' asymmetries and of certain operational structures in which the co-operation would be conducted.

The European Group of Territorial Cooperation (EGTC) and the Euro-regional Co-operation Group (ECG), specific instruments of the European territorial co-operation

Recognizing on the one hand the development of territorial co-operation in Europe and, on the other hand, the lack of relevant communitarian provisions, or, in other words, the existing gap between its political priorities embodied in increasing the financial means and the absence of an instrument that can offer a legal framework, enabling the implementation of certain real cross-border policies[17], the European Commission succeeded to introduce a co-operation instrument – *the European Group of Territorial Co-operation (EGTC).* In the absence of competencies of the EU given through treaties, the legal framework of this instrument is given by the cohesion policy. Representing a specific action necessary to achieve the cohesion policy, the new instrument does not consequently constitute a base for the development of a real cross-border co-operation or territorial policy in the European Union[18]. Adopted in July 2006 and entered into force on August 1st 2007, the Regulation regarding the European Grouping of Territorial Cooperation (EGTC) (1082/2006) put, for the first time, at the disposal of sub-national entities of Member States, a juridical structure of communitarian law aimed to support cross-border co-operation. It is a flexible tool that sends to national rights and an optional one as the EGTC is optional and does not exclude other forms of co-operation. According to art. 3 of the Regulation, the EGTC is composed of members "in the limit of their competencies, according with their national right", belonging to one or more of the following categories: Member States, regional collectivities, local collectivities, public law entities[19], as well as associations made by bodies that belong to one or more of the above mentioned categories. The members of EGTC must be located on the territory of at least two Member States.

The creation of an EGTC is done through a *convention* specifying the members' list, the timing, the name, the location and the modifications and dissolving conditions. The application and interpretation of the convention is done according to the national law of the

[15] Art. 5 from the Council Regulation no. 724/75 from March 18, 1975, Official Journal of the European Communities, L 73/2 from March 21, 1975.

[16] The Commission Communication 1562/3 establishing the orientation for the INTERREG initiative, Official Journal of the European Communities, C 215 from August 30, 1990.

[17] Regulation (CE) no. 1082/2006 regarding an *European Grouping of Territorial Cooperation* (EGTC), paragraph 4, Official Journal of the European Union, L 210/19 from July 31, 2006.

[18] A. Noureau, *L'Union européenne et les collectivités locales*, Thèse de doctorat en Droit, Universite de la Rochelle, Faculte de Droit et de Science Politique, aprilie 2011, p. 358, to be seen at: http://www.theses.fr/2011LAROD023.

[19] Concerning Art. 1 (9), paragraph 2 from the Directive 2004/18/CE of the European Parliament and of the Council from March 31, 2004 regarding the coordination of the awarding procedures for public supply and services contracts, Official Journal of the European Union, L134 from April 30, 2004, p. 114.

state on who's territory is the EGTC established its headquarter. Based on the convention, the EGTC's members adopt by unanimity the EGTC *statement*. The statement must contain a series of elements such as: the functioning and competencies of the decision making bodies, as well as the number of members' representatives; the EGTC decisional procedures; the working language or languages; the way of functioning, especially regarding the human resources management, the recruitment procedures, the type of personnel contracts; the modalities of financial contributions of each member and the budgetary and accounting norms, including the financial normative of each of the EGTC's member in this respect; the ways of assuming responsibilities by the members; the authorities responsible to designate an external audit body; the procedures of changing the statement[20]. From the organizational point of view[21], an EGTC contains an assembly constituted from the representatives of its members, having a director that represents EGTC and acts in and for its name.

EGTC has as a general mission to facilitate and promote the territorial co-operation aiming to consolidate the economic and social cohesion. EGTC can act either for the management and implementation of the territorial co-operation programs or for the management and implementation of the projects co-financed by the European Union through the European Fund for Regional Development, European Social Fund and/or Cohesion Fund, but they *can also achieve other specific actions of territorial co-operation among its members, with or without the communitarian financial contribution.* The Member States can limit the missions that the EGTC can achieve without the communitarian financial contribution. The mission mandated to EGTC by its members does not relate to the exercitation of the competencies offered by the public law, nor to the functions that deal with the defense of the state's general interests, such as the surveillance and regulation competencies, justice and foreign policy.

EGTC is aimed to have legal personality[22] and, in all Member States, the widest legal capacity recognized to legal persons according to the national law. Moreover, the EGTC may receive or alienate tangible or intangible properties, may employ staff and may sue and be sued.

EGTCs represent a real revolution in the area of co-operation between territories. It introduces the states as actors of territorial co-operation, through their recognized possibility to be members of a group of territorial co-operation, besides the local and regional actors. This represents an important innovation in relation to previous practices, based on the Council of Europe's instruments, where the state only had a regulatory role, like a referee, setting the legal framework for co-operation, but leaving the local collectivities to organize their relations by themselves.

A legal instrument similar to EGTC is about to become operational on the Council of Europe's level. The *Euro-regional Co-operation Grouping* (ECG), introduced through the Protocol no. 3 of the Framework Convention in Madrid[23], represents a co-operation body aiming to promote, support and develop, in favor of populations, cross-border and inter-territorial co-operation among its members, in the areas of common competence, respecting the competencies established through the internal legislation of each Member State. For this

[20] Art. 9 (2) from Regulation (CE) no. 1082/2006.
[21] Art. 10 (1) from Regulation (CE) no. 1082/2006.
[22] It is not clear from the regulation if it is a legal person under communitarian law or of national law, given the frequent references in the regulation text to the national rights. According to the experts of the European Political Studies Group of Experts (EPSGE), EGTC constitutes a legal person of communitarian right, conducted by the national law – The Study realized by EPSGE for the Committee of Regions "*European Grouping of Territorial Cooperation - EGTC*", COR 117_2007_ETU, January 2007, p. 92.
[23] Ready to sign at Utrecht, on November 16, 2009, it does not entered into force. At the end of 2011, 12 states had signed the Protocol and two have ratified it (Switzerland and Slovenia). Romania it is not a signatory state. The Protocol shall to enter into force when 4 states became parts (art. 19 (2)).

purpose, the ECG has legal personality, budgetary autonomy, contractual capacity, the possibility to recruit personnel, to acquire movable and immovable property and to undertake legal procedures. Designed mainly for sub-national authorities or collectivities of the signing states that must be preponderant inside a grouping, ECG allows the participation of states if at least one of their territorial collectivities is a member of the ECG. Whilst the Protocol and the Regulation 1082 seem to be very similar, the Protocol takes into account the fact that an EGC could be, at the same time, an EGTC. The range of possibilities opened by the Protocol, however, is broader than the communitarian rules and the solutions offered are more flexible. In addition, its subsequent formulation to the appearance of the communitarian regulation allowed covering certain limits of the EGTC identified in practice[24].

The potential of the new legal instruments for territorial co-operation

The implementation in the national juridical systems of EU Member States of the European regulation regarding EGTCs led to an increase of the limits of action of sub-national authorities, giving them the capacity to participate in cross-border co-operation activities within the limits established by national legislation, even in more centralized states. The possibility that the new juridical co-operation instruments are opening the possibility for a state to sign agreements of co-operation with a foreign country raises the issue of the development potential, thus having a parallel diplomacy and impeding the essential attributes of sovereignty, particularly of diplomatic monopoly. Even more so as the European regulation states that an EGTC can be created independently of European financing. On the other hand, giving the state the possibility to participate in an EGTC involves, to a certain extent, a desacralization of its role, because the state becomes a partner, among others, inside a co-operation grouping.

Practice has shown, however, that this form of international action of sub-national authorities represents a way of answering to concrete issues related to the progressive blurring of national borders, rather than a means of asserting an international vocation for these authorities[25]. The international co-operation of the regional and local actors comes, in this way, to complete the state's action and not to compete with it. The state remains, in the territorial co-operation, through EGTCs, the master of the game, authorizing the participation of its collectivities to such a structure and controlling, to a certain extent, the mission entrusted. Moreover, the EGTC does not have international legal personality and cannot exercise sovereign attributes in the sense of international law. Any questioning of national sovereignty is thus excluded.

EGTCs, as the most elaborate level of institutionalization in the process of cross-border co-operation, involves both a transformation of the traditional diplomatic functions and distance from pre-existing forms of territorial co-operation that did not assume any involve the responsibility of territorial authorities participating. Allowing the association of all parties, both state and non-state ones, co-operating inside the same structure, the EGTC subscribes to the concept of multi-leveled governance, being able to become a space where territorial policies are discussed and decided upon, a governance laboratory on many levels. Creating an EGTC facilitates the contacts between sub-national powers, on the one hand, and the Member States and European institutions, on the other hand. At least for the centralized states, the EGTC represents an instrument that allows the regional and local levels to consolidate their

[24] To compare the two instruments see Y. Lejeune, *Studiu comparativ al grupării europene de cooperare teritorială (GECT) și al grupării euroregionale de cooperare (GEC)*, Comitetul European asupra democrației locale și regionale al Consiliului Europei, Strasburg, November 18, 2010, LR-IC(2010)13.

[25] The analyze is based on the EGTC study, the similar instrument of the Council of Europe not being yet functional. According with the data of the Committee of Regions, till the end of 2011 were created 26 EGTC with the participation of 15 Member States, gathering more than 550 regional and local entities.

partnership with the European level. The presence of the states in this type of structure involves a series of advantages, allowing the expansion of the areas and topics of co-operation between partners and developing co-operation between asymmetrical territories from the point of view of management and competencies. At the same time, although territorial co-operation benefits from a certain independence from inter-governmental co-operation in virtue of their autonomy, as regards the choice of domains, partners or intensity of the relations, this way of the state's presence ensures the coherence of all external actions.

Conclusions

The pressure of the European integration and of globalization lead to the upheaval of political and juridical systems of states, to a weakness of the state' model, the role of the state being blurred by a coalition of sub- and supra-national forces, making it no longer the only link between the internal and international policies. Although the need has emerged to define the relationship between the national authority level and the other two, the power of the state has not weakened significantly, developing new governing instruments through which it can center itself in the relationships with the supra-national and national authorities. The evolution of European territorial co-operation depicts this phenomenon of redefining the state's functions. Thorough European territorial co-operation instruments, the holder of the monopoly of international relations is faced with a particular field of foreign relations, where the non-state actors' presence is dominant, becoming a protagonist of this particular way of co-operation across the borders. Although there is a progressive opening of sub-national entities to an original form of co-operation, this does not endanger the state's supremacy in the area of foreign relations, because the state is the one that frames and orients it.

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THE IMPACT OF THE COMMUNITY LAW OVER THE NATIONAL PENAL LAW - SOVEREIGNITY VS. INTEGRATION. COOPERATION OR UNIFICATION?

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Abstract

For the last five years the scientific debate concerning the direct relation between the community law and the national penal law was revived not only due to the intervention of the great masters in the community penal law but also due to some popular penal law authors, especially young ones, who continued to exploit the classical categories in the light of a strong sensitiveness of these categories towards the new juridical realities. The issue of the community juridical instruments' influence over the national penal law is a difficult one to resolve even as we speak for the penal law being so tightly linked to the state sovereignty. Still, at European level there are a whole series of unification tendencies to be seen even in the field of the penal law.

Key words: *Sovereignty, Community Law, Union Penal Law, European Union, Cooperation, Unification, Euro-offences.*

Introduction

After several trials and projects rooted in the old European history, the old continent succeeded around the 50's in finding the necessary strength for the idea of unity to lead to the creation of the European Community. With the passing of time great figures of those days driven by the ideal of a united Europe managed, after the European Council was established, which was a determinant factor in the future community construction, to adopt a series of constitutive treaties and other programmatic documents which finally led to the birth of the European Union as we know it, perhaps a little shyer but with the high aspirations of a great actor on the international scene.

After the expected failure of the so called federalist project concerning the establishment of a Constitution for Europe, the end of the year 2007 brings about the signing of the Reform Treaty, better known as the Lisbon Treaty, which, although built on the old but improved skeleton of the project instituting a Constitution for Europe, but without the "fearful" title of constitution – entering into force on the 1st of December 2009.

The speed at which the European Union has evolved during the last twenty years is amazing, both in what the "expansion towards new geographic areas is concerned, and the increasing of the integrationist level"[1]

Having on its side a state-of-the-art institutional background with seven Union institutions (The European Parliament, the European Commission, the Council, the Court of

[1] E. Dragomir, D. Niţă, *Tratatul de la Lisabona – intrat în vigoare la 1 decembrie 2009/ The Lisbon Treaty – entering into force on the 1st of December 2009/*, "Nomina Lex" Publishing House, p. 21.

Justice, the European Central Bank and the European Court of Auditors), the above listed objectives seem easier to attain especially if we also take into account the fact that – by the signing of this treaty – the goal was to decrease the demographic deficit of the community structure functioning by increasing the role of the European Parliament, the national parliaments and of the European citizens' themselves.

The relation between the community law and the national law systems is governed by two important principles: the principle of integration and the principal of primordiality. By virtue of the integration principle, "the community law forms an autonomous juridical system integrated in the law systems of the member states"[2], having as consequence the idea of a direct and immediate application of the community law and the fact that private persons could turn to the norms of the community law, invoking it straightforwardly before national courts for defending the rights they were granted by the community law (the direct effect of the community norms), but also to declare inapplicable those national acts which opposed the community law.

De lege ferenda / "with a view to the future law"/ we consider that the Romanian legislator should seriously take into account the idea of altering the fundamental law and of issuing some organic laws which to allow the unhindered application of the community law.

"The penal law, as field of study, is difficult to define, because a definition entails tackling of institutions, preserving the essential elements and of the significant correlation between them"[3].

Also, the penal law as science and law branch is different from one state to another, depending on the specific penal legislation and the penal policy of each state. At present, despite the overall diversity of the European penal law there is also a community penal law based on international treaties and conventions based on the cooperation between the European states on the European Convention on Human Rights[4]. *It is of course about the penal community law norms adopted by the European Union member states which created for themselves specific organisms on an institutional level, such as: The European Parliament, the Council, the Commission, the Court of Justice and The Court of Auditors*[5].

For the drafting of the new Romanian code, the aim was, on one hand, to revaluate the tradition of the Romanian penal legislation and on the other hand, to align it to the current regulatory guidelines of reference juridical systems in the European penal law. Let us hope that this code will enter into force in 2013 together with the new Romanian Penal Procedure Code, as it is intended.

About the meeting point between the two matters and even about the unification tendencies of same in the Romanian doctrine, one might show that in principle, the penal matter cannot make the object of a legislative unification at European level[6], the penal law being considered as the expression of the national sovereignty of each of the member states[7], a feature that doesn't go away by accession to this organization. "The Union's member states do not waive their sovereignty in what the incrimination and sanction of the acts dangerous to the

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[2] O. Ţinca, *Drept comunitar general*, "Lumina Lex" Publishing House, 2005, p. 300.

[3] V. Mirişan, *Drept Penal. Partea Generală – Prezentare comparativă a dispoziţiilor Codului penal în vigoare şi ale noului Cod penal*, "Universul Juridic" Publishing, 2011, p. 9.

[4] J. Pradel, G. Corstens, *Droit penal europeen*, Edition Dalloz, 1999, Paris – reference paper refering to the diversity of the European penal law, the penal law generated by the European Convention of Human Rights, the penal alw and the community law, etc.

[5] G. Antoniu, *Dreptul penal şi integrarea europeană*, Penal Law Magazine, no. 3/2001, pp. 9-45.

[6] G. Antoniu, *Activitatea normativă penală a Uniunii Europene (I)*, / *The Penal Normative Activity of the European Union*, The Penal Law Magazine, no. 1/2007, p. 9.

[7] G. Antoniu, *Legislaţia comunitară şi legea penală*, / *The Community Legislation and the Penal Law*, The Penal Law Magazine, no. 2/2000, p. 9.

juridical order is concerned, the penal legislation and the penal process remaining within the national competence"[8].

Nevertheless, reality underlined the necessity of a continuous closeness between the national provisions of the state members so as to efficiently face the danger of criminal phenomena at European and world level[9]. Thus, from a stage characterized by a strict intergovernmental cooperation, in this filed was reached the promotion of some very bold ideas like the one about creating a "European penal judicial area" in the field of penal judicial cooperation[10] generated from the need to compensate with police measures the freedom of circulation of those involved in criminal conducts.

The doctrine aimed at "creating more and more proper forms of integration in the European penal systems, it is about cooperation or the perspective of unification"[11]. The mistrust of a certain part of the doctrine in what the perspectives of a "forte integration" at a European[12] level is concerned, demonstrates the difficulties of a community construction in the penal matter, situation which puts on close-up an older but not less complex mechanism, that of *interrelationing* deriving from "the existence of a conflict between the community parameter and the internal penal norm which implies the neutralization of the latter due to its dilution before the sovereignty of the community norm"[13].

A sensitive meeting point between the two matters concerns the application of the penal law in time, as the European jurisprudence opens, for the national law system, the obligation to construe the internal norms in conformity with the values standing at the base of the democratic society, freedom and safety of every citizen. According to the principle of incriminations and sanctions legality, unanimous admitted principle in the Romanian criminal doctrine[14], the retroactive application of the penal law is forbidden when it takes place in the detriment of the offender. From the jurisprudence of the Court of Justice of the European Union (CJEU) results the requirement that the penal law should not be applied extensively in the detriment of the accused, by analogy, as well as the interdiction to extend the range of applying the existent offences to facts which – previously – were not offences. The European directives cannot be used by competent national authorities without introducing it in the national legislative system by adopting a law in order to determine the penal liability or aggravation of the sanctions of the one guilty to have violated the provisions from the directive under discussion. Cases like *Berlusconi against Italy*[15] indicate the fact that the community law in penal matter has as objective the judicial cooperation within the Union which is built on the principle of mutual acknowledgement of judicial sentences and decisions and also include the closeness acts with law power and administrative norms of the member states. Although the legality of applying a more favorable penal law is discussed in several cases brought before the Court of Justice of the European Union (CJEU), the community judge avoided to establish a hierarchy between the principle of the community law supremacy and that of applying a more favorable penal law.

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[8] M. Gorunescu, *Influenţa indirectă a dreptului comunitar asupra dreptului penal naţional*, Lex ET Scientia International Journal - Juridical Series, no. XVI, vol. 2/2009.

[9] Walter Perron, *Perspectives of Harmonisation of Criminal Law and Criminal Procedure in the European Union, in Erling Johannes Husabe, Ansjorn Strandbakken, Harmonization of Criminal Law in Europe*, Intersentia, 2005, p. 5.

[10] Anne Weyembergh, *General introduction, to Summer School "The EU area of Criminal Justice*", The Institute for European Studies (Université libre de Bruxelles - ULB) and the European Criminal Law Academic Network (ECLAN), 30 June-6 July 2008, p. 3.

[11] S. Manacorda, *Un bilanţ al inteferenţelor între dreptul comunitar şi dreptul penal: Neutralizarea şi obligaţia de incriminare*, in Penal Law Handbooks, no. 1/2007, January – March, p. 1

[12] M. Delmas – Marty, *Les forces imaginates du droit (II). Le pluralisme ordonne*, Paris, 2006, p. 155.

[13] S. Manacorda, *op. cit*., p. 4.

[14] L. R. Popoviciu, *Drept penal. Partea generală*, ProUniversitaria Publishing House, Bucharest, 2011, p. 15.

[15] http://eurlex.europa.eu

Thinking about the failure of the old project of a European Constitution registered in several member states, then the idea of "*European constitutionalisation*" seems almost utopian, thinking that the idea of constitution is inevitably related to the notion of state and the construction of the European Union almost always tried to go around the pattern of a super state or federal state, being more of an international organization but less of a state. And still, regardless of the clear opposition put on by Great Britain and even France, on different matters, of course, the Declaration from Berlin adopted on the 25th of March 2007, on the occasion of the 50 years anniversary since the signing of the Rome Treaties, "constitutes a document of high relevance, because it states the idea of the necessity to adopt some new and engaging institutional arrangements as a consequence of the evolutions obtained by the European integration"[16].

Should federalism be the future of Europe? The answer to this question targets several problems including those about the application of the national penal law. Should the Lisbon Treaty represent the decisive step towards constitutionalisation, then the member states, making use of the European Union specific institutional background will have to find a solution for the correlation of the CJEU activity with that of the national judicial courts. But are there possible solutions to this matter? The disappearing by merging of some European courts or the creation of a third jurisdictional forum besides The European Court of Human Rights and the Court of Justice of the European Union, to take over the constitutionality control related prerogatives? The inclination of the European Union towards one or the other of the proposed variants takes time, as takes the engagement of the ever so different member states in this new and highly complex constitutional mechanism. On the other hand, "A EU penal code couldn't be conceived but as an emanation of a European sovereign unitary state and not of a Union of sovereign states, as the EU is right now"[17].

So it is difficult to talk about a direct influence of the community law on the national penal law but, according to a EU Communication from 20.09.2011 suggestively called "Towards a EU Policy in the Penal Matter: ensuring the efficient application of the EU policies through the penal law", "the global objective of the EU policy in the penal matter should constitute the consolidation of the citizens' trust that they live in a Europe of freedom, safety and justice, as well as in the fact that the EU legislation protecting their interests is fully applied and fully observed and that, at the same time, the EU will act for the whole observance of subsidiarity, proportionality and of other basic principles of the treaty"[18].

In conformity with the Lisbon Treaty, the EU may turn to the penal law for consolidating the insurance of observing the EU norm and policies. The penal legislation must presently be adopted by the co-decision procedure, turned into a common law procedure upon the adoption of the Lisbon Treaty by the European Parliament and Council under the full judicial control of the Court of Justice of the European Union. In addition, the national parliaments are called in to play an important role in the development of the EU legislation in the penal matter.

The discussions held during the inaugural reunion of the European Committee experts group focused on two recurrent themes – the interaction between the administrative and penal

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[16] G.I. Chiuzbaian, in *Preface* of the book - C. Călinoiu, V. Duculescu, *Drept constituţional european* " Lumina Lex" Publishing House, Bucharest, 2008;

[17] [17] G. Antoniu, *op. cit.*, p. 11.

[18] COM (2011) 573 FINAL, Brussels, 20.9.2011, *Către o politică a UE în materie penală: asigurarea punerii în aplicare eficace a politicilor UE prin intermediul dreptului penal*". Comunicare a Comisiei Europene către Parlamentul European, Consiliu, Comitetul Economic şi Social şi Comitetul Regiunilor / *Towards a EU Policy in Penal Matter: ensuring the efficient application of the EU policy through the penal law". Communication of the European Commission to the European Parliament, Council, the Economic and Social Committee and the Regional Committee/.*

sanctions and the obligation of the member states to provide penal sanctions that are "efficient, proportional and dissuasive"[19].

If at the beginnings of the European Union the cooperation in the penal matter was done mostly during common police or investigation actions, as well as through the bringing together of the penal provisions both in what concerned the penal process law institutions (settling the extraditing requests or avoiding the conflicts of competence) and "the substantial penal law (by unifying as possible, the contents of some offences and sanctions, especially of those in the field of organized crime, drug traffic and terrorism)"[20], the Corpus Juris project emerged, concerning the general penal law and penal procedure whose scope was the elaboration of a number of guiding principles concerning the protection in penal law of the European Union financial interests within the European juridical space. In other words, Corpus Juris was a first attempt of penal unification, echoing in our legislation also, through Chapter IV, title IX from the Romanian Penal Code adopted through Law 301/2004, chapter named "Crimes and misdemeanors against the financial interests of the European Community".

One cannot overlook in this context the provisions of the EU's Charter of Fundamental Rights either, which contain in a unique wording, for the first time in the history of the EU, the ensemble of the civil, political, economic and social rights of the European citizens and also of other persons living on EU territory. Among these, in Chapter VI – Justice – we mention some of the fundamental rights also defended through the penal law: the right to effective remedies at law and fair trial, the presumption of innocence and the right to defense, the principles of legality and proportionality of penal acts and their sanctions, the right not to be judged and punished twice in penal procedures for the same act. In the context of the Lisbon Treaty the Charter acquires the same juridical force as the treaties but the provisions from the Charter do not enlarge at all the competences of the Union, as they are being defined in the treaties.

In matter of penal law the Treaty makes possible the adoption of some *de minimis* rules for defining and condemning certain cross - border offences as terrorism, weapons and drugs trafficking, money laundry, sexual exploitation of women, electronic criminality.

At a doctrine level it is accepted that the influencing of the national penal law by the community juridical instruments is manifested in two ways: "Firstly, a *negative effect* is indicated, that retrospect to the forbiddance to violate the liberties recognized at a community level: (free circulation of persons, products, services and capitals), through the interdiction of customs rights and of quantitative restrictions at market entrance and exiting, as well as of any other measures with same effect"[21] (art. 34, 35 TFEU). It is about a negative effect in case one provision from the national penal law is considered incompatible with the community law. The national provision is "neutralized". An internal provision may be incompatible with the community law, mainly when it forbids a conduct allowed in conformity with the community law or even encouraged by it. For instance, the national law considers sanctionable the deed of an importer that puts on the market alimentary products originating from another member state, without authorization. Such incrimination will violate the provisions of art. 34 Treaty on the Functioning of the European Union (TFEU) which guarantees the free circulation of goods and forbids "the quantitative restrictions at import or any other measures with similar effect". In compliance with the community jurisprudence all national measures susceptible of preventing directly or indirectly in the present or in the future, the intra community trade are considered to be equal to those which impose quantitative restrictions. Other meeting points

[19] http://e-juridic.manager.ro
[20] G. Antoniu, *op. cit*., p. 13.
[21] Jean Pradel, Geert Corstens, Gert Vermeulen, *Droit pénal européen*, 7eme Edition, Dalloz, Paris, 2009, p. 677.

for the incompatibility between the national norm and the community law concern the subjective side of some infractions but the proportionality of the punishments as well.

As to the *positive effect* of the community law on the penal law, it refers to bringing near the legislations and applying the common actions or policies and differs from the negative one by the fact that it doesn't concern the removal of an impediment for the realization of the community law or about the interdiction of introducing such a new impediment but taking active measures for the realization of this right.

Towards the effervescent concept of the beginnings of the European Union, the last years marked a reconsideration of the state's role, in the sense of transferring some prerogatives to the European Union and to regions or sub-regions – fact that still doesn't bite into the sovereignty of same – for this way, as analyst Barbara Spinelli states, "the classic state doesn't yield sovereignty but understands that in reality it has already lost it without hope. Only through Europe it may hope, perhaps, to recuperate and reconstitute it"[22].

The field of applying the EU penal law aims the sphere of the so-called "*Euro-offences*", meaning those referring to terrorism, traffic of persons and sexual exploitation of women and children, illegal drugs traffic, illegal weapons traffic, money laundry, corruption, counterfeiting means of payment, informatic criminality and organized crime, as provided in the treaty. The majority of the criminal fields already are the object of legislative acts adopted before the Lisbon Treaty which were updated or pending update. Additional "Euro-offences" may be defined only by the Council, deciding unanimously, after the approval of the European Parliament (here, the co-decision procedure is no longer incident).

Article 83 paragraph (2) from the TFEU allows the European Parliament and Council to establish, based on a proposal of the Commission, "minimal norms referring to the definition of offences and sanctions in case the closeness of the acts with law powers and the administrative norms of the member states in penal matter proves indispensable for securing the efficient application of a policy of the Union in a field which has been the objective of some harmonization"[23]. Should this art. 83 par. 2 TFEU constitute the true base for the establishment of a European Union penal law then the institutions must decide to turn or not turn to penal law measures (instead of other measures as administrative sanctions) as an instrument to insure enforcement and must establish what EU policies need to use the penal law as a supplementary instrument for insuring the enforcement. As an example, the field of financial markets and the way the main players play their roles here represents a case where the penal law should be a useful additional instrument for securing the efficient enforcement of the EU policies. In the current context of financial crisis, the norms regarding the financial market aren't always observed and sufficiently applied. "This fact may seriously undermine the trust in the financial sector. A better convergence between the juridical systems of the member states, including the penal law, may help prevent the risk of an improper functioning of the financial markets and may contribute to the creation of equitable competition on the internal market"[24].

Conclusions

Romania has made important steps towards adapting its penal legislation to the union norms in force and for exemplification; we mention two very actual situations in this sense: regulating the *extended confiscation,* according to Law 63/2012 that introduces this institution by altering and supplementing the Penal Code in force and the Law 289/2009 concerning the

[22]*Barbara Spinelli at. all., Suveranitate naţională şi integrare europeană,* Polirom Publishing House, 2002, p. 285.

[23] Art. 83 paragraph (2) from TFEU.

[24] Communication "*Consolidarea regimurilor de sanctiuni în sectorul serviciilor financiare*", COM (2010) 716 of 8.12.2010;/ *Consolidating the sanctions regime in the sector of financial services/.*

new Penal Code. Thus was applied art. 3 from the Decision – Frame no. 2005/212/JAI of the EU Council concerning the confiscation of goods, instruments and other commodities in connection with criminality[25].

The imprescriptibility of some offences according to the Penal Code in force, the new Penal Code and of Law no. 27/2012

According to art. 121 par. 2 and art. 125 par. 2 from the Penal Code in force, imprescriptible are only the crimes against peace and humanity. This provision is taken over also by the new Penal Code which by art. 153 par. 2 and art. 161 par. 2 states that prescription does not exonerate from penal liability or execution of punishment except for the cases of genocide, crimes against humanity and of war.

Law no. 27/2012 for the alteration and supplementation of the Penal Code and of the new Penal Code provides the elimination of the penal liability prescription and of execution of punishment in cases of homicides and premeditated infractions leading to the victim's death.

The controversial issues in the matter have been settled by the European Court on Human Rights which has decided that the extension or elimination of prescription does not violate the principle of non-retroactivity[26].

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METODOLOGY OF SEX CRIMES INVESTIGATION

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Abstract

The Romanian Criminal Code, in its special part, regulates sex criminal offences in Title II, entitled "Crimes Against the Person", Chapter III entitled "Crimes Regarding Sexual Life", Articles 197-204, thus protecting sexual freedom and making sure that this freedom is not exerted in an abusive manner.

In the case of acts committed which contain the constitutive elements of the criminal offences mentioned in this chapter of the Criminal Code. The Special Part, it is necessary to determine the circumstances of the committing of the act, the identity of the participants in committing the act, the consequences of the act, whether there is a causality link between their action and the consequence occurred. In order to individualize the fact, other factors will also be taken into account, such as: the aggravating or mitigating elements and circumstances of the act, factors that facilitated the committing of the act, legal aggravating or mitigating circumstances, the manner of and means used in committing the act.

The crime investigation methodology in this chapter involves: crime scene research, participants' examination by performing forensic examination, the hearings of the persons involved, drawing up of the forensic and psychiatric expertise, forensic traceological, dactyloscopic expertise, biological, chemical, DNA expertise, etc.

Keywords: *technique, identification, forensic science.*

Introduction

In the "Romanian Criminal Code. The Special Part", we find sexual-related criminal offences in Title II, entitled "Crimes Against the Person", Chapter III entitled "Crimes Regarding Sexual Life", structured as follows: Articles: 197 – the criminal offence of rape, 198 – sexual relations with a minor, 199 – seduction, 200 – abrogated, 201 – sexual perversion, 202 – sexual corruption, 203 – incest, 203[1] – sexual harassment, 204 – attempt sanctioning.

For a better understanding of the investigation of such criminal offences, I think it appropriate to start with a general presentation of the crimes having as their main common legal object the social relationships regarding a person's sexual behavior. Of course, through these offences, other social relationships may also be affected, such as: social relationships regarding a person's integrity, their health, optimum family relationships, and optimum relationships in their work environment, etc., which makes up the secondary legal object.

I. A general presentation of the sex criminal offences provided for in the Romanian Criminal Code

A. Rape. The criminal offence of rape is provided for in Art. 197 of the Romanian Criminal Code, having the following legal content:

- in par. 1, in the simple form, "the sexual act, of any nature, with a person of different sex or with a person of the same sex, by coercion or taking advantage of his/her inability of self-defense, or to express his/her will, will be punished with imprisonment for 3 to 10 years and deprivation of certain rights";

- in par. 2, for the aggravated form, "the punishment is imprisonment for 5 to 18 years and deprivation of certain rights, if:

a) the action was committed by two or more persons together;

b) the victim is under care, protection, education, guardianship or treatment of the offender;

b^1) the victim is a family member;

c) the action causes serious damages to the physical condition or health of the victim;

- in par. 3, "the punishment is imprisonment for 10 to 25 years and deprivation of certain rights, if the victim is under 15 years old and, if the action resulted in the death or suicide of the victim, the punishment is imprisonment for 15 to 25 years and deprivation of certain rights".

The special legal object is represented by the social relationships concerning a person's sexual freedom and inviolability. As a rule, through the committing of this act, other social relationships are affected as well, such as the right to life, to physical and psychic integrity, to freedom of movement.

The material object of the criminal offence of rape is the body of the living person against whom the action of the act's perpetrator was directed.

The active subject of the criminal offence of rape is different, depending on the normative modalities in the text.

The passive subject is circumstantial or not, depending on the manner in which the act was committed.

The objective side. The material element is expressed through an action, by which the perpetrator breaks the victim's resistance through coercion or takes advantage of her/his incapacity to resist or to express her/his will, followed by the committing of sexual intercourse.

The immediate consequence consists in a damage brought upon the sexual freedom of a person, but usually there may be multiple consequences consisting in damage to the victim's physical integrity or health (psychoses, venereal contamination, etc.), the victim's death, and other prejudices of a social nature.

The causality link between the material element and the immediate consequence is given by the very materiality of facts.

The subjective side. The form of guilt. The criminal offence of rape is committed exclusively with a direct intent.

For the aggravated types provided or in par.2, item c, and par. 3, thesis II, the form of guilt that the author has in mind is exceeded intent, as the more serious result – severe damage of the victim's physical integrity or health, the victim's decease or, as the case may be, the victim's suicide – is due to the perpetrator's fault.

B. Sexual relations with a minor. The criminal offence of sexual relations with a minor is provided for in the Romanian Criminal Code, Art. 198, having the following content:

- in par. 1: "sexual relations, of any nature, with a person of same sex or different sex, which is under the age of 15 years old, is punished with imprisonment for 3 to 10 years and deprivation of certain rights";

- in par. 2: "the same punishment is reserved for the sexual relation, of any nature, with a person of same sex or different sex, aged 15 to 18 years old, if the action is committed by the guardian or trustee or supervisor, caretaker, attending physician, teacher or educator by

using his/her capacity, or if the offender abused the victim's trust or his/her own authority or influence upon the victim";

- in par. 3: "if the sexual relations sexual relations, of any nature, with a person of same sex or different sex, which is under the age of 18 years old, were caused by the direct or indirect offering or giving of money or other benefits by the offender to the victim, the punishment is imprisonment for 3 to 12 years and deprivation of certain rights";

- in par. 4: "if the acts provided for in par. 1-3 were committed in order to obtain pornographic material, the punishment is imprisonment for 5 to 15 years and deprivation of certain rights, and if, in order to achieve this goal, coercion was used, the punishment is imprisonment for 5 to 18 years and deprivation of certain rights";

- par. 5: "when the act provided for in par. 1 was committed under the circumstances provided in Art. 197, par. 2, item b, or if the acts provided for in par. 1 and 4 had the consequences provided in Art. 197, par. 2, item c, the punishment is imprisonment for 5 to 18 years and deprivation of certain rights";

- par. 6: "if the act resulted in the victim's death or suicide, the punishment is imprisonment for 15 to 25 years and deprivation of certain rights".

The special legal object is represented by the social relationships regarding a person's sexual freedom and inviolability during his/her minority period.

The material object is represented by the minor's body.

The differentiated provisions contained in Art. 198 result in differences between the persons who may be the active subject of the criminal offence.

Also, the passive subject is circumstantial or not, depending on the manner in which the act was committed.

The objective side. The material element is represented by an action, manifested through a sexual intercourse, either with a minor less than 15 years of age, or with a minor between the ages of 15 and 18 years, in which the offender has one of the capacities mentioned in the law.

The subjective side. The subjective element consists in the perpetrator's direct intent to commit the act.

C. Seduction. The criminal offence of seduction is provided for in Art. 199 of the Romanian Criminal Code, having the following content: "the act of the person who, through promises of marriage, induces a female person under the age of 18 years to have sexual relations with him, is punished by imprisonment for 1 to 5 years".

The structure of the criminal offence. The special legal object is represented by social relationships regarding the sexual freedom and inviolability of a female person under the age of 18 years.

The material object of the criminal offence of seduction is the body of the minor female against whom the sexual act was committed, through fraud.

The active subject can only be a man.

The passive subject may be an unmarried female person under the age of 18 years.

The objective side. The material element is represented by an action, namely sexual intercourse with a female person under the age of 18 years.

The subjective side. The form of guilt is represented by intent, in its both forms – direct and indirect.

D. Sexual perversion. The Romanian Criminal Code, in Art. 201, provides for the criminal offence of sexual perversion.

- par. 1: "the acts of sexual perversion committed in a public place or which caused public scandal are punished with imprisonment for 1 to 5 years";

- par. 2: "the acts of sexual perversion with a person who has not reached the age of 15 years are punished with imprisonment for 3 to 10 years and deprivation of certain rights";

- par. 3: "the same punishment is applied for acts of sexual perversion with a person between 15 and 18 years old, if the act was committed by the guardian or trustee or supervisor, caretaker, attending physician, teacher or educator by using his/her capacity or if the offender abused the victim's trust or his/her own authority or influence upon the victim";

- par. 3^1: "if the acts of sexual perversion with a person who has not reached the age of 18 years were caused by the direct or indirect offering or giving of money or other benefits by the offender to the victim, the punishment is imprisonment for 3 to 12 years and deprivation of certain rights";

- par. 3^2: "if the acts provided for in par. 2, 3 and 3^1 were committed in order to obtain pornographic material, the punishment is imprisonment for 5 to 15 years and deprivation of certain rights, and if, in order to achieve this goal, coercion was used, the punishment is imprisonment for 5 to 18 years and deprivation of certain rights";

- par. 4: "the acts of sexual perversion with a person unable to defend himself/herself or to express his/her will or committed by coercion are punished with imprisonment for 3 to 10 years and deprivation of certain rights";

- par. 5: "if the act provided for in par. 1-4 results in the severe damage of the victim's physical integrity or health, the punishment is imprisonment for 5 to 18 years and deprivation of certain rights, and if it results in the victim's death or suicide, the punishment is imprisonment for 15 to 25 years and deprivation of certain rights".

The structure of the criminal offence. The special legal object of the criminal offence is complex, being partly represented by the social relationships regarding a normal sexual life, and partly by those regarding certain social values – public morality, a sense of decency and shame.

The material object of the criminal offence is the body of the person against whom the act of sexual perversion was committed, regardless of whether or not that person participated voluntarily in the act.

The direct active subject (perpetrator) of the criminal offence is not circumstantial according to the text, except if he/she falls within par. 3 and 3^2.

The passive subject of the subsequent two normative modalities is qualified, due to the fact that the person is under the age of 18 years and was induced to participate in perverted acts through the offering of money or other benefits by the offender – par. 3^1 – respectively, was used by the offender in order to obtain pornographic material – par. 3^2.

The objective side. The material element is represented by an action materialized in an act of sexual perversion.

The subjective side. The form of guilt is represented by intent – direct and indirect.

The act provided for in par. 5 is committed with exceeded intent.

E. Sexual corruption is provided for in Art. 202 Romanian Criminal Code, having the following legal content:

- in par. 1: "acts of an obscene nature committed against a minor or in the presence of a minor are punished with imprisonment for 6 months to 5 years";

- in par. 2: "when the acts provided for in par. 1 are committed within the family, the punishment is imprisonment for 1 to 7 years";

- in par. 2^1: "if the acts provided for in par. 1 and 2 were committed in order to obtain pornographic material, the special maximum penalty is increased by 2 years";

- in par. 3: "alluring a person in order to commit sexual relations with a minor of different or same sex is punished with imprisonment for 1 to 5 years".

The special legal object is represented by the social relationships regarding the protection of a person's sexual life, by preventing the alteration of the minor's instinctual or/and moral behavior, especially within his/her family.

If the obscene act is committed "in the presence of a minor", the criminal offence lacks a material object, but if it is committed "against a minor", the material object is the minor's body.

The active subject of the criminal offence, with the normative modalities provided for in par. 1, 2^1 and 3, is not qualified according to the law text, therefore it may be any person, regardless of sex, even a minor, if he/she is legally responsible.

However, in the case of the normative modality in par. 2, the direct active subject is qualified; it can only be a "family member".

The passive subject is circumstantial according to the legal text, it can only be a minor, regardless of sex, and for the modality in par. 2, the minor must also have the capacity of a "family member", in the sense of Art. 149^1 Romanian Criminal Code, namely he/she should be "a spouse or close relative, if the latter lives and households together with the perpetrator".

The objective side. The material element of the criminal offence according to the provisions of the three first paragraphs is represented by an action, materialized as an act of an obscene nature, committed against or in the presence of a minor.

F. Incest has the legal content provided in Art. 203 Romanian Criminal Code, as "sexual intercourse between relatives in direct line or between siblings", the punishment provided being imprisonment for 2 to 7 years.

The special legal object is represented by the social relationships regarding a sexual life taking place under conditions of moral normality and without impairing the biological substance of society.

The active subject is qualified according to the legal text, namely it will be the person, regardless of their sex, who engages in sexual intercourse with another person, the respective two persons having the kinship relations specified in the legal text.

The objective side. The material element of the criminal offence is represented by an action, expressed in the form of sexual intercourse – see, for a complete definition, the explanations provided in the text on the criminal offences of rape and seduction with regard to sexual intercourse.

The subjective side. The form of guilt for this offence is represented exclusively by direct intent, the offender being aware of his/her kinship relationship with the partner in sexual intercourse and still pursuing to achieve the intercourse under such circumstances.

G. Sexual harassment. The Romanian Criminal Code in Art. 203^1 provides "the harassment of a person through threat or coercion, in order to obtain sexual satisfaction, by a person who abuses the authority or influence that their position at the workplace provides them with, is punished with imprisonment for 3 months to 2 years or fine.

The special legal object is complex, being partly represented by the social relationships regarding a person's sexual freedom and inviolability, and partly by those ensuring optimum interpersonal relationships in the workplace.

As a rule, this criminal offence lacks a material object, as it is mainly the harassed person's psyche that is affected by the illicit action.

The active subject is circumstantial, as established by the legal text.

The passive subject is also circumscribed to being a person.

The objective side. The material element consists in an activity of harassment, which materializes in – alternative – actions of threat or coercion.

The subjective side. The form of guilt for the criminal offence of sexual harassment is represented by direct intent.

According to Art. 204 of the Romanian Criminal Code, the attempt of the criminal offences provided for in Art. 197, 198 and 201-203, is punishable.

II. General aspects that must be clarified when investigating criminal offences regarding sexual life. The purpose of all the activities carried out when investigating sex crimes is to provide evidence for the constitutive elements of the criminal offences contained in this chapter. To begin with, the social values violated through the act committed will be highlighted, in order to establish the legal object of the criminal offence and to determine the exact article and legal framework that the act committed falls within. The next stage is to establish the material object of the criminal offence if the acts were committed through violence, i.e. if the action was directed towards and left traces on the body of the living person, thus affecting the person's physical integrity, health or life.

The criminal offences mentioned in this chapter, with the exception of the above situations, lack a material object, as the psychic dimension of the freedom of sexual behavior is so obvious that it seems to us rather artificial to consider that this freedom should be rendered objective by the person's body[1].

Also, with a view to determining the correct legal framework of the act committed, it is necessary to establish who is the subject of the criminal offence and his/her identity. There may be cases in which the victim found is deceased or in a state of unconsciousness, without any document upon him/her that would help establishing his/her identity. To the same end, it must be established whether the passive subject may be circumstantial or not, i.e.: if he/she is a minor, under 15 years old, between the ages of 15 and 18; the victim is under care, protection, education, guardianship or treatment of the offender (the criminal offence of rape according to Art. 197, par. 2, item b of the Romanian Criminal Code); if the victim is a family member (the criminal offence of rape according to Art. 197, par. 2, item b^1 of the Romanian Criminal Code); if the victim is a person unable to defend himself/herself or to express his/her will (the criminal offence of sexual perversion according to Art. 201, par. 4 of the Romanian Criminal Code or Art. 197, par.1, the simple form, thesis II of the Romanian Criminal Code); if the victim is a female (the criminal offence of seduction, according to Art. 199, par. 1 of the Romanian Criminal Code).

The identification of the active subject, the perpetrator, is an important task of the investigating team. With this type of criminal offences, the perpetrator's identity is often known by the victim or by the other participants in committing the act. Knowing the identity of the active subject of the criminal offence may also result from the fact that the active subject may be circumstantial, for example, if he/she is: a guardian or trustee or supervisor, a caretaker, an attending physician, a teacher or educator (the criminal offence of sexual relations with a minor, according to Art.198, par. 2 of the Romanian Criminal Code); (the criminal offence of sexual perversion, according to Art. 201, par. 3 of the Romanian Criminal Code); the person who abuses the authority or influence that their position at the workplace provides them with (the criminal offence of sexual harassment, Art. 203 of the Romanian Criminal Code).

With regard to the objective side, evidence of the action will be obtained through specific investigation activities: for the criminal offences of rape and sexual relations with a minor, evidence must be provided for the action of having sexual intercourse; for the criminal offences of seduction and incest, evidence must be provided for the action of having sexual intercourse; for the criminal offence of sexual perversion, there must be evidence of the performance of perverse acts; for the criminal offence of sexual corruption, there must be evidence of the occurrence of obscene acts; for the criminal offence of sexual harassment, there must be evidence of a harassment having taken place through threat or constraint.

The objective side may be conditioned by a purpose of certain acts, as follows:

[1] V. Cioclei, *Drept penal. Partea specială .Infracţiuni privitoare la viaţa sexuală*, "Universul Juridic" Publishing House, Bucharest, 2007, pp. 187-188.

- the criminal offence of sexual relations with a minor (Art.198, par. 3 of the Romanian Criminal Code), if the sexual relations were caused by the offering or giving of money or other benefits;

- the criminal offence of sexual relations with a minor (Art.198, par. 4 of the Romanian Criminal Code), if the facts referred to by Art. 198 were committed in order to obtain pornographic material;

- the criminal offence of sexual perversion (Art. 201, par. 3^2 of the Romanian Criminal Code), if the acts were committed in order to obtain pornographic material.

The perpetrator's action, the circumstances, the mode and means of the act consummation will lead to establishing the subjective side, i.e. the form of guilt. In the case of criminal offences regarding sexual life, the form of guilt is intent, with the exception of variants where the form of guilt is exceeded intent (for example, the criminal offence of rape, Art. 197, par. 3 of the Romanian Criminal Code – rape followed by the victim's death or suicide, or the criminal offence of sexual perversion, Art. 201, par. 5 – thesis I – the act provided for in par. 1-4 of this article results in a serious damage to the victim's physical integrity or health, as well as thesis II, when the act results in the victim's death or suicide).

The consummation of the criminal offence is differentiated depending on the moment of occurrence of the material element of the objective side, in the simple form, when the violation of sexual freedom takes place, and in aggravated forms, when the result, such as the victim's death or suicide, occurs.

There may be situations where the result does not happen, in which case the act is left in the form of an attempt. In this respect, Art. 204 of the Romanian Criminal Code expressly provide that "the attempt of the criminal offences provided for in Art. 197, 198 and 201-203, is punishable". As a result of the provisions of this article, the exception in this chapter is represented by the criminal offences of seduction and sexual harassment, for which an attempt is not possible.

For the individualization of the acts mentioned in this chapter, with a view to enforcing the concrete punishment on the active subject, the work of forensic science investigators and all the activities that make up the methodology of criminal offence investigation are very important and they differ depending on particularities of place, time, mode, as well as number of participants, traces discovered at the crime scene or the persons involved in the act, whether perpetrators, instigators, accomplices, victims or witnesses.

III. Specific activities for the investigation of sex crimes

In order to achieve its goal, *the research of the crime scene* must take place in accordance with the provisions of the Romanian Criminal Procedure Code, as well as with tactical rules applicable to any forensic investigation at the crime scene. The perimeter of the crime scene may contain various categories of traces, such as traces of hands, feet, objects and debris of objects, biological traces, etc. A correct interpretation and use of the traces at the crime scene will make it possible: to establish the circumstances in which the offence was committed, the method used by the offender, the sequence of the activities carried out by the crime subjects before, during and after committing the crime.

Given the type of offence to which we refer in this article and the alternative modalities in which they occur, as well as the passive subjects, sometimes circumstantial due to their age in relation to the active subjects who have different qualities giving them a psychological ascendancy over the passive subjects, physical strength and anatomical characteristics, the investigation of these crimes will take into account aggravating or mitigating circumstances or aggravating or mitigating elements of the offence.

The variety of the crime scene and its features will also contribute to individualizing the forensic research activities. For example, regardless of the type of offence in this category, the scenes are:

- indoor spaces (houses, outbuildings, house appurtenances, clubs, bars, schools, abandoned houses, etc.), ditches, elevators, block staircases;

- open spaces: fields, routes followed by the victims, woods, working in open field, places to graze, playgrounds, parks;

- cars: used by the perpetrator or the victim.

As a result, traces in the crime scene area will be collected depending on the category they belong to, according to the rules applicable in forensics, so as to avoid contamination and intercontamination of the traces, their modification or destruction. Thus, there are situations when, in cases of rape, hand traces are found, preserved and collected, that may lead to the identification of the perpetrator or the verification of statements made by the parties concerned. Identification is done by using the Morphotrak AFIS system.

In the aggravated forms of the offences, resulting in the death, suicide or serious damage to the physical integrity or health of the victim, the victim may be found at the scene as well. In these situations, the victim's body will be preserved and examined, both during the static and the dynamic phases of the research at the scene. There may be traces of blood, semen, sweat, excoriations, bruises or deep lesions on the victim's body, which, by their general appearance, spacing, color, location on the body, number, etc., show the intensity of the constraint, the abuse to which the victim was subjected, the means used by the perpetrator, but sometimes they also show the reaction of the victim to the perpetrator’s action.

In the presence of the forensic expert, the forensic team will perform an internal and external examination of the victim’s body, and the forensic expertise required in the case.

The scene will also provide information about the relationship the subjects of the crime had or did not have, for example, if they knew one another, if they lived together and had a common household, if they went out together, what activities took place that they were involved in together, house habits (for the crimes of incest, sexual corruption), workplace habits (for the offence of harassment).

The research at the scene may lead to the discovery/proof of goals that the offender pursued, in which case these items will also be collected, for example, pornographic material, CDs, computers, etc. Victims are often lured by the offender by the offering of material benefits, sometimes using the Internet.

The hearing of the persons concerned is another feature of the methodology of sex crimes investigation. When the persons involved, with their different capacities, are interrogated, the preparation of the hearing, as well as its carrying out will be individualized by taking into account the typology of the active subject, of the passive subject of the crimes, of the witnesses who may be minors, persons unable to defend themselves or to express their will. Other relevant data will be collected, regarding the dietary habits of the participants (e.g., the habit of consuming various energizing substances, ethnobotanical substances or that have other side effects), use of medications, treatments they undergo.

In the preparation stage of the hearing, the research team members will also gather information by visiting the micro-social groups to which the participants in the offence belong, taking into account the degree of mental and physical development, the educational level, the concepts they have on certain things, their criminal record.

School and education will provide information about a person's psychological profile. In the field of education, the Council of Europe discussed various topics, such as: violence and the resolution of school conflicts; education for intercultural dialogue; modern languages as a means of communication; brutality, bullying and aggression in school; education for democratic values; education for tolerance and mutual trust[2].

[2] Cristina Otovescu Frăsie, Dumitru Otovescu, *The Right to Education and the Dynamic of the Higher Education in Romania*, Romanian Statistical Review, no. 2/2009, National Statistics Institute, Bucharest, 2009, p. 46.

It is advisable to pay attention to those situations in which the victim does not talk about what is happening and, thus, is abused repeatedly, sometimes by members of his/her own family or by a person towards whom he/she has feelings of fear or gratitude.

Once identified the victims and witnesses in cases where the offender's identity is unknown, the hearing will focus on obtaining information about the offender's description, so that they can be identified by using the technical-scientific police equipment, such as: drawing the identi-kit, searching in the IMAGETRAK, IBIS databases.

In the case of offences regarding sexual, their investigation may include the use of *surveillance, recording or interception equipment.*

Also, for the goal of capturing suspects, raids and surveillances are organized and conducted in areas of potential risk or which are known to shelter wanted people.

The presentation for recognition takes place after several versions have been developed in the case and a circle of suspects has been established. In general, with crimes whose authors are known but the statements of the individuals involved need to be checked, other means of evidence are also required. We mention, in this respect: criminal expertise, genetic expertise, chemical expertise, forensic expertise.

It is generally recommended to perform *the forensic examination of the victim and of the perpetrator* as soon as possible after the committing of the crime. Of course this is a relative requirement, bearing in mind that often these crimes are committed without any complaints or notifications of the police, to make them known to the judicial authorities, which would proceed to investigate and document the case.

Thus, most often, in the case of crimes regarding sexual life, it is required to perform: an examination of the victim in order to find traces of violence and aggression on his/her body; an examination of the offender or suspect in order to search the body and look for possible traces, particularly those that may be left by a self-defending victim; the discovery, collection and preservation of biological evidence that may be used for DNA expertise, such as blood, semen, hair, tissue, urine; any STDs that both the victim and the aggressor might have; collecting of vaginal or rectal secretions.

The expertise intended to establish the genetic profile on basis of seminal tracks, as well as those of blood and saliva, is one of the most reliable means of evidence[3].

It falls within the forensic expert's responsibilities to: demonstrate the violent coercion of the victim; probe the reality of the sexual intercourse; identify the biological traces collected at the scene, from the victim, from the defendant; demonstrate the victim's physical and mental inability to defend or to express his/her will[4]; establish whether the victim was a virgin or not; determine the victim's state of pregnancy.

Incapacity of self-defense may occur in the following situations: with people who are in a state of convalescence after serious illness, with elderly people, paralyzed persons, people in a state of unconsciousness, people who are dying or under the influence of drugs[5].

The more common variations of death occurred in the case of rape are those due to mechanical asphyxia and less frequently, death consequent to injuries caused by hitting with hard objects, stinginig-cutting or splitting objects[6].

The performance of the following may also be required: *toxicological examination* to determine blood alcohol level, the substances, drugs ingested; *forensic psychiatric expertise*,

[3] See E. Stancu, *Tratat de criminalistică* , fourth edition, "Universul Juridic" Publishing House, 2007, p. 541.

[4] See Ş. Florian, D. Florian, *Ghidul medico-legal al juristului*, "Napoca Star" Publishing House, Cluj-Napoca, 2005, p. 97.

[5] For more details on drugs, see Cristina Otovescu Frăsie, *Illicit Drug Consumption Vs. the Right to Life*, in the Romanian Law Studies Review, no. 3-4/2008, *"Andrei Rădulescu"* Legal Research Institute of the Romanian Academy, 2008, pp. 309-321.

[6] See C. Siserman, *Probleme medico-legale ale vieţii sexuale*, in *Medicina legală*, coordinator Ş. Florian, "Napoca Star" Publishing House, 2000, p. 219.

if there is a possibility or suspicion that the victim suffers from a mental disorder, due to which he/she was able to express his/her will, or that the perpetrator suffers from a mental disorder.

Inability of self-defense may occur in the following situations: with people in a state of convalescence after serious illness, with older people, people who are paralyzed, people who are in a state of unconsciousness, agony. Psychically, it may be argued that the victim was unable to express their will in the following situations: due to chronic mental disorders or disabilities, oligophrenia in the degree of imbecility or idiocy, the main psychotic disorders in a manifesting phase, temporary mental disorders, acute intoxications that alter consciousness[7].

In the case of crimes whose subjects are circumstantial due to their age, they are older women or have suffered psychological trauma, the expertises may be essential, because the subjects' statements will not provide information that may form the basis for establishing a circle of suspects, all the more so as during the committing of the offence other factors of place and time might have acted upon them, diminishing their judgment or influencing in a negative or positive manner the formation process of their statements.

It is of particular importance to examine the mental status of the victim in order to identify disharmonic personalities, psychotic states, so as to eliminate possible false accusations of rape[8].

Actions to catch participants in such acts red-handed may be organized, especially when the places of occurrence of the facts referred to in this article are known. Well-organized *searches and seizures of objects and documents*, respecting the laws and rules of criminal tactics may lead to the discovery of pornographic material, or recorded material that proves the participants' criminal activity.

Conclusions

In addition to the research of the scene in the case of sex crimes, an important role is played by the way of performing the case documentation and investigation in order to determine the circumstances in which the crime was committed, establish the circle of suspects, and prove the components of a criminal offence for the correct qualification of the act and then, its individualization.

Also, the hearings of the persons involved, the preparation of the forensic expertise, of the psychiatric, biological, chemical, toxicological, traceological examinations help identify the persons and apply the concrete penalty.

Given that a large number of perpetrators and victims in these cases may suffer from different mental disorders or mental illnesses, ensuring psychological protection and counseling is helpful in preventing and combating these crimes.

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[7] Ş. Florian, D. Florian, *op. cit.*, pp. 107-108.
[8] C. Siserman, *op. cit.*, p. 218.

Ș. Florian, D. Florian, *Ghidul medico-legal al juristului*, "Napoca Star" Publishing House, Cluj-Napoca, 2005;

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POLITICAL POWER, LAW AND LAWFUL STATE CORRELATION

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Abstract

The correlation state-law is distorted or optimized according to the political regime understood as "the way of associating political reports, as an expression of adequation of the state to the purposes of power and to the vocation of its exercise".[1] As appraised, "the large palette of constitution and evolution of the political regimes, from the democratic ones to the totalitarian one is bound up with the level of reflecting the will and interests of the citizens for the institution of these regimes"[2].

The review from a historical and synchronic point of view, as presented during contemporaneity, emphasizes the aspects of the political power – law connection from which the judicial doctrine states[3].

Keywords: *rule of law, political power, the state, the law.*

Introduction

The role of the Law as conservation instrument of the domination over the majority of the population in a community, born at the cross roads of archaic world and cultural world, as a sign of progress and civilization, when the old patterns based on manners and tradition do not satisfy anymore the interests of the world in full flourish.

Law confers trust and protection to the dominant groups, for the contribution as order instrument but also as an instrument of the majority of individuals from a community that feel somehow protected by its principles; therefore the immense value of law for the organization of social structures and the role meant to exercise for the evolution of world was conceived.

The power did not consist, not even in the beginning, of gross force but on the contrary it expressed the social condition of man and the power of regulations incumbent for the exercise of power and its conservation.

Law serves the political objectives but as world evolves, does not accept as exclusive the uncensored pattern of order, based on the arbitrary will but the motivational pattern, in other words relations that are not arbitrary instituted but are more and more related to the judicial values that step into the consciousness of the community. Politics and law merge through the values to which they subsume and which they pursue to achieve.

Life is marked by irreparable contradictions between two antithetic processes: one of manipulation, expression of the domination of the groups that rule, another one reversed, of cultural dynamic culture starting from the interior of the groups allowing the overthrow of the situation of dominant categories. If power is under the government of judicial element meaning its consent, the acknowledgement of the ones legitimate to exercise power as a result

[1] M. Duverger, Ianus, *Les deuxfaees de l'oecident,* Fayard, Paris, 1969, p. 14.
[2] C. Vărlan (coord.) a. o., *Politologie*, "Didactică şi pedagogică" Publishing House, Bucharest, 1992, p. 43.
[3] Ion Craiovan, *Filosofia Dreptului sau Dreptul ca Filosofie*, "Universul Juridic" Publishimg House, Bucharest, 2010, pp. 293-300.

of the popular majority then the contradictions and dispute worsen as far as power is therefore exercised so that it provokes visible dysfunctions within the relation with law.

When the judicial reasoning possesses value status and power is judicially dedicated then the relations of law are not contradictory but integrant.

Power is not bound to comply with the judicial reasoning but it can assume this reasoning; on the other hand law, proposes only the solution of obedience not of confrontation but, in the end law wins as long as it is founded on the reasoning and judicial maturity of the world, and these should not be censored by power but by culture.

Historically, the functionality and optimization of the relation power-politics-law is built step by step, always confronting and surpassing the inherent contradictions of social life, not being void of deformed expressions as the ones existing in the states that have experienced totalitarianism.

Analyzing the relation between political power, law and lawful state, Professor Ion Deleanu observes the different, surprising, and contradictory assessments of the lawful state, looking over numerous "*doctrinaire perceptions*", among which:

- lawful state corresponds to an anthropological necessity (H. Ryffel);
- it is a myth, a postulate and a principle, a veritable tenet (Chevallier);
- a pleonasm, a judicial nonsense (H. Kelsen);
- a useless concept which is arbitrary and mutilates other two concepts (A. Hauriou)[4] and so on.

Such assessments represent the expression of some approaches of different perspectives of the premises and mechanisms of the state phenomenon related to judicial phenomenon that led to the apprehension of multiple significances of the concept "*lawful state*".

Here are some of them:

- lawful state means the subordination of the state to law (J. Picquel);
- is a system of organization where the framework of social and political reports is dependent to law (J.P. Henry);
- the state where power is subordinate to state, all the manifestations of state being legitimate and limited by law (M. J. Edor);
- lawful state means fundamental guarantees the fundamental public freedoms, the protection of the order of laws (J. L. Quermonne);
- lawful state implies the existence of constitutional regulations that impose to everybody (G. Duhamel);
- State is able to conciliate freedom and authority; lawful state is the ranking and thematized judicial order (J. Dabin)[5] and so on.

Every theory and opinion regarding the concept *lawful state* are the result of the contemplation concerning some comparatively long historical evolutions that are contradictory, full of achievements and fiascos and ranges that are always researched because of the two interdependent phenomena: state and the right to insist upon the history of the concept of lawful state so we make reference to some significant moments[6].

The evolution of the concept of lawful state is indissolubly related to the fight against feudalism and absolute monarchy and the liberal evolution within Western European countries. An important element is *Magna Carta*, elaborated in England in 1215 which

[4] I. Deleanu, *Drept constituțional și instituții politice*, treaty, "Europa Nova" Publishing House, Bucharest, 1996, pp. 100-101.
[5] Ibidem, pp. 114-115.
[6] Sofia Popescu, *Statul de drept în dezbaterile contemporane*, "Editura Academiei Române" Publishing House, Bucharest, 1998, pp. 14-35.

normalizes the relation between the king and nobility, containing in a rudimentary form the interdiction of arbitrary detention and the legitimacy principle, facts that would later become the bay stone of the concept of rule of law *(Rule of Law*). The Carta provided that nobody is to be taken or confined but in the case of a legal and honest process according to the law of the country.

The liberal doctrine, whose roots is to be found in the political thinking of the revolution in the 17th century fights against absolute monarchy and promotes a governing system that is organized as a constitutional monarchy and according to the principle of separation of powers.

Let us signal the fact that the American Declaration of Independence alleged the idea of natural equality of people, of their inalienable rights that cannot be breached, of the sovereignty of the people, of the right to resist the oppression and the right to subvert the power that becomes tyrannical.

Philosophically, Kant revealed that the individual is a human being, regardless of his quality to be a citizen and that the state is compelled to comply with law which is founded on the quality of the individual to be a human being while Hegel underlined the autonomy and lawfulness of law.

In the XIXth century, as several values like humanism, freedom and dignity of human beings were promoted, Jellinek pleaded the thesis of auto limitation in pursuance of which the state itself.

As we have seen in § 2 of this chapter, the doctrine appraises the fact that the *lawful state* would happily synthesize the elements of a triple doctrine, the liberal one which is the prime one but rather conservative, then the most conservative and sometimes counterrevolutionary like the German *Rechtsstaat* and finally the strict *liberal* one, expressible in the principle *Rule of Law*, but also in the principle of legality, inherited from the French Revolution.

The conceptual core of the lawful state was therefore set at the confluence of some great models:

1) within the English version, the *Rule of Law* was progressively implemented within the ambiance of the sovereignty of the monarch and as an attempt to limit it, and in the end in order to consecrate the sovereignty of Parliament. They reached the level where they recognized the "*constituted power*" – by means of the positive law – to the necessity to found the documents of the executive, either directly or indirectly, on the authority of Parliament and to constrain everybody to comply with law and jurisdiction;

2) within the German version, the concept of *Reehtsstaat* which during its historical evolution acknowledged four aspects: a) *liberal*, corresponding to the phase of the modern or capitalist world, with its private range that claims the existence of some fundamental rights, the subordination of the power of law, laws that satisfy the requirements of equality of the economical competitions, the superiority of Parliament b) *material*, where the concept of *Reehtsstaat* becomes the central constitutional concept, the state achieving its purposes only within law and through law; c) *formal*, once with the uprise of the judicial positivism, where state is not anymore identified with the people but is defined as a legal person, the law can no longer be situated above state, being its product, but the state narrows its own activity through judicial norms that it creates; d) *democratic*, founded on the principle of legitimacy where the official decision of the institutions of the state adopted according to a procedure, is based upon the consent expressed by the citizens. Here, the stress is laid upon the Constitution, the principle of sovereignty of the people and upon the promotion of the human rights;

3) within the French version, the lawful state was a "*legal state*" that cultivated the principle of legitimacy and which aims towards the assurance of the supremacy of legislative related to the executive.

The formation of the lawful state implies a historical process, rather contradictory, with achievements and difficulties, with powerful concise accents from one state to the other, according to the entireness of the socio-political and cultural agents from each and every country that should not touch its essence where the social action should be oriented at least towards the following directions:

- the assumption through the norms of law of several moral values and authentic politics that are persuasive for the global civil world and for the individual;
- the setting up of a democratic ambition; the consolidation of the principle of responsibility of the state; the institutionalization of several controlling means that are efficient for its activity; the institution of coherent and stable judicial orders;
- the strict promotion of the principle of legitimacy and of the principle of constitutionality; the changeover of the human being into a axiological and cardinal reference mark.

Conclusions

The state, a complex social phenomenon having a millennial existence, is analyzed within the specialty doctrine by means of three perspectives: *judicial, political and social-economical*[7].

The essential elements of the definition of state, as in the statements of different authors, refer to*: the existence of a leading group invested with governing attributions and exercise of public authority in the name of the people;* the political breakdown of a historical constituted human collectivity; *the geographical allocation*; *the prerogative of the leading group to establish and defend the state order and also the judicial order within it.* From this perspective, state may seem on one hand, the entireness of institutions invested through Constitution, or according to these, with power prerogatives, while on the other hand, as a *social phenomenon, synthesizing each and every act and fact by means of which the power is being exercised* and which conduct to the organization and cohesion of a human collectivity spatially and temporally spot.

The abstract and judicial concept of "*State*" may explain the multiple situations and relations that take place between the *State*– active and passive subject, subject of rights and liabilities and the other social groups, or between State and natural persons-individuals and we may analyze the inherent content of judicial regulations of the State.

In every political definition, we encounter a differentiation between leaders and the led ones, differentiation that appeared within a sociological point of view when some members of the group were able to serve the other members of the group. This fact shapes the concept of State: on one hand, the *leading force, the public power, possessed by a certain social group in order to lead*, and on the other hand, *continuous and fierce fight for conquering power and for maintaining it*.

From the social and economical perspective, State seems to be a group of individuals, very well organized and very stable, that occupies a geographical definable territory and which is politically acknowledged, where on a public authority exercises commanding or power prerogatives, provided with the vocation and institutional and organizational capacity to express and compel the will of the group as a general will.

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NEGOTIATED JUSTICE FROM THE PERSPECTIVE OF THE CRIMINAL PROCEDURE CODE

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Abstract

The introduction of this institution in the contents of the Criminal Procedure Code[1] represented a challenge for the Romanian legislator whose concern was to solve the cases on trial in the context of necessity to ensure expedience in a fair trial, the application of these rules in judicial practice facing difficulties in the absence of transitional provisions.

Keywords: *evidence presented in the criminal investigation phase, guilty plea, sentence reduction.*

Introduction

The idea of negotiated justice or consensual justice[2] appeared in the context of changes that characterized the Penal Law of the 1970s, when the phenomenon of increasing crime has generated a real criminal justice crisis in the European States[3], characterized by the inability of the judicial bodies to solve criminal cases on trial (the demand was increasing steadily, while the supply was shrinking), law enforcement becoming selective, even incomplete in some cases. In this context, the removal of the criminal cases from courts by diversifying the methods used in the sphere of criminal procedural law was the saving solution in an attempt to halt this inflation[4].

In this sense, the conflict mediation agreement emerged as a more easily accepted and implemented solution than an imposed sentence, the very existence of the expression "consensual justice" or "negotiation", as an institution of criminal law meaning at first glance a paradox, considering that the traditional format of the criminal law is completely alien to discussions, concessions or compromises[5].

[1] Forward Criminal Procedure Code used as Romanian Criminal Procedure Code.
[2] See J. Pradel, *Consensualisme en droit penal compare*, 1988 in Boletim da Faculdade de Direito de Coimbra, pp. 1-46.
[3] F. Tulkens, *Surcriminalisation et decriminalization: les choix de la justice penale aux Etats –Unis a la fin des annees 1960*, Document de travail, no. 17, 1987.
[4] H. Jung, *Alternativen zur Garantie Individueller Rechte der Betroffenen*, Bonn, 1987.
[5] J. Pradel, *op.cit.*, pp. 1-46.

However, the idea of "negotiated justice" was transposed in the European criminal law by Recommendation R(87)18 of September 17, 1987 of the Committee of Ministers of the Council of Europe, which stipulates that where a defendant's guilt results from the evidence presented in the case, the courts can apply to a simplified procedure, which results in the pronouncement of some judgments in the absence of the trial phase[6], similar provisions being part of the legislation of other European States. Thus, the article 233 of the Norwegian Criminal Procedure Code stipulates that, where the suspect admits his deed, he will be asked if he admits that it is criminally liable. If he testified unconditionally and the case can be examined under the accelerated procedure, the suspect would be asked whether he consents to such a procedure, and if he agrees, the Prosecutor would ask the competent court to proceed without impeachment, by a single appearance[7].

German Criminal Code does not provide for a special procedure, but only the reduction of sentence limits, taking into account the conduct of the perpetrator after committing the offence, concerning compensation for damage caused to the injured party[8].

The Italian Procedure Code provides for two special procedures which are based on the guilty plea. In the case of the first special procedure, for an offence for which the sentence prescribed by law is less than two years, both in the prosecution and trial phase, the offender or the Prosecutor may require the judge to recognize the guilty plea, which aims to reduce the sentence.

The second procedure may be applied in the case of all offences except offences for which the sentence is imprisonment for life, and consists in the defendant' request to conduct the trial only based on the evidence presented in the criminal investigation phase. If the judge agrees with the request of the defendant, he can pronounce a judgment of acquittal or conviction, in which case the sentence is reduced by one-third, and the convict waives any right to appeal against the judgment pronounced[9].

Similar provisions are found in the American legislation which provides that the sentence imposed as a result of judicial agreement is less than that given in the case of a trial, this reduction leading to the prevention of the criminal phenomenon[10].

We should also mention the provisions of article 6, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms which proclaim the guarantees on improving the rights and freedoms recognized to persons before national judicial courts, to avoid or, where appropriate, to neutralize any violations of any of these rights by State authorities, with wide applicability in all civil and criminal cases. These provisions contain all procedural details specific to a fair trial in order to settle in a reasonable time the cases pending before the court by an independent and impartial court established by law, which will decide either on the infringement of rights and obligations of a civil nature, either upon the soundness of any indictment in criminal matters[11].

As a consequence of the fact that the reaction of society to those who come into conflict with the criminal law is not arbitrary, but on the contrary it is rational and broadly

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[6] See Recommendation R(87)18 of September 17, 1987 of the Committee of Ministers of the Council of Europe on the simplification of criminal proceedings, adopted on September 17, 1987, title II, paragraph b.

[7] Decision no. 1470 of November 8, 2011 published in the Official Gazette of Romania, Part I, no. 853 of December 2, 2011.

[8] Idem.

[9] Nemeş Adriana, *Justiția negociată în contextual dreptului penaldin perspectiva drepturilor omului*, in "Dreptul" Review, no. 1/2010, p. 192.

[10] Decision no. 1470 of November 8, 2011 published in the Official Gazette of Romania, Part I, no. 853 of December 2, 2011.

[11] V. Pătulea, *Proces echitabil - Jurisprudenţa comentată a Curţii Europene a Drepturilor Omului*, Romanian Institute for Human Rights, Bucharest, 2007, p. 6.

governed by the provisions of the law,[12] the criminal trial hovering about between committing the offence and perpetrator's punishment has the role, as an organized activity, to discover the crimes, identify and catch the offenders, raise and present the evidence, make the offenders to stand criminally liable by applying a sanction[13], the courts performing the process of sentences' individualization[14].

In the same time we have to mention that the criminal liability is the indispensable condition in order to apply the punishment[15].

To that end, the modern criminal law comes not only to legitimize the State's prerogative to punish (jus puniendi), but at the same time to lay down the framework within which it can exercise this prerogative, this right not being a discretionary one, but being exercised only in the content and limits provided by law[16]. In order to achieve these objectives it is necessary that the principles of criminal trial not be applied isolated, but rather in a continuous interaction and mutual conditioning, each principle as well as all the principles as a whole contributing more or less in finding out the truth, principles such as efficiency (expedience), the active role of judicial bodies and ensuring the right to defense having a close connection with finding out the truth in each case pending before the court[17].

In support of these prerogatives and following the recommendations regarding the need to ensure expedience in the criminal trial, provisions to answer the need for effectiveness of trial have been introduced in the Criminal Procedure Code, thus contributing to the elimination of the use of laborious and unnecessary procedures[18]. Until the introduction of the article 320[1] of Law no. 202/2010[19] in the contents of the Criminal Procedure Code, the courts refrained from pronouncing judgments only based on the evidence presented in the criminal investigation phase, because in the remedies against the judgments of the courts with respect to the amount of the sentence applied, the judicial control resorts proceeded with the revocation or invalidation of such judgments, as a result of infringement of fundamental principles of criminal trial, namely the principle of the active role of judicial bodies, the principle of contradiction and the principle of non-interference[20].

Enforcement conditions for the provisions of art. 320[1] of the Criminal Procedure Code.

In order to apply the simplified procedure of trial in the case of guilty plea, the following conditions must be cumulatively met:

a) With regard to the jurisdiction of the court

To that end, if the prosecution material shows that the deed exists, that it was committed by the defendant or the indictee and that his criminal liability can be involved, the Prosecutor shall rule the arraignment by indictment[21]. Where it shall not be refuted, the superior hierarchical prosecutor shall submit it to the competent court.

b) With regard to the type of offence committed

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[12] G. Stefani, G. Levasseur, B. Bouloc, *Procedure penale, deuxieme edition*, Dalloz, Paris, 1984, p. 1.

[13] I. Neagu, *Tratat de procedură penală*, Pro Publishing House, 1997, p. 1, V. Dongoroz et al., *Explicaţii teoretice ale Codului de procedură penală român, Partea specială*, vol. II, "Editura Academiei R.S.R." Publishing House, Bucharest, 1976, p. 5.

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[16] F. Streteanu, *Drept penal-partea generală (suport de curs)*, p. 2, www.scribd.com.

[17] N. Volonciu, *Drept procesual penal*, "Didactică şi pedagogică" Publishing House, Bucharest, 1972, p. 72.

[18] Explanatory statement for Law no. 202/2010 (http://www.cdep.ro/proiecte/2010/400/10/1/em411.pdf).

[19] Official Gazette of Romania, art I, no. 714 of October 26, 2010.

[20] See Cristina Celea, *Judecata în cazul recunoasterii vinovăţiei*, Romanian Penal Law Review, no. 1/2011, p. 87.

[21] N. Volonciu, *op. cit.*, p. 296.

According to provisions of article 320[1] paragraph 7, the provisions of articles 1 to 6 apply only in the case of offences for which the sentence prescribed by law is a fine or a fine sentence alternating with an imprisonment sentence or only an imprisonment sentence, but they do not apply where the criminal action is a crime that is punishable with the sentence of imprisonment for life, but this paragraph leaves unregulated the situation when, for the crime committed, the law provides for imprisonment for life alternating with the imprisonment, as in the case of the offence of capital murder (article 176 of the Criminal Code[22]), because at the procedural time of the enforcement of the provisions concerning the trial in the case of guilty plea (before the commencement of the judicial inquiry), the court may not appreciate if it shall apply the sentence of imprisonment for life, or the imprisonment sentence after sentence individualization[23].

c) With regard to the defendant, he must:

- *declare personally or by authenticated document that he acknowledges committing the facts presented in the act of apprehension*

Thus, according to provisions of article 320[1] paragraph 1 of the Criminal Procedure Code, until the commencement of the judicial inquiry, the defendant may declare personally or by authenticated document that he acknowledges committing the facts presented in the act of apprehension. It is thus understood that in the case file there must be a statement given personally by the defendant before the court. In turn, in case of statement by "authenticated document" some clarifications are required[24], as a result of the fact that this type of document is not defined by the legislator in the Criminal Code, Title VIII, article 150, paragraph 2 of the Criminal Code defining only the "official document" as a document emanating from a unit of those referred to in article 145 or belonging to such units. A definition of the authentic act was provided in the contents of the old Romanian Civil Code[25], currently the notary public, in accordance with the provisions of article 8, letter b of Law no. 36 of 1995[26], performs the task of authentication of documents drawn up by it, by the party, in person or by counsel, and in accordance with the provisions of article 13, paragraph 2 at the request of individuals having Romanian citizenship, as well as the Romanian legal persons, the diplomatic missions and consular offices of Romania can authenticate the documents.

- *ask the competent court to judge based on the evidence presented in the criminal investigation phase*

The provisions of paragraph 1 of article 320[1] express the requirement formulated by the legislator of having in the case file, in addition to the plea declaration, the request by which the defendant ask to make the judgment only based on the evidence presented in the case file in the criminal investigation phase.

As a result of the fulfillment of these two conditions, the judgment shall occur only based on the evidence presented in the case file in the criminal investigation phase, except the

[22] Forward Criminal Code used as Romanian Criminal Code.

[23] Cristinel Ghigheci, *Judecata în cazul recunoaşterii vinovăţiei*, www.juridice.ro.

[24] See Cristina Celea, *op. cit*., p. 91.

[25] Article 1171 of the old Civil Code, repealed: "The authentic instrument is defined as the document made with the solemnities required by law, by a public official", and in article 263 of the New Civil Procedure Code (Law no. 134/2010 published in the Official Gazette of Romania, Part I, no. 485 of July 15, 2010) – "The authentic document is the document made or, as the case may be, received and authenticated by a public authority, notary public or other person vested with public authority by the State, in the form and under the conditions laid down by law. Authenticity of the document refers to the establishment of the identity of the parties, expressing their consent regarding the content, their signature and the date of the document. It is also authentic any other document issued by a public authority granted by law with this quality".

[26] Law no. 36 of May 12, 1995 on notaries public and notarial activity, published in the Official Gazette of Romania, Part I, no. 92 of May 16, 1995, republished in the Official Gazette of Romania, Part I, no. 732 of October 18, 2011.

circumstantial evidence[27]. These circumstantial evidence are not defined in the Criminal Code or Criminal Procedure Code, but we can define this notion if we take into account the institution of extenuating or aggravating circumstances provided for in the contents of article 73, 74 and 75 of the Criminal Code, we can consider that these evidence are nothing but relevant and conclusive evidence that are effective in favor of defendant[28].

d) With regard to the time by which the defendant may request that the judgment to be made based on the simplified procedure.

The time by which the defendant may request that the judgment to be made based on the simplified procedure is "until the commencement of the judicial inquiry". Over this period there were some controversies that have generated a heterogeneous practice of the courts, which is why the Prosecutor General of Romania pointed out in the text of the appeal in the interest of the law promoted on 24.08.2011 that the commencement of the simplified judgment procedure entered by the provisions of article 320^1 of the Criminal Procedure Code can occur only before the trial court and until the commencement of the judicial inquiry, since the aim of this procedure is the expedience of the criminal trial by excluding the classic judicial inquiry, and such a request may be made to the first hearing, but also at a later date, provided that the trial have not commenced the judicial inquiry; the request initiated after this procedural time shall be denied as tardy formulated, however, the High Court of Cassation and Justice has rejected the appeal in the interest of law stated by the Prosecutor General of Romania[29].

Also, in this respect, exceptions were formulated on the non-constitutionality of the provisions of article 320^1 of the Criminal Procedure Code[30], since the institution of this term affects the principle of equality of citizens before the law, as well as the principle of applying the more favorable criminal law, depending on the procedural stages of the defendants, with a possibility for three different situations, namely: the situation in which the defendants were put to trial after the entry into force of this law, in which case the provisions of article 320^1 of the Criminal Procedure Code shall apply; the second situation is the situation in which the defendants, although put to trial prior to the appearance of Law no. 202/2010, have not exceeded the procedural time for the commencement of the judicial inquiry – also the application of these provisions does not raise any problems, and the third situation which concerns defendants who were put to trial under the provisions of the old law, but who have exceeded the time for the commencement of the judicial inquiry; in this case, some have not been definitively judged, and if their case, the principle of the more favorable criminal law shall apply, and other defendants which, although definitively judged, are in different procedural times, i.e. review, appeal for annulment or appeal against execution, the latter situation not being sensitive to the application of the principle of the retroactivity of the more favorable criminal law[31].

We believe that these conflicting situations should have been regulated by means of transitional provisions which should have been expressly provided in the content of article 320^1 or as separate articles in the content of the Law no. 202/2010. Taking into account the need to limit the immediate legal effect[32] of decisions no. 1470 and 1483 of November 8,

[27] M. Udroiu, *Explicaţii preliminare ale Legii nr.202/2010 privind unele măsuri pentru accelerarea soluţionării proceselor în domeniul penal*, http://www.inm-lex.ro/fisiere/pag_99/det_1275/7180.pdf.
[28] See Cristina Celea, *op. cit*., p. 93.
[29] See Decision no. 28 of December 12, 2011, published in the Official Gazette of Romania, Part I, no. 119 of February 16, 2012, www.iccj.ro..
[30] See Decision no. 1470 of November 08, 2011 and Decision no. 1483 of November 08, 2011, in the Official Gazette of Romania, Part I, no. 853 of December 02, 2011.
[31] Decision no. 1470 of November 08, 2011, Official Gazette of Romania, Part I, no. 853 of December 02, 2011.
[32] Substantiation note to Government Emergency Ordinance (G.E.O.) no. 121/2011 for the modification and completion of some legislative acts, www.gov.ro.

2011 on the exception of non-constitutionality of the provisions of article 320[1] of the Criminal Procedure Code, namely their suspension by right[33], which would have caused periods of legislative vacuum and a heterogeneous judicial practice, transitional provisions have been introduced by the provisions of art. XI of the Government Emergency Ordinance (G.E.O.) no. 121/2011 for the modification and completion of some legislative acts[34] designed to remedy the issues invoked by the Constitutional Court, by giving the possibility of plea to the first hearing with complete procedure immediately after the entry into force of this emergency ordinance, thus allowing the application of the more favorable criminal law to all legal situations arising under the empire of the old law and judged according to the new law[35].

e) With regard to the judgment in the court.

At the time of the hearing set, the court reads the act of apprehension and proceeds to defendant' hearing; the recognition of the plea declaration does not remove the right of the defendant to be heard in order to achieve its rights of defense. After hearing the defendant, if the *Court grants the application for adjudication* according to the procedure laid down in article 320[1] of the Criminal Procedure Code, it hears the Prosecutor and the other parties in the debate, the provisions of article 340-344 of the Criminal Procedure Code, governing the debates and the order of hearing, the last heard being the defendant, the written findings, the judging subject and the resumption of judicial inquiry or debate following to be applied properly. Also, the Court *may reject the application for adjudication of the case according* to the simplified procedure[36] if it finds that the evidence presented during the criminal prosecution are not sufficient to establish that the deed exists, is a crime and was committed by the defendant.

The effects of the application of the provisions of article 320[1] of the Criminal Procedure Code.

In the case of grating the application for adjudication of the case, the settlement of the criminal side by the Court shall be made in accordance with the provisions of article 320[1] of the Criminal Procedure Code, if the evidence presented during the prosecution show that the deed exists, it is a crime and was committed by the defendant; the changes in the content of this paragraph (as provided for in the G.E.O. no. 121 in 2011) had the role to attune its provisions with the conditions necessary to achieve the immediate purpose of the criminal trial[37].

If the offence has caused damages to the injured person, and it brings a civil action in the criminal proceedings, the civil action being exercised alongside the criminal action, and for the settlement of the civil action it is necessary to present evidence before the Court, then its severability may be ruled, under the provisions of article 320[1] paragraph 5 of the Criminal Procedure Code.

As a result of the application of the simplified procedure, the Court may pronounce in this case the defendant's conviction, which benefits from the reduction by a third of the sentence limits prescribed by law in the case of prison sentence, and from one-fourth reduction of the sentence limits prescribed by law in the case of the fine sentence. As it emerges from the interpretation of this paragraph, it follows that in the case of the application

[33] In accordance with the provisions of article 147, paragraph 1 of the Constitution of Romania, republished in the Official Gazette of Romania, Part I, no. 767 of October 31, 2003.
[34] Official Gazette of Romania, Part I, no. 931 of December 29, 2011.
[35] Substantiation note to G.E.O. no. 121/2011 for the modification and completion of some legislative acts, www.gov.ro.
[36] Mihail Udroiu, *op. cit.*
[37] Paragraph 4 of article 320[1] of the Romanian Criminal Procedure Code, before its amendment by G.E.O. no. 121/2011: "The court settles the criminal side when, from the evidence presented, it appears that the facts of the defendant are determined and there are sufficient data concerning his person to establish a sentence".

of simplified procedure, the Court shall pronounce the "defendant's conviction", but the text of the law does not give the opportunity to the Court to pronounce another solution out of conviction, not even the acquittal solution, when the deed lacks the degree of social danger of a crime under the provisions of article 10, letter b of the Criminal Procedure Code[38].

Also, the defendant may benefit from the reduction of sentence in the cases provided for in article 16 of Law no. 143/2000 on preventing and combating drug trafficking and illegal drug consumption[39], in article 20 of Law no. 678/2001 on preventing and combating trafficking in human beings[40], as well as in article 19 of Law no. 682/2002 on witness protection[41]. In these situations, where the procedure of guilty plea provided for in article 320^1 applies, the limits of the sentence to which the reduction provided for in paragraph 7 of this article shall apply shall be the limits reduced as a result of the initial application of the other causes of reduction of sentences provided for by law[42].

In case of a competition between the extenuating or aggravating circumstances, one may apply the provisions of article 80 of the Criminal Code, in which case the reduction of the sentence under the special minimum is not mandatory, but this fact does not preclude the application of the simplified procedure of trial, according to article 320^1.

As a consequence of the application of the provisions of paragraph 7, if the Court retains the legal or judicial extenuating circumstances referred to in article 73 and 74 of the Criminal Code in the case of sentence individualization, the application of the provisions of article 76 of the Criminal Code on the effects of extenuating circumstances shall be made by reference to the sentence limits reduced in accordance with the provisions of article 320^1 of the Criminal Code[43], and where there are many defendants and only one of them requests to make the proceedings only based on the evidence presented in the file at the stage of prosecution, the Court may rule by closure the severability of the case for the other defendants, if this is possible[44].

If the Court finds that the evidence presented in the file is insufficient to determine whether the deed exists, is a crime and was committed by the defendant, it shall reject the application by which the defendant requests to make the proceedings according to the simplified procedure and continues proceedings under common law procedure provided for in article 321-360 of the Criminal Procedure Code.

Conclusions

Introduction of the simplified procedure of guilty plea shall be subject to the requirements concerning the need to observe the principle of efficiency, which involves both quick settlement of criminal cases and simplification, if possible, of criminal procedural activity[45].

The provisions of article 320^1 of Law no. 202/2010 contributes to this challenge, but in addition to the advantages of this procedure, consisting in the decongestion of courts' activity, the text has been criticized and the implementation of this procedure has generated, due to the lack of clear provisions, different interpretations that could have been removed by the introduction of transitional provisions in the Law no. 202/2010. Moreover, the legislative initiative of trial procedure introduction in the case of guilty plea remains salutary in

[38] Cristinel Ghigheci, *op. cit.*
[39] Official Gazette of Romania, Part I, no. 362 of August 3, 2000.
[40] Official Gazette of Romania, Part I, no. 783 of December 11, 2001.
[41] Official Gazette of Romania, Part I, no. 964 of December 28, 2002.
[42] Mihail Udroiu, *op.cit.*
[43] High Court of Cassation and Justice, Criminal Department, Decision no. 2334 of June 09, 2011.
[44] Idem; see Criminal sentence no. 334 of 11.04.2011 of Bucharest Tribunal, The Second Criminal Department, File no. 17573/3/2011.
[45] Anca Lelia Lorincz, *Drept procesual penal*, "Universul Juridic" Publishing House, Bucharest, 2011, p. 51.

conditions in which it is found also in the context of the provisions of the New Criminal Procedure Code, in the form of a special procedure in Chapter I of Title IV – The Plea Agreement, continuing to be applied since the entry into force of Law no. 135/2010[46].

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[46] Official Gazette of Romania, Part I, no. 486 of July 15, 2010.

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THE PROCEDURE IN CASES WITH MINOR OFFENDERS, COMPARATIVE ANALYSIS BETWEEN LAW IN FORCE AND THE PERSPECTIVE OF THE NEW CRIMINAL PROCEDURE CODE

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Abstract

The minor does not possess the mental maturity, intellectual development and experience required for the efficient use of procedural rights granted by the law[1], so the legislator established a special procedure for prosecution and judgment, as well as for the enforcement of court orders, in case the offender is a minor between 14 and 18.

Keywords: *special procedure in cases involving juvenile offenders, Criminal Procedure Code in force, the new Code of Criminal Procedure*.

Introduction

This special procedure provided for and regulated by Articles 480-493 of the Code of Criminal Procedure shall apply in cases where the defendant is a minor, the participation of the child in any capacity (e.g., witnesses, injured parties) do not attract special procedure. Regarding special procedure in cases involving juvenile offenders, unlike other special procedures, we are dealing more with the usual procedure, Article 480 of the Criminal Procedure Code provides that the normal procedures plus additions and exceptions special procedure.

Prosecution in cases involving juvenile offenders under the legislation in force

At this stage of the criminal process, work is carried out according to the usual procedure being considered, mainly two specific provisions, namely: one on call of certain people to listen to the minor by the prosecution and the other one concerning obligations to conduct an essay on evaluation, as follows:

a) When the defendant is a minor who has not reached the age of 16, the prosecution may, if it considers it necessary, decide to call in any hearing or confrontation of the child the protection services for victims and perpetrators of social reinstatement where the child resides and the parents, or when appropriate the guardian, trustee or person in whose care or

[1] I. Oancea, *Drept penal. Partea generală*, "Didactică şi pedagogică" Publishing House, Bucharest, 1971, pp. 406-407.

supervision the minor is; citing such persons is required to perform criminal proceedings and presentation material, in this case, citing must be fulfilled to all people and not only to some of them; omitting citations for everyone may void the acts already performed in terms of relative nullity, such a violation of law may be covered by her non invocation by the person injured in its interests or its non-invocation within the period prescribed by law or by the fulfillment by the first instance, the procedure of citation of the persons referred to in Article 481 of the Criminal Procedure Code. Two important causes, justify the calling of these people namely: these people cited can provide information to the investigating authorities on the causes and conditions that led to or contributed to the offense, and such information would be difficult to obtain from other sources; the second perspective of citation reason of these people seek to establish a framework for making objective and sincere statements and the presence of such persons is likely to help to such purposes. The persons cited for hearings and confrontation, or presentations of the prosecution material who do not attend do not prevent the making of such acts.

b**)** To have an accurate representation of the physical and intellectual development of the minor, representation that can be used to apply the most appropriate treatment of criminal justice, the prosecution is obliged to order to the Service of victims protection and social reintegration of offenders to perform an evaluation essay in the cases of minor offenders. This report of evaluation has the purpose to provide data on the minors and their perspective of social reintegration. This data may refer to:

- physical and psychological profile of the minor;
- intellectual and moral development of the child;
- family and social environment in which he lived and developed;
- factors which influenced the minor's behavior and favored its criminal behavior;
- the minor's criminal history;
- the minor's behavior before and after the commission of the offense.

The assessment report must be certified in writing. Making it is mandatory in all cases with accused or minor defendants, even if during the prosecution they become adults, thus the requirement of this evaluation report is related to the time of the offense; meaning that if it is established that at the time of the offense the offender was minor the report is mandatory, even if such a prosecution against the perpetrator shall be made after the termination of his minority status[2].

Prosecution in cases involving juvenile offenders in light of the new Criminal Procedure Code

The new Criminal Procedure Code maintains the provisions of the law in force concerning the persons called to prosecution in cases with minor offenders, such as Article 505 paragraph 1 of Law no. 135/2010 provides: "*When the suspect or defendant is a minor under the age of 16 at any hearing or confrontation of the minor, the prosecution cites his parents or, when appropriate, his guardian, trustee or person in whose care or supervision the child is temporarily as well as the social assistance and child protection from the location where the hearing takes place*". An initial finding by way of change of the name used it's a note on the "Legal clothes" the person who has committed an offense is wearing. Therefore, according to the legislation in force, the person guilty of the offense goes through the following stages: *the perpetrator*, from the time of the offense until the prosecution starts, when he becomes *the accused*, term he keeps until the initiation of the criminal proceedings, and then becomes *the defendant*. In this regard, we note that the new Code of Criminal Procedure gives up the institution of the accused, the perpetrator having the status of a *suspect* until the initiation of criminal proceedings, when he becomes *defendant*. But the legislative

[2] G. Theodoru, Lucia Moldovan, *Drept procesual penal*, "Didactică și pedagogică" Publishing House, Bucharest, 1979, p. 340.

novelty provided by the Law no. 135/2010 in the paragraph of article analyzed consists of widening the list of persons called by the prosecution in cases involving juvenile offenders, as besides the persons cited under the provisions in force, there is also the general direction of social assistance and child protection in the location where the hearing takes place. If this addition will prove to be a qualitative one, in the interest of the minor, thus better protected or will remain a mere quantitative addition, it's the judicial practice that will reveal it.

Paragraph 2 of the same Article 505 of the new Criminal Procedure Code states: "*When the suspect or defendant is a minor who has attained the age of 16, citing the persons under para. (1) shall be ordered only if the prosecuting authority considers it necessary"*, therefore the legal provision consecrates expressly the faculty and not the obligation of citation of the persons mentioned, if the suspect or defendant has already turned 16.

The provisions of the New Code of Criminal Procedure show that the institution of prosecution presentation material (provided by applicable law) is being abandoned and at the end of prosecution will proceed as follows: the criminal investigation body shall submit the case to the prosecutor, accompanied by a report (Article 321 paragraph 1 New Criminal Procedure Code), following that the prosecutor verifies the prosecution work and if he discovers that it has been complied with legal provisions which guarantee the truth and that the prosecution is complete and that there are the necessary and legally administered evidence, he delivers the indictment ordering the prosecution of the defendant (Article 327 the new Code of Criminal Procedure), the file will be registered with the competent court and sent the same day to the preliminary chamber judge (Article 344 of Law no. 135/2010). According to the Article 342, the procedure's objective of the Pre-Trial Chamber is represented by the verification of the legality and legality seized as well as the verification of the legality of the evidence administration or making documents by the prosecution. Since this procedure of the preliminary room replaces the presentation of criminal procedure material, we may consider that the importance and novelty require a presentation aiming to issue an opinion. Preparatory measures contained in the Article 344 of the new law imply the obligation of the Chamber judge to communicate to the accused a certified copy of the indictment and the notice that he can make requests and raise exceptions, but that he can as well hire a lawyer to file written notes. Article 345 provides that the judge of preliminary chamber decides through a reasoned conclusion, in closed session without the participation of the accused and the prosecutor, either the start of the trial or return the case to the prosecution, in cases expressly specified by law.

On the issues presented, the opinion expressed in the literature[3] is that this preliminary procedure room offers more guarantees for the disclosure of the accusation, but also ensure the right to defense, and underlines the idea that through the new law there is not distinction between minors and adults on this procedure.

With regard to the assessment report of the minor, the novelty in its regulation is contained in paragraph 5 of Article 506 of the new Code of Criminal Procedure and provides that: *"Through the assessment report, the probation service requested can make reasoned proposals on educational measures to be taken to the juvenile"*. This proposal reasoned of probation counselor may or may not be endorsed by the court, which will decide whether a non-custodial measure or a deprivation of liberty will be imposed.

Judging minor offenders under the Code of Criminal Procedure in force.

In our judicial system the minority status of the defendant does not attract special rules of jurisdiction, cases involving juvenile defendants are being tried according to the rules of ordinary competence. Regarding the composition of the court there is, however, a special provision, under Article 483 of the Criminal Procedure Code, according to which judges

[3] T. Dascăl, *Minoritatea în dreptul penal român*, C.H. Beck Publishing House, Bucharest, 2011, p. 347.

entering the panel of judges shall be designated by law, which means a special entitlement to take part in judging cases with minor defendants. Violation of this provision voids the judgment in accordance with the provisions of Article 197 paragraph 2 of the Code of Criminal Procedure, so absolute nullity, the jury was not established by law. The justification of this provision is that judges entering the panel of judges shall be persons having, in particular, the possibility of appreciating the moral status and development of the child and to choose from the measures or penalties provided by law the most appropriate for the minor defendant.

The court formation with prosecutor is required both at first instance judgment and the judgment on appeal or appeal and must be ensured during the entire trial, the prosecutor's attendance is mandatory and is attracted by the minority status of at least one of the defendants in the cases where there are listed juvenile and adult participants regardless the nature of the offense, how to notify the court and the solution given; the non-compliance of the prosecutor's participation in the trial, mandatory under the provisions of Article 315 paragraph 1 of the Code of criminal Procedure, attracts absolute nullity because thus, the provisions of law relating to members of the court have been violated. Because the criminal trial has its own duration, it is possible for minor offenders to reach the age of 18 throughout the process. According to Article 483 paragraph 3 of the Code of Criminal Procedure, the defendant who committed the offense while he was a minor will be tried under the special procedure relating to minors. The obligation of editing the evaluation report remains valid even if the trial takes place after the defendant became major.

The Law no. 202/2010, regarding some measures to accelerate the settlement of the process was repealed par. 1 of Article 484 of the Criminal Procedure Code which sounds as follows: *"Trial of the case regarding an offense committed by a minor it is done in his presence, unless the minor was removed from the trial"*. Therefore, in the context of the old regulations, before its amendment by "the Small reform" the trial was always held in the presence of the minor and, therefore, the court, in addition to regular attendance, could have brought it to term, if the minor evade the law, a short trial was allowed without him; literature and practice were unanimous in believing that the minor defendant could be tried only if the research undertaken, it is established that circumvent the law, thus avoiding trial had proven to be established with certainty by the judiciary, the mere absence of the minor cannot be considered stealing it from judgment[4].

Analyzing the changes in the procedure in cases involving juvenile offenders, the doctrine[5] underlines the undeniable advantages identified in the development, with priority in the first instance procedure, since it claims that the warrant to bring the minor in, in order to ensure the presence requirements (requirement imposed by Article. 484 para. 1 Code of Criminal Procedure) may have undesirable effects on the minor's development and its procedural position. This warrant was considered to be a severe restriction of personal freedom[6], and if rehabilitation and child care were the objectives of paragraph. 1 of Art. 484, the actual text of the law has been used to obtain retrial, thus offering the possibility of avoiding the juvenile court. Likewise ordered and judicial courts, after scrapping the back of the default judgment, claiming that the institution is unenforceable term informed minors, whose presence in the judgment is binding on all trial periods, subject to cancellation

[4] N. Volonciu, *Tratat de procedură penală. Partea specială*, "Paideia" Publishing House, Bucharest, 1994, p. 463; I. Neagu, *Drept procesual penal. Partea specială. Tratat*, "Global Lex" Publishing House, Bucharest, 2006, p. 712.

[5] T. V. Gheorghe, C. Coadă, *Consideraţii referitoare la modificările şi completările aduse părţii speciale a Codului de procedură penală prin Legea nr. 202/2010 privind unele măsuri pentru accelerarea soluţionării proceselor*, in "Dreptul" Review no. 5/2011, "Universul Juridic" Publishing House, Bucharest, 2011, p. 153.

[6] A. Crişu, *Tratamentul infractorului minor în materie penală. Aspecte de drept comparat*, C.H. Beck Publishing House, Bucharest, 2006, p. 131.

absolute[7]. As a consequence of the repeal of par. 1 of Art. 484 Criminal Procedure Code, the minor defendant acknowledged term minor can receive as changes to the "Small reform" of Article 291 permit the application of deadline institution and informed defendant.

Under the penalty of nullity, the minor defendant must always be assisted by counsel, legal aid obligation ceases when the defendant became major complaint before the court, if the defendant minor becomes an adult after notification of the court, the insurance of his defense remains compulsory[8].

The court is obliged to call the Service of victims protection and social reintegration of offenders from the juvenile home and his parents, and if the case is so the tutor, curator or person in care or supervision of which the minor is, and other persons whose presence it is considered necessary by the court for better knowing the person of the defendant; the citation omission of such persons calls for the relative nullity; proceedings is not hindered by failure of persons legally cited.

Hearing cases involving juvenile defendants is not public and takes place separately from other meetings, in accordance with Article 485 of the Criminal Procedure Code, breaking the provisions relating to lack of publicity of the court hearing in cases involving juvenile defendants attracts the nullity of the judgment, rendered in such circumstances, only to the extent that has caused an injury that cannot be removed otherwise and is invoked by the person concerned, therefore, the relative void.

If the minor defendant is below the age of 16, the court may order his removal from the courtroom, after having heard him, if it considers that either inquiry or debates could have a negative impact on the child.

When those involved are both adults and juvenile defendants, if disjunction cannot raise special problems, since each of the two aspects disjoined apply the appropriate, if disjunction cannot work, court judges in composition provided for cases involving minors, but after the usual procedure and applying the provisions of the special procedure for juvenile defendants.

Trial of juvenile offenders in light of the new Criminal Procedure Code

The new Criminal Procedure Code maintains the provisions of the applicable law on the composition of the court that will judge the defendant, and are also incorporated provisions relating to persons called upon to judge minors, or the minor's parents shall be cited or, where applicable, the guardian, trustee or person in the care or supervision of which the child is in temporarily. If for criminal prosecution, the new Code of Criminal Procedure provides the citation of the DG welfare and child protection of the location where the hearing takes place for the trial phase, in accordance with Article 508, will cite the probation service.

If applicable law requires that the meeting in which the juvenile offender proceedings shall be conducted separately from other sessions, Law no. 135/2010 replaces the provision of paragraph 1 of Article 509 which states: "Cases involving juvenile defendants are judged emergency and priority". However, judging offenders in non-public session is retained by the new law, as well as the possibility of court removing the minor defendant sitting under the age of 16, if management believes that certain evidence may have a negative influence on him. Moreover, the new law states that, under the same conditions, the parents or persons entitled to representation can be temporarily removed from the courtroom. Literature[9] takes the view that this new regulation is a step forward, the possible situations in which the child cannot report freely and without coercion certain facts or circumstances in the presence of his parents or persons entitled to representation. The new Code of Criminal Procedure Article 510 paragraph 1 contains rules that, when the same question involves several defendants, some

[7] G. Antoniu, A. Vlăsceanu, A. Barbu, *Codul de procedură penală-texte, jurisprudenţă, hotărâri C.E.D.O.*, "Hamangiu" Publishing House, Bucharest, 2006, p. 465.
[8] M. Preda, *Urmărirea şi judecarea infracţiunilor săvârşite de minori*, in "Dreptul" Review no. 9/1970, p. 51.
[9] T. Dascăl, *op. cit.*, p. 404.

minor and some major and you cannot sever, the trial takes place according to Article 507 paragraph 1 and after the usual procedure in applied. We note that the regulation is so pre-amendment introduced by Law no. 356/2006, for the purposes of disposition by severance court case in which the defendants are tried together with adults, and if severance is not possible, due to be judged as appropriate by specialized juvenile and family court, the department or specialized.

Conclusions

An important matter in determining criminal responsibility of the offenders consists of relative contradiction[10] between the two trends of the modern world: on one hand, the rising trend in all legislations of the minimum threshold at which the criminal responsibility starts (the purpose being the protection of minors), and on the other hand, juveniles tend to become precocious, due to the technical means of information and enlightenment. This precocity of children manifests itself in criminal plan, so the legislature is obliged to find solutions that meet the requirements of prevention, education and punishing juvenile offenders.

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M. Preda, *Urmărirea şi judecarea infracţiunilor săvârşite de minori* in "Dreptul" Review no. 9/1970.

[10] C. Turianu, *Răspunderea juridică pentru faptele penale săvârşite de minori*, "Continent XXI" Publishing House, Bucharest, 1995, p. 21.

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LEGALIZATION OF EUTHANASIA CONTRARY TO RELIGIOUS MORALITY, IN THE CURRENT SOCIETY

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Abstract

The research of euthanasia in terms of Christian morality is meant to highlight the conclusion that no one may decide to terminate life, even when some people are in the terminal stage of a disease.

In general, euthanasia is punishable by legal rules prescribed by states, but there are countries that allow such a practice, which is contrary to humanistic principles and spiritual values protected by religion so that the Church has an important role in educating citizens to meet all humanistic values and not to intervene on their own initiative in any way in the progress of life, by suppressing it.

Key-words: *euthanasia, morality, religion, risk society, moral values.*

Introduction

The illicit or licit nature of euthanasia has sparked controversy since the earliest times, having as a starting point the statement of Francis Bacon[1], from 1623, that the mission of medicine would be not only to restore health, but also to "sweeten" pain and suffering caused by disease, being able "to obtain for the patient, when there is no hope, a sweet, quiet death".

Initially, euthanasia had a passive sense, of abstaining from any treatment that might prolong the patient's end unnecessarily, ensuring a peaceful death, without anyone to contribute to the suppression of life, but in the nineteenth century the sense of active euthanasia is added, involving suppression of life, by the action of another person, at the request of the patient, when there is no way to save his life.

The doctrine is also talking about the so-called "voluntary" euthanasia[2], specific to certain people who abandoned the elderly or weak or deformed children, in contravention of basic human rights to life, as well as the so-called "social" euthanasia, an expression used by the fascist regime in Germany in order to kill 200000 malformed, debilitated or terminally ill children.

[1]F. Bacon, *Instauratio Magna*, 1-er part, libr. IV, chap. II, trad. Oeuvres philosophianes par Boillet, M., Hachette, Paris, 1834, cited in Encyclopedia Universalis, Corpus 9, Etymologie-Fungi imperfeti, Paris, 1990, p. 113.

[2] Plato, *Oeuvres complètes, tome quatrième, La Republique* (translation by Baccou, R., Librairie Garnier Frères, Paris, 1936, p. 111), stating that "those whose body is badly built, and those who have a perverse heart and incorrigibly obstinate by nature, will be left to die".

Developments in the Church's attitude towards euthanasia

Catholic Church showed[3] that the term euthanasia refers to the responsibility of a health professional or a close person, in connection with the death of a man or a disabled person. Euthanasia would be the gesture or omission causing the deliberate death of the patient, wanting to end a life marked by suffering.

In the writings of the Holy Fathers and in the decisions of the Ecumenical Councils a firm position was taken against certain acts qualified as sins, such as abortion, contraception use[4], euthanasia or assisted suicide, physicians being also encouraged to serve life, so that even in apostolic times we meet doctors devoted to their vocation, ministers of the physical health, but also of the spiritual one, as an essential condition of true health.

Together with the secularization of society, the church's role as guarantor of the morality of medical care began to be claimed, but the Great Schism of 1054 marked the emergence of two divergent moral currents, by default of two Christian bioethics, but different.

Rather than to discover the authentic values of Bioethics, the West went on the road to secularization, the road to life desanctification, attitude deriving, on one hand, from the spread of socialist ideas of Marx, which pursued humanity without God, the socialist humanism characterized by a deep trust in the creative forces of man[5], and on the other hand, from the National Socialist doctrine of Hitler, who was trying to justify war atrocities by means of the so-called "values", war that resulted in tens of millions of victims[6].

In the context of the diversification, sometimes aggressive, of Christian bioethical systems, it was reached a widespread practice of medical acts, morally reprehensible, which affect human life, such as euthanasia.

Regulations of states on euthanasia

In legislation, euthanasia was allowed in some countries. If the attempt to legalize this procedure of extinguishing life failed in 1906, in Ohio in the U.S., in April 2001 active euthanasia was legalized in the Netherlands, which becomes the first country in which terminal patients have the right require suppression of life through lethal injection, physicians not being responsible for the "occurrence" of this death of compassion (*mercy killing*).

On May 16, 2001, the Parliament of Belgium voted also for the legalization of euthanasia under certain conditions and with respect to certain particular procedures: the patient must be an adult or an emancipated minor (capable in the moment of demand), the request must be made voluntarily, deliberately and repeatedly, without any external pressure, the disease must be irreversible, constant and unbearable, the patient must be consulted by another physician, etc.

The Criminal Code of Russia, from 1922 exempted the author of a murder committed out of mercy, if he acted at the request of the victim.

Passive euthanasia has been permitted since 1994 in Oregon for seriously ill people, in other U.S. states being forbidden. Also, this form of euthanasia is permitted by the French Criminal Code, which recognizes the right of a patient in the terminal stage of a disease to refuse the treatment already considered futile and to be allowed to die *(orthotanasia*).

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[3] *Declaration on euthanasia* published by the Congregation for the Doctrine of Faith on May 5, 1980

[4] C. Drumea, *Omul între „a fi" sau „a nu fi" – Probleme fundamentale de Bioetică*, "Editura Arhiepiscopiei Romano-Catolice" Publishing House, Bucharest, 1998, p. 121, which, regarding contraceptive pills, indicates that there has never been such a powerful a drug to be administered to healthy people so without medical reasons.

[5] R. Andi, *The Cambridge University of Philosophy, second section*, Cambridge University Press, 1999, p. 719.

[6] T. Engelhardt, H. Jr., *Fundamentele bioeticii creştine. Perspectivă ortodoxă*, "Deisis" Publishing House, Sibiu, 2005, p. 54.

A law passed in 1922 in Denmark requires the physician to comply with the will of a patient found in the terminal phase to be left to die, as the law adopted in December 2005 in Israel.

In some states, such as Switzerland, Greece, Iceland, Finland, Austria and Germany euthanasia is prohibited, but murder committed at the request of the patient who is terminal, shall be punished with a detention for statutory mitigating circumstances.

In Romania, the Criminal Code in force does not expressly provide the sanctioning of euthanasia, but they are virtually prohibited and may be classified as crimes of murder, the court being able to retain as legal mitigating circumstance the disease status of victim and his request to suppress his life.

In art 190 of the new Romanian Criminal Code, adopted by Law no. 286/2009, which has not yet entered into force, the killing act is accused separately at the request of the victim. This article reads: "Murder committed at the explicit, serious and repeated, conscious request of the victim, who suffered from an incurable disease or serious medically certified infirmity, causing permanent and unbearable suffering, shall be punished with imprisonment from 1 to 5 years". In doing so, the Romanian legislature implements the divine right of Christian religious and ethical norms, the church giving, over time, particular importance to the legal element[7] through which the state can influence people's behavior positively.

Romanian Orthodox Christian religion's role in the fight against euthanasia and other issues that contradict human morality in the context of EU integration

In order to harmonize the Christian practice on defending human values violated by acts such as euthanasia, human trafficking, contraception, etc. and in order to integrate this morality in the European Union, all Christian churches in Romania, together with the Jewish religion, expressed in a solemn manner, on May 16, 2000, in Sinaia, their agreement and their support for Romania's EU integration. The leaders of churches and religious communities signed a joint declaration to that effect and specified that Romania's integration in the European Union is for us, at the same time, a chance to be helped and an opportunity to contribute spiritually and culturally in the life of the European Union.

Cultural and religious particularities of each nation can serve as a binder and as an asset for Europe's unity and stability, rather than to constitute factors of conflict, as it happened many times in history. Religions have the holy vocation to contribute to the reconciliation and rapprochement between individuals and peoples, to the glory of God and salvation[8], contributing together to educate people to respect the human values and Christian morality rules.

Romania's integration in the European Union can influence most areas of life and activities of our people and other people in the Union, including people's spiritual life and conduct. Obviously the religious life in Romania will be subject to different influences coming from Europe; therefore an upgrade is required in the BOR, for the purposes of return to tradition, in the writings of the Holy Fathers, in the canons of the Ecumenical Councils, briefly in the truth of the Gospel. On the other hand, we should get to know better the world in which we enter, as the Romanian Orthodox Church to identify the best speech and the most effective way of expression, so that to remain on a position of power in the Romanian state and within the European Union, the Christian Orthodox religion trying to bring up the negative effects of euthanasia and to influence, to the extent possible, the positions of decision makers in this respect.

[7] E. Paraschiv, *Izvoarele formale ale dreptului*, C.H. Beck Publishing House, Bucharest, 2007, p. 189.

[8] *Religious Declaration for Romania's EU Integration Sinaia May 16, 2000*, document published on http://www.eglisebruxelles.com/ro/documente/declaratie.html (accessed on September 6, 2011).

In fact, European integration movement was inspired by Christian spiritual springs, which then departed, but a coherent view of reality claims the resumption of these springs, in order to complete the process started decades ago.

The major problem of the common witness of the Christian Churches in the EU means that the reconciled and creative potential, all comprehensive of Christianity is affected by *confessional fractures* across the continent, largely responsible for the negative attitude of postmodernity towards Christianity[9].

The significant contribution made by Christianity in human history lies in the universality of the Christian message, which no longer defines the individual according to social status, as in Roman law, but considers all people equal, but not as in stoicism, based on a natural tie, but as sons of One God. In fact, Orthodox Christian churches in Greece and Cyprus have managed to stay within the European Union, fulfilling their mission in the new European context smoothly, helping, despite globalization and the phenomena of alienation, to preserve the national and ethnic identity of believers.

Conclusions

In accordance with religious precepts, since antiquity have existed authorized opinions opposed to the suppression of people's lives through euthanasia[10].

In the context of the desanctification of the conception of life and adoption of a cosmopolitan liberal morality, in some parts of the world the humans being seen as objects, being subject to human trafficking, abortion or potential challenge to give up life by suicide or euthanasia, a procedure under which one can hide serious deeds, when from some interests, some people unwittingly surrender to life, although there were still opportunities for their healing.

Therefore, it would be necessary to review concepts of human relations in the light of humanities and religious morality that puts the center of its focus on human welfare, for which states and international organizations adopt the best regulatory measures so as to avoid the potential gap that the future would open if, for selfish reasons or obscure material calculations, the importance of human spiritual values is lost.

Also, the Romanian Orthodox Church has the mission to operate in the EU forums in order to find the best methods and procedures for imposing humanistic values, such as the right to life and to make sure that the other human rights and freedoms are fully respected.

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[9] N.R. Stan, An interview with Pr. Prof. Univ. Dr. Wilhelm Dancă: *Christianity and the current challenges*, in the magazine of the *Metropolitan Church of Oltenia*, no. 5-8/2006, p. 135.

[10] C. Drumea, *op. cit*., p. 101, showing that in his famous oath, Hippocrates stated: "I will not let myself be driven by anyone's word in order to buy poison or to give my consent for such a thing".

Plato, *Oeuvres complètes, tome quatrième, La Republique,* translation by Baccou, R., Librairie Garnier Frères, Paris, 1936;

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THE PROBLEM OF CULTURAL CRISIS IN ROMANIAN AND EUROPEAN SOCIOLOGY

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Abstract

The crisis phenomena which roam the present day world laid their mark upon spiritual life. The urge towards bringing form to perfection in its struggle against the rebellious and amorphous matter represents human condition's capacity of self-exceeding its status. Through creation and artistic knowledge, man clears up the unknown paths of the future and offers himself inner peace and an existential certitude in what concerns his place in the Universe and his future.

From the point of view of the crises manifesting themselves at the macro-social level, social disorder represents the main sociological indicator. Social disorder manifests itself primarily through denying some traditional values. This seems to be the consequence of speeding up life's evolution as it is seen in the framework of technical civilization: acceleration rather through cultural diffusion - or through mimetic cultural pretensions – than through a real intellectual and moral education; acceleration through double-dealing cultural education, abstract and intensive; through alteration of the parents - children relationships; through multiplication of pleasure opportunities, entertainment and evasion; through the young peoples' chase for shallow acquisitions, difficult to accomplish by honest means, but indispensable for satisfying the temptations. This way, the anomic phenomena of the 21st century go hand in hand with nature's transcendental and symbolical framework.

The main issue of this paper is understanding the role of culture in scattering the darkness of distrust between peoples, the invitation to cooperation through plenary communication of values conferring dignity and meaning to human existence, one of the culture's role being that of offering new perspectives to human progress.

Keywords: *Cultural crisis, spiritual life, human condition.*

Introduction

The processes of globalization involving world-wide economy and the necessity of solving the vital problems of humanity constitute a basic characteristic of our time. The aspiration to perfecting form in the conflict with the rebellious and amorphous substance represents the capacity of self-surpassing of human condition, which, through creation and artistic knowledge, deciphers the unknown paths of the future and offers inner pace and an existential certitude to the individual in his relationship with his place in the universe and his future perspectives. That is why we must not be in agreement with the negativistic tendency regarding the destiny of culture in contemporary world, or with the elitist idea of eluding the cultural values from their unavoidable process of communication and receptivity.

Freed from the tyranny of the official culture, the peoples in the South-Eastern part of Europe develop their own national culture beginning with the dialectical combination of the

most valuable traditional elements with the over-particular assimilation of universal culture's genuine values[1]*. Within this process of economic integration and synchronization with the European cultural phenomenon, the means of mass communication and the improved reproduction techniques can have a beneficial effect if they are put in the service of promoting genuine national aspirations, and if they do not have in view penetration through persuasion of consuming ideologies and of the cultural industry in the developed countries, in the central institutions in these countries.*

Progress cannot arise from the sterile opposition between superior culture, isolated in a secular exclusiveness and transformed into a reference system and the boycotting the new cultural forms, disseminated world-wide due to the technical progress: radio, television, cinema, video, internet, etc. At the same time, progress cannot arise either from the reciprocal negation of the two types of cultures: traditional and modern, different from each other through the profoundness of the vision, through the structures of sensibility and through the variety of compositional scales and the different perception of socio-historical realities.

A solution would consist in applying a double integrator current: on one way, in the democratization of traditional forms, and, on the other, in recognizing the natural rights to existence of the new cultural forms arisen from the strong pressure of the masses of people to History. Acknowledgement of the cultural values, according to the standardized norms of consumptions could not be produced without a secure sales market of cultural products. Or this market never had such a favorable setting as in consumption society, when manipulation of the public's artistic taste itself serves to profit making. More than that, cultural industry market fully demonstrated the effects of this organizing type upon the purchaser of cultural assets: the unique sensorial of satisfaction proving this way an extraordinary flexibility in orienting production towards those needs whose primary satisfaction can guarantee the control of stimulated and exploited desires according to the logic of profit –making and domination. That is why consumption is encouraged through a subtle advertising system, served by mass-media which continuously recreates false needs having in view the broadened reproduction of consumption. A large manipulation margin of the public opinion is added to all these by those who are planning cultural industry where propagandistic slogans of the "welfare state" serve at encouraging investments and securing new profits.[2] Prior to all these, as the concept of consumption society has an ideological connotation, reflex of the convergence of the post-industrial society, and the lack of ideology and policy in consensual validation of the middle class life style. The technical and scientific reasoning and the methods of organizing and administrating the economy standardizes, through the equal acquisition power and equality of chances, continuous consumption and satisfaction of needs.

Instead of drawing up a long term development policy of human personality, based upon the authentic way of living in consensus with the bio-psycho-social human nature, cultural managers direct his motivations and yearnings towards a system of values whose axis is focused upon a way of living based upon the obsession of consumption and the endless effort of property possession. A system of moral and spiritual values is needed in this framework, meant to providing to man the feeling of formative utility of these possessions, and not the ephemeral pleasure of possession. Under these conditions, man feels himself dragged out and suspended from his axiological system whose dimensions were and will always be the need for an axiological framework of protecting values, being in secret

[1] I. Bădescu, *Sincronism European şi cultură critică românească,* "Dacia" Publishing House, Cluj-Napoca, 2002, p. 178.
[2] A. Duțu, *Cultura română în civilizaţia europeană modernă*, "Minerva" Publishing House, Bucharest, 1978, p. 97.

communion with the laws of nature, the source of his plenary certitude of his way of life. From a way of accomplishment, material values changed into objectives.

In this context, the ongoing processes of globalization have made the role of multiculturalism more prominent in the efforts of integration. A true integration cannot occur under the translucent ice of uniformity. How can cultural diversity be managed in such a way that it becomes a source of innovation, of stimulating the political process and not a factor of blocking communication or isolating community? We may fear that cultural values will be quickly disintegrated, and with them, community relations? The image of a "global village" and of a planetary civilization foretold some time ago increasingly comes into shape, thanks to regional and regional integration processes, although national cultures imperatively requires the right to difference as a guarantee of successful completion of these new cultural units[3].

Viewed from this angle, culture also appears in society as a factor of unity, not so much between the different sides of personality, as between different personalities. Cultural work is, firstly, continuity and cohesion, because there is no culture without tradition. Biologically or spiritually, value manifests itself in consciousness and in the world through adaptation, transformation and renewal. Communication between historic values and modern values is performed by the continuity in time; each generation hands it down to the next generation, in such a way as to preserve what it has acquired, and it distributes on a high scale. By the setting up vocation of value, culture unites generations and allows the progress of society.

No society is living in anarchy, without an emerging culture, even if it is rudimentary. There is no society without a conception of life, or without a conception of the universe. If we take into consideration stability and cultural change, they all demonstrate the dynamism of culture: culture only static cultures are dead cultures. But changes occur so slowly that the only way we perceive them is by opposing past to present. Although cultural changes are noticed everywhere, they present themselves as a condition, but not absolute in themselves or through themselves. Culture is both stable and in continuous change. Cultural change cannot be perceived only as part of the problem regarding cultural stability; it can only be understood by evaluating the change in its relationship with conservatism.

While culture as a human being's attribute is limited to the human being, culture as a whole exceeds the individual. The argument in favor of the objective reality of culture consists in the fact that it gets out of human control and it operates within the limits its own laws. The fact that there is a cultural continuum, despite the constant change of people whose behavior characterizes culture, is an argument for the objective existence of culture. We must consider culture as existing in itself, dominating people's lives as they are nothing else than mere passive instruments of its power.

Perceived as a whole, culture can be considered as man's gradual liberation of himself. Language, art, religions represent different stages of this process. In each of them man discovers and demonstrates a new power - the power to build his own world. They do not confound the ideal with its concrete manifestations in every moment of man's becoming self-conscious. They must not ignore the tensions and frictions, the strong oppositions and deep conflicts between the obscure, unconscious forces and man's multiple, creative forces. They cannot be reduced to a common denominator. They tend towards opposite directions and are subject to different principles. But this multiplicity and this disparity do not indicate either disagreement or disharmony[4]. All these functions are complementary. Each reveals a new horizon and uncovers a new aspect of the human phenomenon. Dissonance is at the same time harmony: opposites are not mutually exclusive: they are independent. What unites the various

[3] A. Husar, *Ideea europeană*, "Institutul European" Publishing House, Iaşi, 1993, p. 328.
[4] D. Otovescu, *Sociologia culturii-Antologie autori străini*, "Beladi" Publishing House, Craiova, 2010, p. 243.

forces of culture is not an identity of nature but the identity of its basic objective: the moral perfection of the species. If there is a dynamic equilibrium in human culture, this is the result of a struggle between contrary forces.

Although ethnic and cultural stereotypes, religion, the level of economic development, the great linguistic diversity are factors that hinder European integration, the development of a cultural policy would not have been possible without a common base of all European countries. Culture has helped whole generations to find out their meaning, their identity, their own vision; it has given communities a sense of belonging and mutual respect. For the EU to develop a viable and suitable cultural policy, both a thorough knowledge of the past, and cultivation of respect for diversity are necessary.

The present state of knowledge on the issue of cultural crisis in Romanian and European sociology has a continuing reflection in the sociologists' preoccupation concerning the cultural crisis in modern society and in Europe, giving each and every word a precise meaning, and each problem a particular clearing up. Cultural industry reflects the same reports and similar contradictions as industry producing material goods, except the fact that, being an accomplice to the dominant ideology, it has served to homogenize and precisely to neutralize potential conflicts, especially those that might come from cultural environments.

The reactions of European culture to the overall array of facts and social, political and economic changes during the inter-war period were more ethical and teleological than political. Fundamental themes of the intellectual debates of those days revolved around the consequences of the economic rationalization upon spiritual life. Formalization of the processes of thinking and of the methods of knowledge was experienced as a loss, more or less deliberate, of any axiological transcendental references, as a progressive reduction of the existence to elementary functions[5]. It appears as the objective and irreversible process not only within capitalist development, but also within contemporary cultural conditions, where any process of knowledge and action was devoid of subjective and inter-subjective intentionality.

The basic idea circumscribing the entire theoretical fabric of Western sociologists' theses regarding cultural industry is that major innovations of the modern era have been paid by a decline of theoretical consciousness. In our century, progress has led to a degree never reached; prevalence of society over nature, but on the other hand, it was accompanied by an evolution that gives value to what is immediately usable and technically exploitable. This means that the principles of truth, freedom, justice, humanity have lost their substance, to become mere manipulative symbols. Ambition to achieve these principles in social life exhausted itself: he who does not know what is freedom, is not in the position to fight for it.

Representatives of the Frankfurt School viewed the technical progress that has penetrated and possessed the artistic and cultural fields' enlarged reproduction, the main agent that, manipulating it in their interests, decision-makers of culture and art in capitalist societies have adapted their artistic production the laws of the market.

The same as with mass society "mass culture" is highly controversial among Western experts. In its definition is going to be an apologetic position the "opulence society" in the '60s, either from violent criticism of new cultural forms, in the name of nostalgia and neoconservative critics. As a form of social consciousness, whether false or alienated, mass culture is not a relative autonomy recognizes the inherent phenomena superstructures, nor the ability to reproduce themselves, and being enriched by its own laws, which gives a peculiar art and culture.

Relations between mass society and culture have also been the subject of many studies and conflicting conclusions, depending on the position of the opponents, conservative and

[5] P.P. Panaitescu, *Contribuţii la istoria culturii româneşti,* "Minerva" Publishing House, Bucharest, 1971, p. 10.

elitist, apologetic or a romantic, and past-ridden. Mainstream extending from A. de Tocqueville by D. Bell, E. Morin and E. shills argues that mobility, socio-cultural heterogeneity, concentration and centralization of economic and political ties in modern societies has weakened the primary groups and have made them an easy target for psychological aggression and action media propaganda.

Dialectics of cultural life in developed countries is, at present, according to two contradictory social phenomena. On the one hand, the social division of labor leads to the further creation of new living environments, new groups, new social demands and feedback diverse cultural experiences and educational systems on the other hand, entertaining and highly centralized media secret a cultural industry becoming more homogeneous. This dialectic has been confirmed by the findings of sociological surveys conducted in mid H. L.Wilensky in the seventh decade[6].

Both critics and apologists of mass culture, both detractors and its supporters argue against the unilateralism of approach. Good or bad, mass culture is a real phenomenon of the contemporary world, whether in a uniform pace of homogenization of mass society, whether it is a continuous source of human alienation in the new conditions of life, it is still a functional subsystem of mass society, by developing new mechanisms to perform some functions that the old institutions of mass society previous company cannot meet. The flow is so fundamental that it consists in an attempt to legitimize mass culture and in her character leveling and standardized to total. Another critical issue is the mass culture technique established between development, primarily the mass media, cultural values and approval takes place within the spread of mass culture. Such an approach underestimates the culture of images, specific today. Dissemination of cultural values was and is an intrinsic dimension of the cultural phenomenon everywhere. Naturally, diffusion values, the influences of culture in our time have achieved planetary scale, in an impressive speed of transmission, at a rate unsuspected by ancient artists. This almost simultaneous broadcasting of cultural values and mass media have made an undeniable contribution, responsibility for the harmful effects of mass culture is at least to underestimate the relationship between the results of scientific and technical discoveries and their manipulation.

Beyond the political fragmentation, beyond the various tests of power politics, beyond the great deeds or aberrations, Europe remained a community of civilizations, maintaining common elements in the traditions, language, religion, political organization and culture. Through its cultural policy, the EU has started to encourage inter-cultural cooperation, to enhance the European cultural heritage and bring it closer to the general public. Maastricht treaties after they tried to strengthen the road to a "*Homo europeus*". All they have done taking into account the EU motto "Unity in Diversity", respect for the cultural identity of the Member States manifesting as a political non-harmonization of laws in the field, and through participation in discussions and projects relating to that matter - as, for example, *the Convention on the Protection and Promotion of diversity of means for expressing cultural diversity*, adopted by the General Conference of UNESCO on October 20, 2005.

Romanian experience in the field of industrialization, social mobility and, in particular, migration provides a fertile ground for analysis. Especially in the resilience of spiritual symbols of cultural values that circumscribe the aggressive penetration and pressure systems of foreign cultural norms and values. In the mid-60s, forced collectivization of agriculture imposed by the canons of Soviet collectivization in 1929, began to erode the system of moral values and cultural norms and the millenary of the Romanian village. Structural features of Romanian culture: the history, vision, naturist, fellowship with the

[6] D. Otovescu, *Tratat de sociologie,* "Beladi" Publishing House, Craiova, 2010, p. 599.

eternal laws of the cosmos, deep sense of ethic, etc., began to be seriously threatened by a critical unmet need: hunger and uncertainty about tomorrow.

Under these circumstances, it became a problem to have a role and status of citizen. Especially for the younger generation of men to work as a laborer on construction sites, expanding labor market, social achievement was tantamount to a test of maturity. Disaggregated under pressure forces, the Romanian village, which ensured the preservation of cultural cohesion, moral values and national entity, it dies slowly, hit by a fatal disease. With an aging population and lack of young reproductive cell, the Romanian village still enliven the holidays, when young people turned to show his new citified status[7]. This horizontal mobility should not matter whether it would be followed by the saddest consequences of the social behavior of the fresh wave of city dwellers.

Because the desire to have this status as soon as possible led to a rush to imitate the behavior of city. And, as behavioral norms and values of civilization were the archaic imitation of their new lifestyle has become a basic rule. Given that traditional morality was replaced by toadyism healthy, conformity and opportunism, imitation was limited to the outward forms of behavior that lead to the desire to integrate urban challenge and ridicule violent peasant origin and morals, those who are not ashamed to acknowledge its source. So it is that these new arrivals have remained suspended between morality and immorality sound alien to the mentality of the class and its culture.

A similar situation, although more dramatic, a Romanian immigrant found in psychology. Family receiving a dual education, conflict, duplication of its behavior in the social life is based on dual standards and cultural values: Romanian cultural values do not deserve respect because they are our public life forged demagogy, while only the values of Western democracy can give an authentic setting for the fulfillment of his personality. Therefore, future Romanian immigrant culture is socialized in this internal conflict, but on a false basis.

Values were, at first, load the internal organization of culture, harmony between different cultural levels, of human behavior and action. The conception of the world is how to see and build the world as a whole. It is the general picture of the world order, "the discovery of truth" to the world. As such, it facilitates human action adaptation of the cosmic order. It is a theoretical framework to explain every phenomenon in the world. The conception regarding the world is not made up of things and events, but of organizing principles and explains their culture and creating the possibility of individual action. I mean, any cultural community, human, for there must be a mechanism to explain the phenomena, but precisely the conception of the world contains premises or principles within which man can understand everything and every phenomenon.

The sum of a certain culture values the grouping guidelines, which serves the assessment of actions and cultural activities through training institutions and statutes, gives the possibility of creating a general order to the same rules that those belonging to a certain culture and community tend to the same values, which facilitates a common life and maintain their cultural community. Cultural norms are super-individuals, super-communitarian and, as such, like any cultural element, can range in space and time. Cultural rules are transmitted or learned through literacy. Learning the rules of their own culture, people regarded as normal, and on the foreign abnormal, unnatural. Each community has its rules and regulations and institutions for the transmission and learning rules and institutions and rules for maintaining the cultural rules. Failure to follow a community question leads to the existence of community life within it.

[7] C. Schifirneţ, *Generaţie şi cultură*, "Albatros" Publishing House, Bucharest, 1985, p. 455.

Having a legal basis, the EU began to worry about this vast field called culture, which include: arts, dance, music, theater, books and cultural heritage. Complementary areas, closely related to the field of culture: education, developed through programs such as ERASMUS, COMETT, DELTA EUROPACHET, LINGUA, SOCRATES and LEONARDO, and broadcasting, which is concerned with both the film industry and media through programs such as MEDIA I and II.

Since January 2000, by Decision no. 508/2000/CE of European Parliament and Council of 02.14.2000 the three programs: Ariane, Kaleidoscope and Raphael have been consolidated into a single program framework, multidisciplinary, called "Culture 2000 "and considered today as the sole instrument of cultural funding. Launched over a period of five years, it was renewed with the plan “Culture 2007-2013”. The programmer aims at highlighting the common cultural space, to promote cultural diversity, encourage cooperation organizations and national institutions and major events to facilitate public access to culture. Equipped with a fund of 167 million euros, the program supports initiatives such as festivals, co-productions, education, exhibitions, artistic creations, tours and conferences. This program is intended for artists, cultural operators and a wide audience, including youth and disadvantaged groups economically and socially. With all programs and projects supported by the EU, there are voices that say “absence of a European cultural project” and calls for the integration of culture in the process of unification of the states. Although the Community actions seeking compliance with national and regional cultural diversity, however, the need to promote recovery policies and highlight the common European cultural heritage. Community action must aim at encouraging cooperation between Member States and, if necessary, supporting and complementing their action in the following areas: improving knowledge and the dissemination of culture and history of European peoples, preserving and safeguarding the cultural heritage of European significance, non-commercial cultural exchanges, artistic and literary creation, including in audiovisual. The multi / interdisciplinary approaches subsumed objective analysis of the crisis Romanian and European culture in sociology may focus on: identifying cultural institution acting as the principal agent in the big cultural social communities - modern human body form as evidenced by specific structure of social relations particular invoice, relatively simple organizational entity, whose primary function development and / or propagation of goods and services (value) designed to meet the cultural needs - art. Size mainly determines the operational unit of culture, above all, a flexible and adaptive behavior, and secondly, a continuing concern for the whole system self-regulation based on its primary purpose - the value of a spiritual, aesthetic, artistic and its circulation in society. Regarded as an agent, given the current operational activities, business culture is a tool for achieving social goals - which make up the cultural mission, the reason for its existence.

You could say that meeting a number of cultural agencies defining features such as: are deeply interested in their actions and decisions mostly purposeful spiritual, aesthetic, artistic, are dependent on the quality and structure of cultural resources at their disposal, have an “dialogue” consistent with the human community which includes representatives of other cultures, are specialized in conducting, promoting and disseminating their own cultural products and services. Opera is a work of cultural brotherhood. To the extent that value remains immanent consciousness, they remain foreign to each other; even share the same value, even if each is worth developing in them the same arrangements. The cultural action once people establish a genuine and permanent link. Truth can never be a truth if it is true only for me, is pretty nice if it is never nice for me. Value is not only for the individual, it belongs to the community. Hence the desire of people to persuade their fellows to participate in their axiological universe. Culture is an appeal to all people to overcome constraints of space and time in the search for unity of mind and also a call to overcome individual

differences, the universal and essential. In every society, culture corresponds to a particular same time to live, think, act, an original form of civilization in a given society in a group or an individual and a dialectical movement between the material transformation sustained and voluntary change. In this movement, group or individual work without their active and constructive part of his daily practice, the transformation of society and its civilization. Without creating a culture of values, civilization, and non-renewable fixed rigid structure, is doomed to death.

Therefore, the technique is not culture, because it reflects not only material values that lead to the enrichment of living conditions. This is because between the development of civilization and cultural authenticity to its spiritual essence is no necessary correlation. The development of civilization means increasing sophistication of material and social living conditions. This progressive refinement and cumulative is the inevitable result of social experience and differentiate the myriad types of continuous complexity of organization.[8] The refinement means not only intellectual and technical developments in comfort, but most efforts tend to promote a more hygienic living, healthier and, to some extent, more human. Any profound change that course of civilization, in particular any change in economic support, is accompanied by a reversal and a reduction of cultural values. But driven by the force of inertia of old cultural patterns, traditional types fail to maintain response. This mismatch between traditional reactions to new conditions is accompanied by certain restlessness, aware that most individuals may experience a fundamental failure as a culture.

Conclusions

In reality, national cultures have a natural openness to the universal values for dialogue and exchange with other cultures and spiritual spaces. Modern and contemporary social values have increased communication and communication between cultures, with the extraordinary expansion of the media system, such that interference cultural connections and exchanges of securities have become the dominant reality today. In the cultural, structural report reproduces the contemporary world of unity and diversity, cultures and communicating between them interfering. Human diversity has its basis in the forever cycle of social interactions with their objective and subjective records, differentiated and cohesive. Different cultures are placed face to face today are in mutual dependence, engaged in a common context that expands on a planetary scale.

It is necessary that the inevitable transfer of sovereignty to European institutions for individual decisions to be considered realistic and pragmatic, not to leave the place insinuation of reservations and concerns about the possible dissolution of national identity as a result of Romania's EU integration.

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JURIDICAL INTERACTIONS BETWEEN ACCESSION AND CO-OWNERSHIP

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Abstract

According to the new Civil Code[1], when sustainable works are performed in good faith on the author's plot of land, but partial on the plot of land of the neighboring owner, "the latter may request the registration in a new land book of a co-ownership right of his neighbors over the resulting immovable asset, including the related plot of land, in relation to the value of the contribution of each of them" (Art. 587, para. 1). In this situation, the quotas of the ownership right shall be determined according to the each neighbor's contribution in the performance of the work, regarded in its entirety.

Therefore, the lawmaker deemed as an efficient solution for the two owners of the immovable assets affected by the work, that to create a co-ownership right over it, as well as over the related plot of land.

As a matter of fact, with respect to the owner of the neighboring fund, on whose plot of land a construction is made without his consent, the lawmaker's solution to give such owner a property right is a logical solution, which complies with both the definition of accession, and its effects, as regulated under the law. Surprising is, however, the lawmaker's decision to join also from a juridical point of view the owner of the neighboring fund with the construction owner, by effect of co-ownership.

The regulated hypothesis starts from the premise of an author's performance, on his own plot of land, of a construction, which exceeds –however- the limits of his own plot of land. Interesting situations might occur in practice, generated precisely by such "proportion".

Keywords*: accession, co-ownership, the New Civil Code, jurisprudence, right of superficies*

Introduction

*According to the new Civil Code*2*, when sustainable works are performed in good faith on the author's plot of land, but partial on the plot of land of the neighboring owner, "the latter may request the registration in a new land book of a co-ownership right of his neighbors over the resulting immovable asset, including the related plot of land, in relation to the value of the contribution of each of them" (Art. 587, para. 1). In this situation, the quotas of the ownership right shall be determined according to the each neighbor's contribution in the performance of the work, regarded in its entirety.*

In this way, the contribution of the work's author shall be equal to the value of the related plot of land the owner of which he is, the value of the materials and, therefore, of the workmanship used for its performance, and the contribution of the owner of the

[1] *Noul Cod civil si reglementarile anterioare. Prezentare comparativă*, 2nd Edition, provided and annotated by Mona Maria Pivniceru, "Hamangiu" Publishing House, Bucharest, 2012, p.138.
[2] Idem.

neighboring plot of land shall be equal to the value of the part of his own land, which became a part of the plot of land related to the sustainable work made by the good-faith author.[3]

The second paragraph of the same article provides the neighboring owner with a possibility to obtain in co-ownership also the work made in bad faith on his plot of land; however, in such case, the quotas of the two co-owners shall be differently appreciated. In this way, "when establishing the quotas, account shall be taken of the value of the plot of land owned by neighboring owner, as well as of half of the value of the contribution of the work's author".

In this case, the owner of the neighboring fund shall, however, continue to have the possibility to request the bad faith constructor to erect the work, but only of that part from the work which is placed on his land. Also, the owner of the neighboring fund shall still have a possibility to request and obtain by enforcement, when such are not willingly paid, damages resulting either from the lack of use of the occupied land, or from other circumstances, such as a potential fund deterioration caused by the erection of the construction.

Finally, the lawmaker offered a situation of juridical compromise (Art. 587 para. 3), for the situation in which the parties do not reach any agreement. In this way, the court of law shall be the one to have the role to determine which the quota is assigned to each of the co-owners, depending on their contribution in the resulting immovable asset.

It is considered "that the lawmaker made an omission by failing to expressly regulating the right of the neighboring owner to request that the work's author be bound to buy the affected plot of land, at the circulation value such land would have had if the work had not been carried out, as the lawmaker did in the hypothesis provided by Art. 582 of the new Civil Code"[4].

Therefore, the lawmaker deemed as an efficient solution for the two owners of the immovable assets affected by the work, that to create a co-ownership right over it, as well as over the related plot of land.

As a matter of fact, with respect to the owner of the neighboring fund, on whose plot of land a construction is made without his consent, the lawmaker's solution to give such owner a property right is a logical solution, which complies with both the definition of accession, and its effects, as regulated under the law. Surprising is, however, the lawmaker's decision to join also from a juridical point of view the owner of the neighboring fund with the construction owner, by effect of co-ownership.

The regulated hypothesis starts from the premise of an author's performance, on his own plot of land, of a construction, which exceeds –however- the limits of his own plot of land. Interesting situations might occur in practice, generated precisely by such "proportion".

Please note that the lawmaker did not intend to protect the constructor that makes the largest part of the construction on his own plot of land, a construction which –for various reasons, with or without his knowledge, with or without his intent, exceeds the limits of his own property.

We consider it would be unfair for the owner of the work carried out in proportion of 90% on his own land to lose 10% of his exclusive ownership of such work, because he did not know or realize that, in the process of its edification, it exceeded the limits of his property. Yet, the discussion is relative. When considering such solution to be fair or unfair, account should be taken of the sizes of the work, as well as of the extent to which its surface occupies the neighboring land.

[3] Fl. Baias, E.Chelaru, R.Constantinovici, I.Macovei, *Noul Cod civil. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2012, p. 656

[4] Fl. Baias, E.Chelaru, R.Constantinovici, I.Macovei, *op.cit.*, p. 657

From this point of view, the provisions from the first draft version Civil Code from 2004[5] were better circumstantiated. According to Art. 452, para. 1 of this draft, "in case of the construction partially edified on the constructor's plot of land, the neighboring owner may, in exchange for a compensation, obtain the entire construction, if at least one half of the surface occupied by the construction was on its own plot of land". Under para. 2, the lawmaker established the fact that, along with ownership over the entire construction, the neighboring owner also acquires a right of superficies over the occupied part from the constructor's plot of land, however only throughout the existence term of the construction." The lawmaker provided for this situation also a lapse term of 1 year from the completion of the construction, a term in which the neighboring owner should have notified the constructor of his intent to obtain the two ownership rights over the construction and a right of superficies over the related plot of land.

Since the 1864 lawmaker failed to regulate such situation, the judicial practice was the one which generated several solutions. In this way, when settling such cases, the courts of law resorted to: "considering that the author of the work, in all the cases, acted in bad faith, which could lead to the demolishment of that construction part which was on the plot of land owned by the neighbor; considering that the constructor acted in good faith (his title to the plot of land being a putative one), should the impairment caused to the neighboring fund be minimum, the owner of the partially occupied plot of land being entitled only to invoke accession; the acknowledgement of the constructor's accession right to the portion of the land owned by the neighbor and occupied by the constructor, with the obligation right to pay damages to such neighbor; the constitution of a co-ownership right between neighbors, either by the parties' agreement, or by a judicial way"[6].

The doctrine, however, took into consideration other solutions as well. In this way, it was considered that "a fair solution would be (…) a transfer of property under an onerous title (sale or exchange of plots of land) in case the author of the work is acting in good faith, and the plot of land subject to trespassing has a small area. Such a solution would not contravene the provision of Art. 44 para. 3 of the Constitution, in its reviewed version. Such a legislative solution was adopted in the Swiss Civil Code"[7].

As previously mentioned, the *de facto* situation which generated this regulation is that in which a person is partially building on his own plot of land and partially on his neighbor's plot of land. This hypothesis generates two possible situations: the construction is erected mostly on the plot of land owned by the person who makes the construction or more than half of the construction extends into his neighbor's plot of land.

The fact that the regulation from the New Civil Code refers only to the first situation can be noted, while the second situation formed the object of the regulation of the Draft Civil Code of 2004. In this way, the current regulation of one of the hypotheses excluded the other one, although both situations should have formed the object of the regulation.

From the perspective of jurisprudence and previous doctrine, expressed in the absence of a regulation, several juridical solutions were noted for the situation in which the performed work largely extends on the constructor's plot of land and only to a small extent into the neighbor's plot of land. Such solutions were:

[5] Draft Civil Code of 2004, http://www.dsclex.ro/coduri/pr_civil.htm, accessed on 26.09.2012, 17:20.

[6] Fl. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod civil. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2012, p. 656

[7] B. David, *Accesiunea imobiliară artificială*, Doctoral Dissertation, coordinated by Valeriu Stoica, ph.D.,p. 21,http://www.unibuc.ro/studies/Doctorate2012Februarie/David%20Bogdan%20-%20Accesiunea%20imobiliara%20artificiala/rezumat%20teza%20drept-PDF%201.pdf, accesed on 26.09.2012, 16.00.

- "exclusion from the application of Art. 494 of the Civil Code, being considered that artificial real estate accession does not operate, which means that the owner (of the plot of land – our note) is provided with an action for claim/damages, and it cannot be compelled to preserve the work;

- Art. 494 of the Civil Code shall apply, which means that artificial real estate accession applies "only that the situation is atypical and it generates impairing consequences";

- they proposed to not apply Art. 494 of the Civil Code, "to satisfy the principle of fairness". As long as the landlord remained passive, according to Guidance Decision No. 13/1959, then he who constructed would be entitled to preserve the work and use the land. "Such a solution has no legal grounds. Jurisprudence may innovate without denying the existing regulations, or the solution of 1959 contravenes Art. 494 of the Civil Code and the texts regulating the ownership right. The solution was criticized in the doctrine."

- another proposal was that a co-ownership right should be born in such a hypothesis." This solution has no legal basis either"[8].

It seems that the lawmaker considered that the latter is the ideal solution to solve this problem, for which reason it also created a legal basis for it.

The second situation, the one in which more than 50% of the work made extends over the area of the neighboring plot of land, has no separate regulation in the new code, which means that the above stated rule applies, regardless of the scope of the work which affects the neighboring plot of land, which fact seems to us to be neither just, nor fair.

We do not understand why the lawmaker considered that the regulation proposed in Art. 452 of the draft Civil Code of 2004 was a faulty one, and it decided to include this particular case in the general regulation.

As specified above, the draft Civil Code of 2004, in the version enacted by the Senate, provided under Art. 452 the fact that when the work extending over the neighboring plot of land exceeds half of the total length of the work, a potestative right was born in favor of the owner of the neighboring land; in virtue of such right, such landlord could become, against a compensation, the landlord of the entire construction, and, respectively, the holder of a right of superficies over the plot of land related to the construction, which plot belongs to the constructor.

It is true that such regulation had its deficiencies, which could be –however- easily remedied. In this way, as also commented in the doctrine[9], the fact that the neighboring owner should have, in exchange for the obtainment of the ownership right over the entire construction, paid damages only with respect to that portion of the work which is found on the constructor's land, thus entering free of charge into the property over the work made on his own land was neither just, nor legal. The general regulations on accession were obviously breached in this manner. The lawmaker should have established as incumbent on such landlord, presuming that the latter intended to use his potestative right, a compensation which should take into account the entire construction.

Another criticism of that text was represented by the fact that the lapse term of one year in which the potestative right could be exerted. [*sic!*] The "possibility that, after the lapse of the 1 year-term, the owner of the neighboring plot of land could exercise his potestative right of accession or, if the author of the work is acting in bad faith, his right to request that the work be removed" should have been acknowledged[10].

[8] http://www.juridice.ro/35558/conferinta-dreptul-afacerilor-23-24-mai-2008-pe-larg.html, commented fragment from the lecture of professor Valeriu Stoica, ph.D., accessed on 28.09.2012, 11:15h.

[9] http://www.stoica-asociatii.ro/Conferinta-Dreptul-Afacerilor-2008-s9-i76-ro.htm, accessed 28.09.2012, 11:35 h.

[10] http://www.stoica-asociatii.ro/Conferinta-Dreptul-Afacerilor-2008-s9-i76-ro.htm accessed on 28.09.2012, 11:35h.

Other criticism brought to the respective article envisaged the lack of the regulation of a reverse situation, namely of the situation regulated by the current code, when more than half of the work was found on the constructor's land. The solution proposed by the doctrine was to grant "applicability to those solutions from the situation in which the work was conducted on two plots of land belonging to different landlords"[11].

The draft civil code of 2004 received numerous amendments which resulted in the enactment of the Civil Code in its current version.

A significant development of the regulation results from the realization of a distinction between the various categories of works which can be carried out, respectively can affect, the plot of land of a person other than the person of the constructor. In this way, according to the amendments proposed by the Ministry of Justice, based on the works of the specialized commission, the draft code was amended, in the sense that a different juridical regime was granted, depending on the two types of categories of works performed: provisional works and sustainable works.

In this manner, in case of provisional works, according to Art. 452^1 of the draft civil code, unless otherwise agreed by the parties, such works had to be removed by their author, regardless of the latter's good or bad faith. The bad faith constructor could, nonetheless, be bound to pay damages for the prejudices caused by his actions, including for the lack of use.

In case of sustainable works, the solutions provided may differ, depending on the constructor's good or bad faith.

Art. 452 and 452^1 can be found today in the civil code in force, being however differently numbered, *i.e.* Art. 452 became Art. 587, while Art. 452^1 became Art. 588.

This form of regulation presents a series of advantages, in addition to the obvious disadvantages which were previously set out. Through this formula, although it is neither just, nor fair in our opinion, "a unique juridical regime, regardless of the proportion in which the work is executed on the two neighboring plots of land"[12] is created. Also, a great advantage is the fact that "the obligation of the neighboring landlord to indemnify the author of the work shall be removed, and –in this manner- they removed the difficulties related to his insolvency".[13] Moreover, in case they reach a subsequent sharing of the work, a security interest in real estate was instituted, by this regulation, namely a lien, in favor of the co-owner which would obtain the right to a difference in value.

The regulation adopted by the lawmaker took into consideration, probably also further to the criticism from the doctrine, does no longer mention the lapse term of 1 year in which the application for registering with a new land book of the neighbor's co-ownership right over the resulting immovable asset should have been filed.

We consider that the solution chosen by the lawmaker is unjust with respect to the creation in favor of the neighboring landlord of the potestative right to acquire co-ownership also over the plot of land related to the construction. In our opinion, it would have been just that only one right of use could be obtained in relation to the related plot of land, which could be maintained throughout the entire lifetime of the construction. Going in the direction of the solution chosen by the lawmaker, in a symmetrical manner, at least the good faith constructor should have also acquired co/ownership over the land affected by the construction belonging to the neighbor.

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[11] http://www.stoica-asociatii.ro/Conferinta-Dreptul-Afacerilor-2008-s9-i76-ro.htm accessed on 28.09.2012, 11:35h.

[12] http://www.stoica-asociatii.ro/Conferinta-Dreptul-Afacerilor-2008-s9-i76-ro.htm accessed on 28.09.2012, 11:35h.

[13] http://www.stoica-asociatii.ro/Conferinta-Dreptul-Afacerilor-2008-s9-i76-ro.htm accessed on 28.09.2012, 11:35h.

Thus, we do not understand why consideration was given, in these terms, to the regulation of Art. 452 of the Draft Civil Code of 2004, in the version enacted by the Senate, which expressly provided under para. 2, the fact that "at the same time with co-ownership over the entire construction, the neighboring landlord also acquires a right of superficies over the occupied portion of the constructor's land, but only during the lifetime of the construction".

An explanation of this solution was given by relating to the Cadaster and Real Estate Publicity Law, which was otherwise repealed by the new civil code. "The plots of land belonging to the two landlords shall be reunited, according to Art.42 of Law No. 7/1996, indicating that the landlords of neighboring immovable assets, for a better exploitation thereof, may reunite them into an immovable asset, based on a cadastral documentation and on the authentic writ, prepared according to the provisions of the law. In the cases provided under Art. 587 of the NCC, the ownership right shall be registered under a court order disposing the registration of the ownership right"[14].

Whether the work was performed in good faith, whether it was performed in bad faith, affecting the land of the neighboring landlord, in case the neighboring landlord wishes to become a co-owner of the work and of the related land, alongside with the constructor, his right shall only be borne from the date when the right is registered with the land book. Registration can be made either based on the parties' agreement, should such parties agree, or based on a court order.

Art. 589 imposing the registration with the land book as a condition necessary for the obtainment of the ownership right is, in fact a transposition into this matter, of the rules regarding the registration with the land book, as provided by Art.888 of the NCC. He who shall obtain the ownership right shall be, as applicable, the landlord of the immovable asset, the author of the work or both of them.

Registration with the land book can be made, therefore, also by the constructor landlord, who obtains, by means of reciprocity, an ownership right over the neighboring land related to the construction. Obviously, the constructor shall be able to do so only after the neighboring landlord manifest in this respect his potestative right.

The constructor's only form of defense, in fact, as resulting from the law, shall be the removal of materials. In this manner, according to Art. 590 para.1, "until the conclusion date of the agreement or the filing date of the action by the person entitled to the registration with the land book, the author of the work may remove his materials". This text of law is targeting, in principle, the good faith constructor, which cannot be obligated to remove the construction; however, we note that he acquired the right to remove his materials.

However, the possibility granted to the good-faith constructor should not be used, however, for vexating purposes. This is the reason why the law acknowledges the possibility to remove materials only until the time when the potestative right of the neighboring landlord is capitalized, either in the sense of becoming a co-owner, concluding in this regard an agreement or filing an action at law, or in the sense of becoming an exclusive landlord, through the payment of damages.

Also, this possibility of the author of the work would be applicable "only in those cases in which it is possible to remove materials without deteriorating the immovable asset. A contrary interpretation would lead to the absurd conclusion that the good-faith author might remove his materials even by deteriorating the immovable asset, (the land – our note), without having the obligation to pay damages, since this solution is provided by Art. 591, para. 2 only for the bad-faith author. The solution of materials removal may not be admitted even if the

[14] *** *Noul Cod civil. Comentarii, doctrină, jurisprudenţă,* "Hamangiu" Publishing House, Bucharest, 2012, p. 881

materials were incorporated in the immovable asset so that they lost their identity, becoming parts of the immovable asset and, thereby, immovable assets (Art. 537)".

Conclusions

A fair solution for the good-faith author of the work, in case the impairment to the neighboring fund is minimum, namely the largest portion of the work is on his own land, is that of becoming the owner of the entire work and related land, obviously with the payment of damages to the neighboring landlord. This possibility cannot be freely capitalized by the author of the work, but he may benefit from this possibility, only if the landlord of the affected neighboring land understands to male an agreement with this object or to bind him in this sense. Article 581 provides the landlord of the neighboring land with the possibility to request that the author of the work should be bound to purchase the immovable asset (of the land related to the work) at the circulation value at the circulation value it would have had, if the work had not been performed.

Therefore, the good/faith author of the work shall be able, in fact, to enjoy it if he is sanctioned in this manner by the landlord of the land affected by his work. In this way, we consider grounded the considerations according to which "although the author of the work becomes a landlord over the immovable asset without his agreement or against a court order (if no agreement is reached with the landlord – our note); in fact, in this manner, his good faith is legitimized, by the fact that only now does he become the genuine landlord of the immovable asset. The author of the work has no possibility whatsoever to refuse entering legality, *i.e.* the obtainment of the ownership right over the immovable asset. The impossibility of refusal is explained also by the fact that it is the passive subject of the potestative right of the landlord of the immovable asset and that he shall be bound by the obligation to submit, to bear the exercise of such right. Therefore, the parties may only dispute on the price at which the immovable asset shall be purchased by the author of the work"[15].

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[15] I. Sferdian, *Observații asupra accesiunii imobiliare artificiale în reglementarea noului cod civil*, "Dreptul" Review, no. 2/2011, p. 22.

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LEGISLATIVE CHANGES GOVERNED BY THE NEW CRIMINAL CODE IN DEFINING THE NOTION OF OFFENSE. LEGISLATOR'S ORIENTATION: ROMANIAN LEGISLATIVE TRADITION AND EUROPEAN LEGAL SYSTEMS

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Abstract

This article deals the most important institution of the Romanian criminal law, the institution of the offense, therefore, the legislator and theoreticians' preoccupation in defining it is fair.

Usually all the concepts or legal notions are defined by judicial doctrine and only some of these are found expressly defined in the laws in force.

Regarding the judicial concept of offense, Romanian criminal law defines it from the theoreticians and pedants' point of view, but also from the legislator's point of view because the systematic and scientific regulation of relations of social defense cannot be reduced to the preparation of special criminal rules, which provide for prohibited actions as offenses and related penalties.

Key words: *offense, institution of law, legislator, social values, guilt.*

Introduction

Some human actions threaten fundamental social-human values.

These actions are contrary to social behavior necessary for the normal operation of the society. Why are these actions considered to be undermining of normality? Because they generate social conflict.

Although conflicts in general can sometimes have deeper roots or causes, placed in the individual's subconscious and from the perspective of the analyzed material, we can notice that they are eminently social, interpersonal conflicts, arising out of the damage of some individual or collective rights, stipulated in regulations[1].

How can stability of social structure be realized? Only by protecting social-human attributes, and this imposes certain social relations by essential legal regulations.

Individuals' behavior is allowed by social relations, that protect fundamental values but, when they committed some criminal actions, by breaking prohibitive rule, these persons become active subjects of the offense[2].

[1] Lavinia Onica Chipea, *Conflict of interests and rights conflict, different categories of work related conflicts*, in Annals of the University of Oradea, Fascicle of Textiles – Leatherwork, CD- ROM Edition, volume I, 2010, ISSN 1582-5590, p. 220.
[2] I. Tănăsescu, C. Tănăsescu, G. Tănăsescu, *Drept penal general*, All Beck Publishing House, Bucharest, 2002, p. 165.

Legislator, through judicial rule, introduces in the social life a set of rules which individuals must follow, that consist either in specifying some actions which must be necessarily carried out, or in setting some prohibitions, in which case certain actions should not be carried out, the individual having to refrain from committing them[3].

These subjects adopt a certain behavior, with their physical and social environment, that influences their motives, aims, needs and motivations[4].

Therefore, the actions of these subjects determined and prohibited by law under the penalty of applying a penalty constitutes offenses[5].

Offense along with criminal liability and criminal law penalties, form the pillars of any system of criminal law, are fundamental institutions of criminal law.

Since it is a fundamental institution of the criminal law, legislator and theoreticians' concern in defining it is fair.

In judicial sciences, we encounter all the time two categories of definitions for different categories or judicial concepts:

- definitions offered by judicial doctrine, by theoreticians and practitioners of law;
- legal definitions, offered by legislator.

Usually all the concepts or legal notions are defined by judicial doctrine and only some of these are found expressly defined in the laws in force.

Regarding the judicial concept of offense, Romanian criminal law defines it from the theoreticians and pedants' point of view, but also from the legislator's point of view because the systematic and scientific regulation of the relations of social defense cannot be reduced to the preparation of special criminal rules which provide for prohibited actions as offenses and related penalties.

It is essential the legislator's care in defining the notion of offense, the actual action must be related to a rule of indictment, to a legal model, to assign it the character of offense[6].

The defense of behavioral order is the state's responsibility. The state is the one which must repress behaviors which deviate from the regulation of certain kind of social relations. Some social relations are protected by the state and others are sanctioned.

The law, as normative document which emanates from the legislative organ, regulates the existent social relations and imposes their confirmation by the state's constraint force.

In doctrine[7] it was stated that in a certain way, the rule of incrimination creates from a legal point of view the offense, it confers the concrete action this quality, only by referring to the rule and to the extent in which the concrete action's features coincide, and superimpose over those of the legal model[8].

Of course, the changes, which occurred over time in the criminal policy of a state, determine the changes brought to the incrimination rule.

We are in such a period, important from a legal point of view, because we are witnessing to a reformation of the Romanian judicial-legislative system.

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[3] Laura Roxana Popoviciu, *Drept penal. Partea generală*, ProUniversitaria Publishing House, Bucharest, 2011, p. 72.
[4] I. Tănăsescu, C. Tănăsescu, G. Tănăsescu, *op.cit*., p. 166.
[5] C. Bulai, *Drept penal român, Partea generală*, vol. I, "Şansa" Publishing House, Bucharest, 1992, p. 111.
[6] C. A. Domocoş, *Fapta omisivă şi incriminarea ei în legea penală română*, "Universul Juridic" Publishing House, Bucharest, 2010, p. 7.
[7] G. Antoniu, *Reflecţii asupra structurii normei de incriminare,* in Romanian Penal Law Review, no. 3/1998, p. 9.
[8] V. Dongoroz, *Drept penal*, Re-edition of the edition from 1939, Tempus Society& Roumanian Criminal Asociation Publishing House, Bucharest, 2000, p. 211; C. A. Domocoş, same referrence, p. 7.

How European construction has undergone an accelerated rhythm of change in the last twenty years, "here is how the Lisbon Treaty raises a question that awaits an answer"[9]: Romania is currently going through a time of transition and adjustment of its legal and judicial system to the Community's "adopted" system, aiming at the unification and harmonization of the legal systems of the Member States[10].

In 2011 entered into force the New Civil Code and in the domain of criminal policy, we have a New Criminal Code, the Law 286/2009, whose entrance into force is expected as soon as possible.

The development and adoption of a new Criminal Code represents a crucial moment in the legislative evolution of any state. The decision to start the elaboration of a new Criminal Code is not just a manifestation of a political will, but represents, in equal measure, a corollary of the social-economic evolution, and also of the doctrine and jurisprudence. Elaboration of a code (criminal, civil, commercial, etc.) assumes, therefore, several premises: an evolution of social relations, which makes old regulations to appear as exceeded; an activity of laborious scientific research, carried out and designed to identify the needs of regulations revealed by the doctrine and practice; a thorough knowledge of the latest trends in national legislation in Europe and of the European rules in the considered domain[11].

In contemporary society, people have begun to evaluate in a different way their real interest in certain conflicting situations and the win/win type of solution, that the justice system cannot provide, gains more and more followers[12].

Returning to nowadays, particularly in the transitional periods of great legislation, which will be the case of the entry into force of the New Criminal Code[13], the institution of the offense consumed great energies in the attempt to define it.

Title II of the New Criminal Code is devoted to the institution of offense.

The regulation that was given to it represents one major elements of novelty brought to the present project.

Romanian criminal policy has passed within a relatively short time through a succession of legislative attempts to impose a New Criminal Code.

The judicial significance of the consecutive legislative changes operated by the legislator have been based on the adoption of the best version of penal protection of the judicial values in accordance with the European penal legislation.

The development of a new penal and penal procedural regulation involves first a selection of social values, their hierarchy in the agreement to changes in the economic, social, and political life in our country. In this assessment, first, the Romanian legislator Romanian had to appreciate to what extent the current penal and penal procedural legislation is satisfactory to the requirements of present society in transition and if it agrees to the provisions of the new Constitution and with the standards set out in documents adopted by the various international bodies[14].

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[9] Ligia Valentina Mirişan, Claudia Timofte, *Some aspects concerning the diplomatic protection offered by the European Union for the citizens in the present economic situation*, in Annals of the University of Oradea: Economic Science, volume I, tom XX, p. 34.

[10] Anca Tătăran, *The Romanian legal system in the context of European integration*, in A.I.J.J.S no. 2/2010, www.juridicaljournal.univagora.ro.

[11] www.scritube.com, A display of reasons to the New Criminal Code.

[12] Laura Dumitrana Rath-Boşca, *De ce medierea?* in Mediation, technique and art, no. 21, june, 2012, p. 35.

[13] I. Nariţa, *Inconsecvenţe şi imprecizii în definirea şi aplicarea legii penale mai favorabile*, in "Dreptul" Review, no. 9/2011, p. 164.

[14] G. Antoniu, *Reforma penală şi ocrotirea valorilor fundamentale ale societăţii*, in Romanian Penal Law Review, no. 2/1996, p. 9.

Legislative changes regard a reassessment of the principles and the basic rules in the penal and penal procedural legislation, which require a new approach of the complex of fundamental principles proper to these branches of the law[15].

So, starting from the Criminal Code in 1968[16], who is now in force, modified on its turn by a series of normative acts, the first version of the New Criminal Code, in the order of chronological enactment, is the New Criminal Code in 2004 enacted by the Law 301/2004, published in the Official Gazette of Romania no. 575/29 June 2004, and which had to enter into force on 29 June 2005.

Recommendations made by specialists regarding the requirements that need to stay at the basis of criminal reform, had in regard, among other things, clear setting of the social values, which are going to be protected by the rules of the new Criminal Code, to be reconsidered and to grade the traditional values and to take account of the new social values too, which have to be protected as a result of the new social and political conditions[17].

This normative act has been criticized from the outset: "with appreciation that the new law is a judicial creation better systematized and adequate to the criminal phenomenon, with which Romanian society is facing"[18], however some judicial institutions could be rethought by the legislator, and eventually changed[19].

The entry into force of this law by G.E.O. no. 58/2005 has been postponed, and in the end, the entry into force of this law has been renounced due to its numerous lacks which it presented.

The elaboration of a new project of the Criminal Code had started in 2007, and, in the end, the version of the project of the Criminal Code from 2009 was enacted by Law 286/2009[20].

Before analyzing the essential features of the offense deduced from the various definitions offered by the mentioned normative acts, we have to do a brief foray into reproducing them as they were regularized by the legislator:

- the Criminal Code in force: Article 17 shows that the offense is "an act that represents a social danger, provided in the criminal law and it is committed in guilt."

It also specifies that the offense is the only basis of the criminal liability.

From this definition, the essential features of offense are standing out:

- an act that represents a social danger; the moral and social aspect;
- an act committed in guilt; human, moral and political aspect;
- an act provided in the criminal law; judicial aspect.

Through these features, the distinction is made between offense and noncriminal acts in relative to other acts, which do not have a criminal feature[21].

- the Law 301/2004: Article 17 shows that the offense is "an act provided by criminal law, which shows a social danger and it is committed in guilt".

It also specifies that the offense is the only basis of criminal liability.

From this definition, the essential features of offense are standing out:

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[15] A. Crişu, *Tratamentul infractorului minor în materie penală. Aspecte de drept compara*t, C.H. Beck Publishing House, Bucharest, 2006, p. 195.

[16] Law 5/21 June 1968, published in O.G. 79-79bis/ June 21st 1968, republished in O.G. 55-56/April 23rd 1973 and republished in O.G. no.65/April 16th 1997.

[17] G. Antoniu, E. Dobrescu, T. Dianu, Gh. Stroie, T. Avrigeanu, *Reforma legislaţiei penale*, "Academiei" Publishing House, Bucharest, 2003, p. 63; M. Gorunescu, *Relaţia Noului Cod penal cu legislaţia specială din care a preluat norme de incriminare*, in "Dreptul" Review, no. 9/2005, p. 150.

[18] T. Dascăl, *Consideraţii cu privire la unele dintre instituţiile reglementate prin Legea nr. 301/2004 privind Codul penal*, in "Dreptul" Review, no. 11/2005, p. 172.

[19] Idem.

[20] Published in Official Gazette of Romania, no. 510/July 24th 2009.

[21] V. Mirişan, *Drept penal. Partea generală*, "Lumina Lex" Publishing House, Bucharest, 2004, p. 55.

- an act provided in the criminal law; judicial aspect;
- an act that represents a social danger; the moral and social aspect;
- an act committed in guilt; human, moral and political aspect;

In a brief comparison of the two legal texts we find only a change in the order of enumeration by the legislator of the essential features of the offense, in the sense that the provision of the act in the criminal law is listed by the legislator before the essential feature of the social danger.

- the project of Criminal Code in 2007: Article 15 shows that the offense is the act provided in the criminal law, unjustified and attributable to the person, who has committed it.

It also specifies that the offense is the only basis of criminal liability.

- and finally, the New Criminal Code, Law 286/2009 defines the offense in Article 15 as being the act provided in the criminal law, committed in guilt, unjustified and attributable to the person, who has committed it.

It also specifies that the offense is the only basis of criminal liability.

By comparing the legal texts included in the two Criminal Codes, the Criminal Code in force, and the New Romanian Criminal Code in defining the offense we see that the definition proposed by the New Criminal Code in Article 15 is substantially changed from the one contained in Article 17 of the Criminal Code in force.

By analyzing the definition in Article 17 from the New Criminal Code, we see that in the elaboration of the New Criminal Code has been pursued on one hand, the exploitation of the tradition of the Romanian criminal legislation, and on the other hand the connection to the current regulation trends of some judicial systems in the European criminal law[22].

Starting from the tradition introduced under the Criminal Code still in force, to include a definition of the offense in a text of the code, although in most legislation such a definition has not been consecrated, being considered as an exclusive attribute of the doctrine, the Romanian legislator has decided to keep this model of regulation, stating the definition of the offense in Article 15 the Law 286/2009[23].

The connection to the current trends in regulation of some judicial systems of reference in the European criminal law is given by the renouncement to the criterion of social danger as an essential feature of the offense.

The definition of the offense in the Criminal Code in force shows in the first place the essential feature regarding social danger, which the act must present, meaning to be dangerous for society.

In the provision in Article 18 of the Criminal Code, is stipulated that, within the meaning of the criminal law, the act, which presents a social danger, is any action or inaction, which harms one social values protected by the criminal law (Romania, sovereignty, independence, unity and indivisibility of state, the person, her rights and freedoms, the property, and also the entire legal order) and for whose penalty is necessary to apply a punishment.

The act harms the social values when it actually damages or puts in danger these values, creating the possibility of producing harmful consequences for them[24].

The social danger of the act results from the gravity with which the values protected by criminal law are injured, as a result of committing it.

As a feature of the offense, the social danger must have a criminal nature, meaning to present a certain grade, a certain gravity specific to the offense as a criminal illicitness, which

[22] M. Iordache, *Definiţia infracţiunii în lumina Legii 286/2009 privind Codul penal*, in "Dreptul" Review no. 11/2009, p. 34.
[23] Idem.
[24] C. Bulai, B. Bulai, *Manual de drept penal. Partea generală*, "Universul Juridic" Publishing House, Bucharest, 2007, p. 152.

distinguishes it from other forms of judicial illicitness (administrative, disciplinary, civil), and to justify the indictment of the act under the criminal penalty. The provision in the law of the penalty necessary for the prevention and rebutment of the indicted act is the expression of the social danger as a feature of the offense[25].

The social danger of the offense shows different degrees, some offenses having a higher degree of social danger (murder, burglary) draw harsher penalties, some have a lower degree of social danger (hitting, threat), for which the legislator provided easier penalties[26].

In the science of criminal law and legislation there is a distinction between the legal social danger and the concrete danger, with the difference that the first one is evaluated by the legislator and given in the incrimination's content, and the second one is evaluated by the trial court[27] during the judgment of a case and reflected in the applied criminal penalty.

However, as I stated, social danger is no longer defined by the legislator as an essential feature of the offense.

"The definition that is given to the offense under Article 15 paragraph 1 in the New Criminal Code is important under many aspects, of which we enounce the following:
- it represents a rule of law which the legislator himself uses when he sets the actions that are going to be listed in the category of criminal illicitness, and the actions that must be taken out from the category of offenses because they are no longer dangerous for society or they are no longer committed;
- it is used to separate offenses for which penalties are set and applied from other antisocial actions for which extra criminal penalties are regulated;
- for practitioners, the definition of the offense is a guide, which they use in the activity of applying the criminal law from the perspective if the committed act fulfills or not the essential features of the offense"[28].

From this definition, the essential features of offense are standing out:
- the act provided by the criminal law: judicial aspect;
- the act committed in guilt: human, moral, political aspect;
- the act unjustified and attributable to the person who committed it.

The new definition of the offense keeps the essential feature of provision of the act in the criminal law.

The materiality of the criminal phenomenon is the act, where the act does not exist, there is no offense, but not any act can be the material substance of an offense, but only that act that shows all the essential, specific and characterized features for the existence of the offense[29].

An act is considered to be provided by the criminal law when the legal rule determines in what conditions a certain action or inaction, social dangerous, is likely to be characterized as an offense and therefore does not attract criminal liability.

Any offense is based on a human action, an outside manifestation of the will.

Nature events or animals' reactions are excluded from the category of criminal acts.

Some offenses involve an action, for example, to steal, the criminal must take a thing not belonging to him; to harm the corporal integrity of someone, he must hit in a certain way the victim; at other times, the offense is committed by inaction, for example the public

[25] C. Bulai, B. Bulai, *op. cit*., p. 152.
[26] A. Boroi, *Drept penal, partea generală*, C.H. Beck Publishing House, Bucharest, 2006, p. 102.
[27] I. Pitulesu, T. Medeanu, *Drept penal. Partea generală*, "Lumina Lex" Publishing House, Bucharest, 2006, p. 105.
[28] C. Niculeanu, *Definiţia şi trăsăturile esenţiale ale infracţiunii în reglementările Noului Cod penal*, in "Dreptul" Review, no. 10/, p. 39.
[29] I. Oancea in V. Dongoroz S. Kahane, I. Oncea, I. Fodor. N. Iliescu, C. Bulai, R. Stănoiu, *Explicaţii teoretice ale Codului penal român*, Vol. I, Second Edition, All Beck Publishing House, Bucharest, 2003, p. 94.

servant, who does not perform his duties or commits the negligence at the workplace or abusive conduct[30].

Committing the act in guilt is the second essential feature of the offense.

For the offense to exist it is not sufficient that the social dangerous activity of the subject to come under the description of the offense, as it is incriminated in the special part of the Criminal Code, but it is also necessary that the act provided by the criminal law to be committed in guilt[31].

When the act is not committed in guilt, it is not imputable to the one who committed it, the person cannot be held for this act.

Guilt is also defined by the New Criminal Code in Article 16 "the act is an offense only if it has been committed as guilt required by the criminal law".

Guilt exists when the act is committed with intent, out of negligence or exceeded intent.

The act is committed with intent when the offender:

a) foresaw the outcome of his/her acts, and intended for this outcome to take place by the commission of that act;

b) foresaw the outcome of his/her act and, although he/she did not intend it, accepts the possibility for it to take place.

The act is committed out of negligence when the offender:

a) foresaw the outcome of his/her act, but did not accept it, because he/she unfound deemed it unlikely to take place;

b) did not foresee the outcome of his/her act, although he/she ought and would have been able to.

There is an exceeded intent when the act consisting of an intentional action or inaction produces a result more serious, which is due to the offender's negligence.

The act consisting in an action or inaction is an offense when it is committed with intent. The act committed out of negligence is an offense only when the law expressly provides for".

We have to state that not just any psychic attitude of the offender may be guilt, but only that which, by the psychic processes contained in it and by its relation with the committed act and with its consequences, expresses the link of psychic causality between the offender and the committed act[32].

Therefore, guilt assumes the existence of two inherent factors of the psychic life: consciousness or the intelligential factor and will or the volatile factor[33].

The unjustified feature of the act provided by the criminal law assumes that it is not allowed by the judicial order, in other words it has an illicit feature[34].

Although the legislator does not show in the regulations of the Criminal Code the content of the phrase "unjustified act", the introduction of this essential feature in defining the concept of offense is not accidental but, on the contrary, it corresponds to the current social and judicial realities[35].

So, it is possible that an act, even provided by the criminal law, not to be illicit because its commission is allowed by a legal rule. For example, killing a person in self-defense coincides with the description realized by the legislator in the text that incriminates

[30] G. Antoniu, Şt. Daneş, M. Popa, *Codul penal pe înţelesul tuturor,* Seventh edition, "Juridică" Publishing House, Bucharest, 2002, p. 47.
[31] I. Pitulescu, T. Medeanu, *op. cit*., p. 107.
[32] C. Bulai, B. Bulai, *op. cit.*, p. 153.
[33] A. Boroi, *op. cit.*, p. 107.
[34] A. Boroi, *Drept penal. Partea generală. Conform Noului Cod penal*, C.H. Beck Publishing House, Bucharest, 2010, p. 144.
[35] C. Niculeanu, *op. cit.*, p. 41.

murder, but the act does not have an illicit feature because the law authorizes its commission in the given conditions[36].

For example, killing a person in legitimate self-defense is not described carried out by legislature to the text which incriminates his murder, but his act is not intended to be illegal because the law authorizes abetted them under the circumstances.

Criminal act must be attributable to the person who committed it.

This essential feature is a novelty in defining the concept of the offense, and, regarding this aspect, the New Criminal Code does not contain regulations to explain the phrase "the act attributable to the person who committed it"[37].

The legislator requires such an essential feature because there are situations in which the social dangerous consequence, taken into account by the legislator in the text of incrimination, is not the consequence of the activity wanted by the offender, but it is due to the pre-existence or intervention of some external factors, which determine or modify the effects of the respective conduct and in the end they produce the result of the incriminated act[38].

Conclusions

The offense is a fundamental institution of the criminal law together with the criminal liability and criminal penalties. The legislator and law theoreticians' care for defining this notion is fair.

By analyzing the definition in Article 17 from the New Criminal Code, we see that in the elaboration of the New Criminal Code has been pursued on one hand, the exploitation of the tradition of the Romanian criminal legislation, and on the other hand the connection to the current regulation trends of some judicial systems in the European criminal law.

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THE REFLECTION OF ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE ROMANIAN LEGISLATION

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Abstract

Freedom of thought, conscience and religion is a fundamental right. It comprises the right to beliefs, the right to change his belief or the right to not share a belief. Romania respects and guarantees this fundament freedom for every person on its territory, according to the national Constitution and international treaties to which Romania is part.

Key words: *freedom of thought, freedom of conscience, freedom of religion, belief, European Convention on Human Rights, Romanian Constitution.*

Introduction

The basic preoccupation of the Member States of the Council of Europe in the process of reformation is to place their criminal legislation to the level of the European Convention on Human Rights, the provisions of the Convention becoming European standards for all national legislations. The European Convention, signed in Rome on 4 November 1950, and entering into force on 3 September 1953 (ratified by the Romanian Parliament by Law 30/1994) is the most important document drafted by the Council of Europe (which was founded in 1949 and gradually enlarged after 1980) for the protection and development of human rights and fundamental freedoms.

The humanistic principles stated by the Convention shall create a judicial framework proper for the development of human personality and its protection against any abuse from the authorities and has a decisive influence on the legislation of the European states, Member States of the Council of Europe.

Romania accepted as a full member in the Council of Europe on 4 October 1993 has laid efforts to modify its legislation (civil, administrative and criminal) in relation to these humanistic principles and in accordance with the actual stage of the development of social relationships.

Starting with the Constitution (in force since December 1991 and revised in 2003), which stated many of the European Convention's principles and from that moment all important normative acts were inspired from the European regulations. Also, in the criminal doctrine numerous studies were dedicated to the European Convention[1].

[1] G. Antoniu, *Implicaţii asupra legii penale române a Convenţiei Europene a Drepturilor Omului,* in Romanian Law Studies Review, Volume 4(57), 1992, No. 1, p.5–13; G. Antoniu, *Articolul 5 din Convenţia Europeană a Drepturilor Omului,* in "Studii de drept românesc" Review, Volume 5(38), 1993, No. 2, pp. 167–184; G. Antoniu, *Articolul 6 din Convenţia Europeană a Drepturilor Omului. Implicaţii asupra legislaţiei penale*

A special attention is paid for the protection of the freedom of thought, conscience and religion.

According to Art 9 of the Convention, "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance (Para 1); freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others" (Para 2).

These regulations were refined and embodied in the practice of the European Court. Thus, in the case *Manoussakis and others v Greece*, the Court stated that renting by the defendants of a hall that it would be used for meetings of Jehovah's witnesses is not illicit in the light of the Convention. The fact that the Greek authorities consider that this cult must have an authorization for function based on Law No 1363/1998 and even creating administrative difficulties for obtaining this authorization, is an encroachment for the defendant's rights to freely manifest his religious beliefs. Such interference overlooks Art 9 of the Convention. The European Court states that in the meaning of the Convention the freedom of religion excludes any kind of involvement of the state in the legitimacy of religious beliefs or of the means of expression if the public order and morals are not harmed. In these conditions, in the case brought before the Court, Art 9 of the Convention was harmed[2].

In the case *Larisiss and others v Greece*, the European Court stated that the alleged acts of proselytism to spread their religious ideas and to convert the listeners to the Pentecostal Church, were in the limits of Art 9 of the Convention. Thus, the measures adopted by the Greek authorities were inconsistent and violate the provisions of Art 9[3].

In the Romanian legislation there are provisions in accordance with the Convention's exigencies.

Thus, the Romanian Constitution states in Art 29 Para 1 freedom of thought, opinion, and religious beliefs shall not be restricted in any form whatsoever. No one shall be compelled to embrace an opinion or religion contrary to his own convictions; freedom of conscience is guaranteed; it must be manifested in a spirit of tolerance and mutual respect (Para 2); all religions shall be free and organized in accordance with their own statutes, under the terms laid down by law (Para 3); any forms, means, acts or actions of religious enmity shall be prohibited in the relationships among the cults (Para 4); religious cults shall be autonomous from the State and shall enjoy support from it, including the facilitation of religious assistance in the army, in hospitals, prisons, homes and orphanages (Para 5); parents or legal tutors have the right to ensure, in accordance with their own convictions, the education of the minor children whose responsibility devolves on them (Para 6).

The Romanian Penal Code incriminates a series of serious offences which may harm the freedom of conscience. Thus, according to Art 318, the act of preventing or disturbing the freedom to exercise any religious cult that is organized and is functioning according to the law (Para 1); also the act of forcing a person, by coercion, to partake in the religious service of any cult or to accomplish a religious act linked to the exercise of a cult (Para 2) shall be punished. Also, the penal law incriminates in Art 247 the act, committed by a public servant,

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române, in "Studii de drept românesc", Volume 5(38), 1993, No. 3, p.257–270. O. Predescu, *Convenţia Europeană a Drepturilor Omului. Implicaţiile ei asupra dreptului penal român*, "Lumina Lex" Publishing-house, Bucharest, 1998, p. 20ff.

[2] Romanian Penal Law Review, IV, 1997, No. 2, pp. 151-152.

[3] Romanian Penal Law Review, V, 1998, No. 3, pp. 153-154.

of restricting the use or exercise of the rights of any citizen or of creating for a citizen situations of inferiority based on nationality, race, sex or religion.

Conclusions

All legal provisions above mentioned form an appropriate judicial framework for solving cases similar to those brought before the European Court.

The Romanian Law 489/2006 on the freedom of religion and the general status of denominations[4], abolishing Decree No 177/1948 on the general status of denominations, with its subsequent modifications and completions, is the base of all religious cults. The new regulation is in accordance with the Romanian reality, regarding religious life, and with the European exigencies, with the international conventions, agreements and treaties to which Romania is part.

Regarding the cult of "Jehovah's witnesses" we must note that the Romanian modern regulation is in accordance with the spirit stated by Art 9 of the Convention, in the meaning that this religious cult acts freely, as a legal person of public utility, being stated in the list of cults recognized in our country (Annex of the Law 489/2006), according to Art 49 of the above mentioned regulation. The recognition as a "religious cult" is received based on a Government Decision, on the proposal of the Ministry of Culture and National Patrimony.

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[4] Published in the Official Gazette of Romania, Part I, No 11 of 8 January 2007.

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PARTICIPATION OF THIRD PARTIES IN CIVIL PROCEEDING: COMPARISION BETWEEN THE CURRENT AND THE NEW CODE OF CIVIL PROCEDURE

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Abstract

This paperwork aims to be a comparison between the participation of third parties in the civil case as per the current regulation and the new Code of Civil Procedure, seeking to capture the new elements and highlight the utility of any change.

Keywords: *third parties, intervention, civil case, new Code of Civil Procedure.*

Introduction

The legislation referring to third party participation in civil cases has its origins in Romanian law showing two forms of third party intervention: intervention of right and permissive intervention. Romanian legislator has set the primary intervention as a rule and the complaint against a third party (impleader) only as a dilatory exception. As of 1990 when amended the Code of Civil Procedure, the text of the legislative act refers also to the permissive intervention (permissive)[1].

The new Code of Civil Procedure, adopted by Law no. 134/2010, regulates both the deliberate and forced intervention, establishing as absolute novelty the institution of forced granted admission for summons.

In the attempt to capture the elements of novelty brought by Law no. 134/2010, as amended by the implementation Law no. 76/2012[2]*, we begin emphasizing unusual elements common to each form of intervention, both forced and deliberate.*

In terms of terminology, the editors of the new Civil Procedure Code undertake well-known doctrinal designations such as primary intervention to define the intervention of right and permissive (permissive) intervention to define the intervention in the interest of one party.

However, is worth noticing the lack of any reference to first court appearance, all references to this procedural time being replaced in the new Code of Civil Procedure with the syntagma first term of hearing.

[1] I. Leş, *Tratat de drept procesual civil*, 4th edition, C.H. Beck Publishing House, Bucharest, 2008, p. 123
[2] Published in the Official Gazette of Romania, part I, no. 365 of 30 May 2012.

1. **Deliberate intervention**

Deliberate intervention is subject of Law no. 134/2010 regarding the Code of Civil Procedure, more specific of Articles 60-66.

The legal condition of deliberate intervention as per the new Code of Civil Procedure was improved, slightly different from the condition set by the current regulation, mainly by the solutions offered during the time of doctrine and jurisprudence included in the wording.

Based on the method of frastical comparison, we are going to emphasize further the new aspects inserted by Law no. 134/2010 to the institution of deliberate intervention.

a. Conditions to admit the petitions for intervention

Current Code of Civil Procedure	New Code of Civil Procedure
Art. 49 (1) *Anyone with an interest may interfere in a case between other parties.*	Art. 60 (1) *Anyone with an interest may interfere in a trial judged between originating parties.*

The legislator adds, as probably noticed, another condition to the general ones namely the condition of the trial to be between *originating parties*, required to lay a petition for any intervention and to allow the admission of the intervener to the trial, conditions already analyzed by the doctrine and upon which we are not going to insist.

Such condition reveals the intention to follow the French[3] model of civil procedural rule. In the absence of any definition provided by the editors of the new Code of Civil Procedure for the syntagma of *originating parties*, the doctrine[4] states that it may designate only *the parties involved in a lawsuit*.

Therefore, we have to make the distinction between *originating (litigation) parties* and the *intervenors.*

During the lawsuit, due to different participation of third parties, is possible to have other litigants (for example if the owner of right remains under trial as defendant, the trial is no longer between the originating parties). As per the current Code of Civil Procedure, after the admission of the primary or permissive petition for intervention, another person may apply for intervention as the number of chain interventions is indefinite. Such solution could compromise the celerity of resuming the original petition therefore we welcome the solution specified in the new Civil Procedure Code, prohibiting primary/permissive chain interventions and facilitating fast resolution of originating petitions[5].

b. Deadline to apply for permissive intervention

Current Code of Civil Procedure	New Code of Civil Procedure
Art. 51 *The parties may lay the petition for intervention in the interest of one party right in front of the appeal court.*	Art. 62 (2) *Incidental intervention is possible till the end of the debate, during the trial, even under extraordinary remedies of law.*

Note that the new Code of Civil Procedure is more permissive to the time when to file the petition for permissive intervention.

In extraordinary cases, the petition for permissive intervention may be accepted in principle, only after the rejection of all requests aimed to ascertain the inadmissibility, annulment or revision of appeal. Referring to the time to file a petition for permissive intervention, nothing prevents the parties to express it together with the extraordinary remedies of law by the intervenor of right. Such doctrinal[6] solution is argued by the fact that

[3] Art. 66, para. 1 from the new French Code of Civil Procedure provides: *the intervention is any request having as subject the participation of a third party in a trial held between the originating parties.*

[4] L. N. Pîrvu, *Perfecţionarea intervenţiei voluntare prin noul Cod de procedură civilă*, in "Dreptul" Review, no. 1/2010, p. 50.

[5] Ibidem.

[6] Idem, p. 50.

this is the only way to prevent in all situations the loss of the intervening right in an extraordinary case as a support to one party.

c. Remedies at law against court resolution issued on the admission in principle of the petition for intervention

Current Code of Civil Procedure	New Code of Civil Procedure
Art. 52 (2) *One can appeal against court resolution once with the substance only.*	*Art. 63 (3) One can appeal against court resolution on the admission in principle once with the substance only.* *(4) One may appeal to the rejection of the petition for intervention as inadmissible within 5 days (...).*

Therefore, the new unlike the previous Code of Civil Procedure makes a distinction between court resolution admitting in principal the intervention appealed once with the substance and the resolution rejecting the intervention as inadmissible, where one may appeal separately.

The possibility to appeal separately against the resolution rejecting the request of intervention as inadmissible is the basis for a faster resolution of all contentious relationships and a prompt clarification of the procedural framework[7].

The legislature, animated by the same objective i.e. prompt resolution of the trial, has limited the number of appeals against the resolution rejecting the intervention as inadmissible to one, only. Thus according to Art. 63 Para 4, second thesis, *the only remedy at law is the appeal if the first court gave the resolution or the recourse to a higher court, if the resolution is a result of an appeal.*

Referring to the case when one can lay the petition for permissive intervention also in extraordinary ways of appeal (Art. 62 Para. 2 NCCP), we consider there must be an express provision stating also the remedies of law against the resolutions issued by the court of recourse and the courts judging in such extraordinary cases. In the absence of any legal wording, it is the judge to define whether to apply *literal interpretation,* suppressing any appeal against the resolutions issued by such courts, even if there are reasons to promote an appeal for annulment or revision for example against the decision taken by the court of appeal or to apply the *extensive interpretation,* presuming that one can appeal against any prior resolution using the same remedy at law applied to the final decision.

In such context, we welcome the amendment to the Law no. 76/2012 paragraph 4 of Art. 63, final thesis, providing that *the trial for the primary request suspend until there is an outcome to the remedy at law against the decision to reject as inadmissible the request for intervention.* This as the judge, in the absence of any legal provision, had no legal reason to suspend the trial for the primary request and the consequence for resuming the previous fund of the appeal or recourse, referred to in the wording of art. 63 Para 4 NCCP, was to prevent the participation of third parties to the trial[8].

d. Restricting the procedural activity of permissive intervener

A first restriction for the activity of the incidental intervener, set by NCCP and not covered by the current regulation, refers to trial withdrawal.

Therefore, after the admission in principle, the permissive intervener may not give up on the trial of his intervention without the consent of the party for whom he intervened.

The intervener has the procedural activity restricted also by the fact that he may commit only procedural steps that do not contravene to the interest of the party in whose favor he intervened (Article 66 Para. 2 NCCP). The novelty of the NCCP consists in the restriction

[7] Idem, p. 53.
[8] Idem, p. 54.

of the scope removing the expression of *any step*, often used in the Article 54 of the present Code.

In the same order of ideas, we have to mention the regulations, slightly different, set by the NCCP for remedies at law exercised by the permissive intervener. The novelty is that it refers not only to the remedies at law aimed to reform the appeal and recourse, subject of Article 56 of the present Code, but also to the extraordinary remedies at withdrawal (Article 66 paragraph 4 NCCP).

- Forced intervention

a. Writ of summons for others

Current Code of Civil Procedure	New Code of Civil Procedure
Art. 58 *The party sued becomes the intervener with a personal interest and the decision will be enforceable to him.*	Art. 69 *The party sued gets the trial stand of plaintiff and the decision takes effect in his respect, too.*

The editorial wording from the new Code of Civil Procedure ends the existing controversy from the doctrine referring to the trial stand of the forced intervener.

Part of the doctrine argues *de lege lata* that, since the third party becomes involuntary a party in law suit, one should not analyze his active procedural capacity because he is not the plaintiff, even though, by definition, he could claim the same rights as the plaintiff[9]. The adverse opinion designates however the third party brought in the litigation as plaintiff, his capacity of intervener with a personal interest (used in the wording of the current Code of Civil Procedure) being nothing but a variety of capacities relevant to the plaintiff[10].

The editors of the new Code settle the doctrinal debate in agreement with the latter opinion, using the term of *plaintiff*.

Nevertheless, we agree with the opinion of the famous specialists in the civil procedural law, namely Leş and I. I. Deleanu, saying that one party remission from sue petition is ineffective if the one brought into trial shows no will to do so.

We also notice a new situation when the defendant may be out of trial as sued for the return or use of an asset and he declares that he will hand over the asset to whom decided by court order. The court invested for the judicial proceedings will seize on the asset subject of litigation (Art. 70 par. 2 NCCP).

b. Impleader

Unlike the current Code of Civil Procedure providing nothing related to impleader resolution (as does Art 52 Para. 1 from the Code of Civil Procedure for deliberate intervention) in two trial steps: the admission in principle and the trial, NCCP states the need to question the admission of any impleader giving the reference from Art.73 to Art.63.

In lack of any express provision restricting the number of thirds brought in the proceedings, the opinion is that chain impleader must be avoided, in order to fasten the trial, proposing to the one impleaded for a second time, to claim his right of warranty or compensation by a separate primary action and not by another impleader[11].

- Showing the right to the holder

The new Code of Civil Procedure sets by a reference to Art. 63, similar to the impleader, for this form of forced intervention too, the way to give a resolution in two trial steps: the admission in principle and petition judgment.

d. Forced granted introduction of other parties into cause

[9] M. Tăbârcă, *Drept procesual civil*, vol. I, "Universul Juridic" Publishing House, Bucharest, 2008, p. 192.
[10] I. Leş, *Participarea terţilor în procesul civil*, "Dacia" Publishing House, Cluj-Napoca, 1982, p. 153.
[11] G. Aioanei, *Parties in a lawsuit* (PhD. Thesis. Summary), p. 24, available on http://doctorate.ulbsibiu.ro/obj/documents/rezumat-aioanei.pdf.

The element of absolute novelty refers to forced introduction of other persons in the proceedings, governed by art. NCCP 77-78.

As per *lege lata*, admitting other person in the proceedings when the plaintiff or defendant did not request it equals to the inevitable disregard of the principle of litigation-led conduct[12].

The provisions of the new Code of Civil Procedure confer the prerogative of introducing other third parties to trial and to the judge *in cases expressly provided by law and non-contentious procedures* (Art. 77 Para. 1 NCCP).

As concerns contentious proceedings, the judge will question the parties, when the legal relationship subject of the trial requires so, the need to introduce other thirds in the proceedings. If none of the parties requests the admission of other third party to trial but the judge considers impossible to solve the cause without the participation of that third party, he will reject the application without any prejudice (Art.77 Para. 2 NCCP).

The solution consisting in a new procedural institution i.e. forced introduction to trial of other third parties as of default is in our opinion "forced" and contrary to the principle of litigation-led conduct (disposability).

It is true that the editors of the new code have created a restricted scope consisting in *the cases expressly provided by law and non-contentious procedure*, but it does not justify the disregard of the principle of litigation-led conduct.

However, we have to make a distinction between the two ways of introducing other thirds to trial by the court, depending on the impact area: mandatory and optional.

In cases expressly provided by law and contentious, the judge has no discretion, as *by the letter of law*, he has the obligation to proceed to bring in other thirds to trial even if the parties are against.

We definitely disagree with such solution promoted by the new Code and therefore, consider such *interference* of the legislature into litigants' trial as a total disagreement with the right of disposal granted to the parties as per Art.9 of NCCP.

The institution's incidence for contentious matters is voluntary and subject of two requirements:

- the admission of other thirds into trial must be claimed by the legal relationship subject of trial and
- raised to the parties for discussion.

Even if both principle of disposability and contradiction seem to be met, if none of the litigants ask for the admission of other thirds to the proceedings but the judge considers impossible to solve the action without the participation of that third party, he will reject the application without any prejudice.

In our opinion, the expression *if none of the parties ask for the admission of other third to the processing* is not exactly appropriate as, if the judge questions the need of such admission, the concerned parties can either agree or object with the consequence of petition rejection.

Therefore, we can conclude that, if in the first case the one interfering in the trial is the legislator in contentious matter the one interfering is the judge.

A new institution qualified as a derogation from the principle of litigation-led conduct aims, as stated in the Explanatory Memorandum to the Law on the Code of Civil Procedure, to make unitary trial more effective, not only the resolution of legal relations by the will of the applicant and/or the defendant but other legal relations too, closely related to the original one,

[12] L. A. Viorel, G. Viorel (A. Savescu – coord.), *Noul Cod de procedură. Unele elemente de noutate absolută*, available on http://www.juridice.ro/196715/noul-cod-de-procedura-civila-unele-elemente-de-noutate-absoluta.html

in order to avoid further litigation[13]. Moreover, it is clearly stated that, this is not a distinct form of forced intervention but it widens the scope of who can initiate such extension of the procedural framework.

The reasons envisaged by the drafters of the Code are without any question *noble* but the role of the court should restrict only to the application of the law without extending it to *researches* having as result the need to extend the procedural framework referring to the parties. Moreover, all legal provisions must be so designed to achieve the goals without giving up to fundamental principles of civil procedure.

Conclusions

The extensive work, aiming to reform both the substantive and the procedural law, involving legal consistency and a substantial/strict correlation as an overall view of the institutions and mechanisms emphasizing the reality of socio-economic relations and procedural tools, will prove the perenniality and fragility on long-term. The living experience of the judge will be the one revealing the imperfections and shortcomings or, on the contrary, the consistency of solutions and regulations issued for the participation of third parties in civil processes.

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NULLITY OF MARRIAGE IN THE NEW CIVIL CODE

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Abstract

The topic of today's conditions of marriage is fascinating and still significant, as well as the cases of nullity of marriage. Although it is a particularly important topic, it has not been addressed in the literature independently, which is why we felt it would be an exciting topic for both professionals and students, and graduates.

Key words: *Bilateral legal act, union, consent, marriage age, nullity.*

Introduction

The concept of marriage has two meanings: on the one hand, marriage is the legal act signed, under the conditions and forms prescribed by law, by those who want to marry; on the other hand, marriage means the permanent legal status or situation of the married ones[1].

General aspects

The marriage act is a bilateral legal act having a solemn character, in which the future spouses agree freely and fully equal to undergo the legal status of marriage; it is the legal basis or the legal source of the state of marriage[2].

Marriage is a union of man and woman based on the freely expressed consent of those who marry and regulated by law.

Marriage is monogamous and is done according to law. This has a civil character – drafting and signing the marriage act and registering marriage in the registry office for marriage is the exclusive responsibility of the state authority and it is usually to last for life for setting up a family.

Legal conditions of marriage

The legal conditions of marriage are those express and mandatory requirements under Family Code[3] and other regulations, whose compliance with are compulsory at the signing of the marriage act. The legal conditions of marriage are: fundamental conditions, namely those concerning the content of marriage, and formal requirements, those looking at the necessary formalities to be fulfilled for having a valid act.

A. Legal fundamental conditions for beginning a marriage:

1. the future spouses' consent to marry;

[1] see: D. Lupulescu, A. M. Lupulescu, *Dreptul familiei*, C.H. Beck Publishing House, Bucharest 2006, p.15.
[2] A. Pricopi, *Căsătoria în dreptul român*, "Fundația România de Mâine" Publishing House, Bucharest, 1998, p. 16.
[3] This issue is regulated by the *New Civil Code* in Book II - About family, Title II - Marriage.

2. the parties to a marriage should be of different sexes. (*although not expressly provided by the legislature, it is understood in the many texts of the New Civil Code and other statues governing the matter*[4]);
3. marriage age – minimum legal age to enter into marriage is 18 for men and 16 for women[5];
4. sharing the health status of the intending spouses – one spouse willful failure to notify the other spouse that s/he is suffering from serious illness may constitute grounds for annulment of marriage.

Impediments to enter into a marriage:

a. the status of a married person – status of bigamy leads to criminal sanctions;
b. natural kinship (it is forbidden the marriage between relatives in a straight line and the sideline up to the fourth degree inclusively);
c. kinship of adoption[6];
d. guardianship (as long as guardianship exists it is prohibited the marriage between the guardian and the minor person under his/her guardianship[7]);
e. insanity or mental weakness and temporary lack of discernment; the breach of this regulation leads to an absolute void marriage.

B. Formal requirements of a marriage:

1. Formalities prior to entering a marriage

a. declaration of marriage – is the first formality that should be done in order to enter a marriage;
b. publication of declaration of marriage – the civil status officer will display publicly the extract of the declaration of marriage;
c. opposition to marriage – any person may oppose the marriage if there is a legal impediment or if other requirements of the law are not met[8].

2. Signing and registering the marriage

a. solemnity and publicity of marriage – the marriage act is signed in front of the civil status officer of the locality where the future spouses have their domicile or residence;
b. marriage registration – is based on the marriage certificate and is written in the register of civil status acts; the marriage certificate will be issued to the spouses;
c. evidence of marriage – marriage can be proved by the certificate of marriage.

Nullity

Nullity is a sanction against the legal effects of the marriage act contrary to the legal provisions on the validity of the act[9]. This is provided by art. 293-296 of the *New Civil Code*, in Book II. About Family, Title II. Marriage, Chapter IV. Nullity of marriage, Section I.

[4] see: D. Lupulescu, A. M. Lupulescu, *Dreptul familiei*, C.H. Beck Publishing House, Bucharest 2006, p. 30.
[5] It is the legal puberty age which may be higher than the actual puberty age. Puberty involves the ability to both have sex and to procreate.
[6] It is prohibited the marriage between the one who adopted or his ancestors and the adopted, and his ancestors; between the children of the person who adopts and the adopted or his/her children; between those adopted by the same person.
[7] For details regarding entering a marriage while breaching this regulation: D. Lupulescu, A. M. Lupulescu, *Drept civil. Persoana fizică*, Editas Publishing House, Bucharest, 2003, p. 223 and D. Lupulescu, A. M. Lupulescu, *Dreptul familiei*, C.H. Beck Publishing House, Bucharest 2006, pp. 38-39.
[8] Opposition (opposition to marriage) is the act by which a person informs the civil status officer of factual or legal circumstances which constitute an impediment to marriage or the lack of a formal condition so that the marriage would be valid - Al. Bacaci, V. Dumitrache, C. Hogeanu, *Dreptul familiei*, All Beck Publishing House, Bucharest, 2005, p. 29.
9 D. Lupulescu, *Drept civil. Introducere în dreptul civil*, "Lumina Lex" Publishing House, Bucharest, 1998, p. 147.

From this definition of the nullity of the legal act of marriage arise the following characteristic features:

- it is a legal sanction;
- it applies only to legal acts not to legal facts, in the narrow sense;
- nullity makes the legal act to lack the effects which are contrary to the legal acts issued to ensure its validity;
- it is considered when the conditions of validity of the legal act are violated;
- the conditions of validity of the legal act and the violated regulations are looked into at the moment when the act was signed[10].

Given the importance of marriage, on the one hand, and the serious consequences of marriage annulment, on the other hand, the law established some derogation concerning the nullity of marriage and the nullity of the legal act of civil law.

The new regulation also applies to absolute and relative nullities, as follows:

a) Lack of marriage age – art. 294.

Marriage with minors under the age of 16 is null and void[11]. However, the nullity of marriage is covered if, by a final judgment, both spouses are 18 or if the wife is pregnant or gave birth to a living child.

In all cases of relative nullity, according to art. 301, marriage annulment may be required within 6 months.

Marriage annulment due to vices of consent (error, fraud or violence) may be required within 6 months after the end of violence, the determination of error or fraud.

b) a situation I think is not correct is regulated by art. 300, which states: 'Marriage between the guardian and the minor person under guardianship is of relative nullity'. Nullity is prescribed, in this case, too, within 6 months after marriage. We believe that such a nullity must be either absolute or the prescription should last at least until the ward is legally considered an adult, so the ex-ward to may better analyses and consider the particularly important act s/he did.

Cases of nullity of marriage are set out in art. 293 – 296 of the *New Civil Code*. The literature and legal cases[12] have decided that there are cases of virtual nullity of marriage, namely:

- fictional marriage – art. 295;
- lack of marriage age – art. 294.

Cases of absolute nullity of marriage:

a. legal puberty or when the marriage was entered by violating the laws on marriage age;
b. marriage with a person who is already married;
c. kinship;
d. state of insanity or mental weakness and temporary lack of mental ability;
e. no displaying of the statement of the declaration of marriage;
f. lack of material consent to marriage;
g. non-compliance with the law on displaying the certificate and the solemn character of the legal act of marriage;
h. civil status officer's incompetence;

[10] see: D. Lupulescu, A. M. Lupulescu, *Dreptul familiei*, C.H. Beck Publishing House, Bucharest 2006, pp. 127-128.

[11] Art. 294, alin. (1) from the *New Civil Code*.

[12] see: D. Lupulescu, A. M. Lupulescu, *Dreptul familiei*, C.H. Beck Publishing House, Bucharest 2006, p. 130; I. P. Filipescu, Gh. Beleiu, *Unele probleme privind nulităţile căsătoriei ridicate de practica judiciară*, in "Dreptul" Review, no. 9/1971, p. 75; I. Albu, *Nulitatea căsătoriei în practica judiciară*, "Ştiinţifică" Publishing House, Bucharest, 1974, p. 75; P. Marica, *Cauzele de desfiinţare a căsătoriei în dreptul comparat*, in "Studii şi cercetări juridice" Review, no. 1/1971, p. 59ff.

i. same sex;
j. fictional marriage.

Cases of relative nullity of marriage:

Marriage can be annulled at the request of the spouse whose consent was vitiated by:

a. error regarding the physical identity of the other spouse;
b. by deception (fraud);
c. or violence.

Legal status of nullity of marriage:

- Absolute nullity may be invoked by either spouse, as well as by any person who has a legitimate interest (e.g. the deceased spouse's relatives to remove the surviving spouse's inherit vocation of the deceased spouse's heritage). Relative nullity may be invoked only by the spouse whose consent was vitiated;
- The right to action for absolute nullity of marriage is inalienable. Instead marriage annulment (relative nullity) may be required within 6 months after cessation of violence or the discovery of error or deception;
- Absolute nullity cannot be confirmed except as provided by law, but relative nullity can be confirmed at any time under the same conditions as in common law.

Effects of the nullity of marriage:

- Whatever were the causes of nullity, the declaration of nullity or the annulment of the legal marriage act ends the marriage (in legal terms the marriage will be regarded as not having taken place);
- Spouses take the names they had before marriage;
- In terms of patrimonial relations
  a. regime of common property could not exist because of the marriage nullity, which operates retroactively;
  b. spousal maintenance obligation did not exist and cannot exist in future;
  c. the right to inherit of the surviving spouse cannot arise even if the other spouse's death occurred before the dissolution of marriage;
- Declaring a marriage null has no consequence on children born or conceived during that marriage. Inheritance between parents and children remain untouched.

Conclusions

We draw the conclusion that the new regulation was necessary and proved that family is still an important institution in a civilized society. The family regulations in general and the marriage ones in particular, regulations that are in force nowadays, are a powerful way to fight frivolous attitudes towards family and society and also contribute to the formation of some skills and habits in the family relations, in accordance with the moral requirements stated by the family law. The nullity of marriage can bring negative consequences both legally and on the family plan; hence it is necessary a good legal regulation and its enforcement, so that people know about its effect.

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GOOD GOVERNANCE

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Abstract

The present paper represents a contribution to the research area dedicated to the study of governance. The proposed approach is taking into consideration four dimensions: the political one, the economic, the administrative and the social one. The study involves three main international institutions: the World Bank, the European Commission and the United Nations Organization.

Keywords: *good governance, human rights and fundamental liberties, accountability, rule of law, efficacy.*

Introduction

During the last decades, the economic, political and social development has reached new levels. The academic interest shown by the political researchers, economic scientists and sociologists transformed governance and the conn topics into one of the most prosperous and dynamic fields of social sciences. New questions rise and new answers and better solutions require to be found.

In the modern society, the state is often identified with the political community or the governance as such[1].

The governance of a state has various meanings. Therefore, governance can be considered the way in which the public, economic and administrative authorities exercise their authority in the management of public affairs, but, as well, governance can be interpreted as the process through which a society can be steered and ruled[2].

It is the state[3] that interferes through the economic policies, molding the political economy[4], in order to correct the disequilibrium and thus to stabilize the state's economy, it is the state that imposes the rules and regulations for a proper functioning, it is the state that creates the general environment for a favorable development and evolution.

[1] Liah Greenfeld, *Nationalism and Modernity*, Social Research, Vol. 63, No. 1, Spring, 1996, p. 20.
[2] Isabelle Guisnel, *Les indicateurs de gouvernance. Les indicateurs: de la fabrique a la practique*, Seminaire Regional sur Gouvernace au Sud, Coutonou, 2002.
http://unpan1.un.org/intradoc/groups/public/documents/ofpa/unpan004378.pdf.
[3] Philippe Brunner, "Economie contemporaine", 2008,
http://jwkieser.free.fr/economie/poly_eco_10_11.pdf.
[4] Thad Dunning, *Resource Dependence, Economic Performance and Political Stability*, The Journal of Conflict Resolution, Vol. 49, No. 4, Paradigm in Distress? Primary Commodities and Civil War, Aug., 2005, p. 474.

Douglass North[5] defines governance as the assembly of formal and informal institutions of a country- these comprising the culture and the unwritten norms, such as the interaction with the economic and political organisms, as well as the underlining of the political side of the public activity of the respective institutions.

In the actual definition of the concept of governance[6] there is pointed its dependence on the specific context in which the country evolves, together with the concrete means to which public institutions appeal in order to manage natural resources, the legal and constitutional framework of the human rights, the behaviors of the order forces, the collection and the redistribution of the public incomes.

By good governance we make reference to the public action, which has to be fulfilled in a more efficient manner as well as it has to be closer to the general interests of the community, therefore, more legitimate. The supposition, in this case, is that the system will not overuse the national resources and that its actions will be focused on a durable development of the country. Therefore, including the social aspects become privileged and are implicated, together with the central authorities' responsibilities, local, territorial and union governance of the state in question, in Romania's case, the European institutions.

Good governance requires eight major features[7]: it is participative, consensus oriented, accountable, transparent, effective, efficient, fair and inclusive, abides the rule of law. A fair legal framework, impartially implemented is a must for the good governance. Participation has to be direct and the full protection of human rights is mandatory. Accountability, which cannot exist without transparency and the rule of law, must be found not only within the governmental institutions, but also the private sector and the organizations of the civil society have to be responsible in front of the public sector.

The conception regarding governance became the object of an analysis undertaken by various areas of interest, which used a series of general and specific indicators in order to explain the national evolutions, as well as the regional and international ones. The main organizations involved are three international institutions: the World Bank, which annually elaborates the Country Policy and Institutional Assessment (CPIA)[8], the European Commission, which lays down the report <<Governance Profiles>>[9] and the United Nations

[5] Douglass C. North (n.1920) is an American economist. In the year 1993, he won together with Robert W. Fogel the Nobel Prize for research in the history of economy through applying the economic theories and quantitative methods in order to explain the economic and institutional changes.
http://ro.wikipedia.org/wiki/Douglass_North.

[6] Jean Fabre, Meisel & Ould Aoidia, PNUD Rappo d'entretien Note de lecture, Regards croises de la Banque mondiale, de la Commission europeenne et du PNUD. Vers une harmonization des conceptions de la gouvernance? Note d'analyse, 2007.

[7] Yap Kioe Sheng Chief, Poverty Reduction Section UNESCAP, UN Building, Rajdamnern Nok Ave, Bangkok 10200, Thailand, URL: www.unescap.org/pdd.

[8] Country Policy and Institutional Assessment (CPIA) is an annual report elaborated by the World Bank in order to measure and classify the countries according to their capacity of using efficiently the aid that might be offered by the World Bank. The CPIA evaluations, realized by the International Association for Development, are used by the World Bank in order to calculate the country's ratings from the point of view of its performance, and it plays an important role in determining the allocation of the financial assistance of this.

[9] In 2007, the European Commission elaborated the methodology for creating the <<Governance Profile>>, according to which the beneficiary communitarian support countries can access additional funds. The *governance profile* is considered to be an instrument of programming which evaluates the problems raised by the governance from the beneficiary states and it responds as such. The *governance profile* has as target nine domains:
- political/democratic governance
- rule of law
- corruption control
- governance efficacy
- internal and external security

Organization, with its United Nations Development Program (UNDP), which underlines the main areas of interest in its work «The project of governance indicators».

In the academic writings there are four dimensions of governance identifies, each bringing together more similar elements, even though these four dimensions are not considered poles of governance[10]:

- the political dimension, which can be explained as the assembly of interactions between political institutions and citizens. Therefore, in dimension there are comprised elements such as electoral mechanisms, political rights of the residents, human rights, separation of powers, rule of law, decentralization, organization of civil society, access to information and so on;
- the economic dimension comprises the macroeconomic and structural policies of a country- fiscal and budgetary policies-; international commerce- the protectionist marches-; market regulation policies, mechanisms for the redistribution of goods and wealth in society; in this case, the group of policies which bring a solid contribution to the economic performance points towards the protection of property rights, the maintenance of macroeconomic stability, a sufficient level of economic freedom and of the free market, the assurance of a public goods network as well as the existence of a proper infrastructure and a certain level of education[11];
- the administrative dimension of governance constituted out of the totality of structures, functioning and public management, the way in which this allows the implementation of policies, as well as the behavior of the bureaucratic system- skills, efficacy, but corruption as well;
- the social dimension of governance groups a series of elements such as the social protection, the health and education systems, equality among men and women, protection of the natural environment, the role of non-governmental organisms in society.

There is a consensus according to which good governance and strong public institutions are essential for economic growth[12] and not only. Good governance is associated with a higher per capita income and it shows a strong causality effect on the social and economic development.

The World Bank has defined for the first time governance in the report named *Governance and Development*[13] as *the manner in which power is exercised in the management of a country's economic and social resources for development; it encompasses the form of political regime; the process by which authority is exercised in the management of a country's economic and social resources for development; and the capacity of governments to design, formulate and implement policies and functions*.

According to the World Bank, the international financial institutions show a major preoccupation for the economic dimension, around 36.8%, although there can be noticed a significant amplification of the social indicators' importance, such as those concerning the

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- social governance
- regional and international context
- quality of partnership.

http://www.acp-programming.eu/wcm/fr/processus/governance-profiles.html.

[10] D. Kaufmann & A. Kraay, *Governance Indicators: Where Are We, Where Should We Be Going?*, World Bank Policy Research Working Paper No. 4280, 2007.

[11] Stephan Haggard and Robert R. Kaufman, *Development, Democracy, and Welfare States. Latin America, East Asia, and Eastern Europe*, New Jersey: Princeton University Press, 2008, p. 353.

[12] D. Kaufmann, A. Kraay and M. Mastruzzi, *Measuring Governance using cross-country perception data*, in Susan Rose Ackerman (ed) International Handbook on the Economics of Corruption, pp. 52-104, Edward Elgar Publishing, MA, 2006.

[13] World Bank 1992a, p.1.

social protection, the natural environment, equality among genders- 26.3%, while the political dimensions remains less important for the act of govermance-10.6%[14].

Nowadays, at least in the European Union, the term good governance tends to be replaced by the expression democratic governance, which refers to various aspects, such as:

- the respect of human rights and of fundamental liberties;
- the support for the democratization processes and the participation of citizens to the acts of selecting policies and the control over their implementation;
- the respect of the public authorities for the rule of law and the access of all citizens to an independent and impartial justice;
- the management by the responsible public institutions in a transparent manner, these institutions being forced by law to be accountable in front of its electors regarding the efficacy and efficiency of realizing and distributing the public services;
- the durable management of natural, environmental and energetic resources, as well as the promotion of a sustainable growth.

At the same time, the European Commission underlines the existence of some important differences between the member states concerning the political, economic, social or cultural dimensions with respect to the act of governance, which means that this has to adapt itself to every specific situation of each and every country, especially in those in which there is a negative evolution in the aforementioned domains.

The European governance model shows that nowadays the political dimension has the major importance (50%), while the social and administrative dimensions occupy more or less an equal position (20%), and the economic dimension presents a relatively low aspect (10%)[15].

The United Nations Development Program[16] defines governance, in the second edition of the User's Guide[17]: "*as a system of values, of policies and of institutions through which a society manages its economic, political and social affairs through the interactions among governmental authorities, civil society and the private sector, as well as among other entities"*.

UNDP chose to use the term of democratic governance, where the concept of democracy is not understood as political system, but as a decisional one. The domains of analysis of good governance in the case of the UNDP approach refers mainly to the human, social dimensions and underline first of all the added value that the UN institutions desire to add to the concept of good governance.

Basing its theories concerning the durable development[18], the UNDP can be found at the origins of the governance approach based on the human rights and fundamental liberties, which replace individually the non-economic aspects from the center of preoccupation too.

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[14] Jean Fabre, Meisel & Ould Aoudia, Conception de la gouvernance. Regards croises de la Banque mondiale, de la Commission europeenne et du PUND. Axe thematique I. Vers une harmonization des conceptions de la gouvernance?, 2007.

[15] Idem.

[16] The United Nations Development Program is part of the programs and funds of the United Nations Organization, having the role of helping the developing countries by counseling and by support in obtaining grants. UNDP was created at the beginning of the '50s. UNDP publishes each year, starting with 1990, a Report of Human Development.

[17] UNDP. *Governance Indicators: a User's Guide.*, 2004, http://www.undp.org/oslocentre/flagship/governance_indicators_project.html.

[18] Amartya Kumar Sen (1933) is an Indian economist, winner of the Nobel Prize in Economics (1998), professor of economic sciences at Harvard University, Cambridge, Massachusetts, USA.
Some of the essential research topics of Amartya Sen are poverty and the economy of social assistance.
Amartya Sen received the Nobel Prize for his activity concerning the economic welfare, economic and the living standard development theory.

Conclusions

Governance has become the object of an analysis undertaken by various areas of interest, using a series of general and specific indicators in order to explain the national evolutions, as well as the regional and international ones.

The political, the economic, the administrative and the social dimensions are considered to be the four dimensions of governance.

It is the state[19] that interferes through the economic policies in order to correct the disequilibrium and thus to stabilize the state's economy, it is the state comprising the electoral mechanisms, the political rights of the residents, the human rights, the separation of powers, the rule of law, the decentralization, the organization of civil society, the access to information, it is the state constituted out of the totality of structures, functioning and public management, the way in which this allows the implementation of policies, as well as the behavior of the bureaucratic system- skills, efficacy, it is the state ensuring the social protection, the health and education systems, equality among men and women, protection of the natural environment, the role of non-governmental organisms in society.

The three international institutions propose the definition of governance according to its area of interest, underlining those dimensions that better serve its objects. Thus, the World Bank gives a higher importance to the economic dimension, the UN puts the accent on the social dimension and the European Union is following basically those indicators which describe the durable development.

Nevertheless, the eight major features[20] required by the good governance must be present: participative, consensus oriented, accountable, transparent, effective, efficient, fair and inclusive, abiding the rule of law.

A fair legal framework, impartially implemented is a must for the good governance. Participation has to be direct and the full protection of human rights is mandatory. Accountability, which cannot exist without transparency and the rule of law, must be found not only within the governmental institutions, but also the private sector and the organizations of the civil society have to be responsible in front of the public sector.

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J. Fabre, Meisel & Ould Aoudia, Conception de la gouvernance. Regards croises de la Banque mondiale, de la Commission europeenne et du PUND. Axe thematique I. Vers une

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Very important have been also his contributions to the interdependence of economic freedom, the opportunity of social security, political freedom (democracy) in relationship with the reduction of poverty and the theory of collective decisions.

To Sen's proposition, the *Human Development Index* project is reoriented, project that the United Nations Development Program updates periodically since 1990.

http://ro.wikipedia.org/wiki/Amartya_Sen.

[19] Philippe Brunner, *Economie contemporaine*, 2008

http://jwkieser.free.fr/economie/poly_eco_10_11.pdf.

[20] Yap Kioe Sheng Chief, Poverty Reduction Section UNESCAP, UN Building, Rajdamnern Nok Ave, Bangkok 10200, Thailand, URL: www.unescap.org/pdd.

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http://ro.wikipedia.org/wiki/Douglass_North.

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CONSIDERATIONS ON THE JUDGE`S ACTIVE ROLE

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Abstract

Although the advent of the new Civil Code has really brought a series of changes as regards the institutions of civil law, which however remains intact - are the principles of law.

These cannot be affected by changes because all the elements that lie at the basis of law's substantiation and each branch of law separately, remain the same.

The legislator may not interfere in giving another interpretation of the equality in front of civil law principle, of the active role of the judge principle and so on.

Based on the tasks that are being at Court`s charge, more precisely to solve the cause which it was invested, the most essential role of the judge is obviously the one to judge, to extinguish a litigation between the parties, by passing a judgment. The injunction - considered as being the final act of a judgment, through the Act of disposal of the Court - must express the truth. Sure the concept of truth is something abstract, but the Court is based on what the evidence attached to the file samples say. The Court, as a result of its study in conjunction with the letter of the law is finally forced to pass a motivated sentence, on the basis of the laws in force.

This mechanism, of finding the truth would have been impossible if though some procedural system it had forbidden it to persist, by legal means to solve those facts that the parties have failed to prove from various reasons.

Key words: *principles, active role of the judge, new Civil Code, civil lawsuit, factor of equilibrium, guarantee of impartiality.*

Introduction

The changes brought by the New Civil Code in fact consists in some reformulations, resystematizations or affixes and in some cases in abrogating some articles as for several institutions of Civil law. Where the legislator considered it appropriate to intervene, - owing to the fact that the old rules did no longer correspond to the current society - has made it.

So, below I will give a brief overview of the changes, additions that this new Civil Code is making. It brings benefits in financial matters, such as the transmission of inheritance or of the rights of those who use bank loans.

With regard to enforcement, customers will have a term of 15 days to pay their debts, in those cases in which the Bank thoroughly motivated, cancels the contract. Banks should be aware when they decide to modify the base rates, because they can go to trial more easily than before, in those cases in which they decide to increase totally unjustified, the rates.

Another important modification introduced by the New Civil Code is regarding to the purviews on the respect for privacy and the dignity of the human person, so it is forbidden the interception without any right, of a private call, to intake or use images, the voice of a human being in a private place, without his consent.

As for the relationship of the couple, the New Code introduces the matrimonial convention or in other words the so-called prenuptial contract, which can be concluded before or even during their marriage. By the matrimonial convention the parties can convene, for example that the surviving companion inherits without payment, before the inheritance`s partition, one or more of the common possessions. At the same time there are some regulations a little bit more rigorous also in the matter of engagement, because there are being offered certain rights after a longer period of time to those couples that are living together... So, in this respect those possessions that have been achieved in that period, in which they lived together, will be divided through partition, and breaking the engagement in an abusive way, will give the abandoned person the right to claim damages.

Maybe some of the most significant modifications refer to divorce and its consequences.

If the marriage breaks up based on one of the companion exclusive fault, that person that isn`t responsible, may claim damages in Court. Grounds for divorce in such situations may be: infidelity, excessive consumption of alcohol, violence, quitting the house.

From all above, turns out that the legislator intervenes where he considers it necessary. But, everything is based on several principles.

On what follows I`ll stick to one of those law principles that I`ve mentioned earlier, more precisely – the active role of a judge. Including this principle is being sustained or its being completed with other general law`s principles, such as: the equality before Law, the celerity of lawsuit, the justness of sanctions.

On the basis of any law system is a serial of guiding ideas, which imposes a certain vision on all of the legal rules, giving the recipient a norm, a direction, a piece of information, a "bird's eye" on the content of the settlement.

These rules ensure the rights, freedoms and duties of people in their mutual relations, compliance with which is latitude or an optional feature but an obligation and when this is broken it attracts criminal liability, civil or disciplinary action as appropriate[1].

The fundamental principles of civil law are those pillars that underpin the foundation of civil process, conducting the whole process.

Related to the current state of regulation, some of the principles are a creation of doctrine, developed by the case law, by jurisprudence and other constitutional rules although they often do not benefit from a conventional, a specific regulation, distinct in the Code of civil procedure[2].

The editors of the new Code of civil procedure expressly brought under regulation the fundamental principles of the civil process, in a separate section of the preliminary title. It is noted that the new Code of civil procedure does not cover only the fundamental principles of the civil lawsuit principles but also those governing the remedies (the uniqueness, the legality of remedy) or execution (to enforce legality, the role of the bailiff and so on)[3].

In the center of the civil process stands the judge as a factor of equilibrium. He will take all those measures that are needed in order that the fundamental principles of the civil lawsuit to be respected by the implied parties, himself being held to respect them.

[1] Laura-Roxana Popoviciu, *Codul penal. Partea generală*, ProUniversitaria Publishing House, Bucharest, 2011, p. 7.
[2] Georgeana Viorel, L.A. Viorel, *Noul Cod de procedură civilă. Reglementarea principiilor fundamentale*, published on May 1st 2012, http://www.juridice.ro/198688/noul-cod-de-procedura-civila-reglementarea-principiilor-fundamentale-1.html, website viewed on September 12th 2012, at 10:10 a.m.
[3] Ibidem.

So, respecting the fundamental principles is not just a nuisance, the role it plays in being one is indispensable since it ensures compliance with all other essential principles of civil process.

Although, typically the active role has the judge in the foreground, nevertheless the new Code of civil procedure stipulates the bailiff at the expense of such an obligation. So that, during the trial, the magistrate is the one who must show an active role, while, during the forced execution, this task is the responsibility of the bailiff. The role of the judge knows, in this new regulation, a resize. The judge`s attributions are more precisely, more accurate, better defined it`s active role increasing representatively in comparison with the current regulatory framework.

To the judge is being recognized the possibility of introducing "ex officio" the third party, of course in terms of law. The judge will be able to request information in writing or orally concerning the fact situation and the motivation in law, will be able to put in the adversarial debate of the parties any circumstances of fact or law, even if they have not been seen in pleadings lodged by the parties will depend on the availability and provision of evidence as it considers necessary and so on[4].

The exercise of active role must have the guarantee of impartiality, the judge having no ability to pose as the defender of one of the parties. He has to confer evenness in the civil process in order to prevent any mistakes on finding out the truth.

Conclusions

The active role of the judge principle is therefore as I noted in above, closely related to the principle of recognizing the truth, being a warrant for it to be realized. The judicial authorities have the primary obligation to pronounce judgements that reflect a right, principled and equitable solution. Such a desideratum can be accomplished only in a procedural system that confers the judge an active role.

Reiterating, this principle presents the following main aspects [5]:

- With regard to the facts and reasons on which the parties have the right to invoke in support of their defense and claims, the judge is entitled to ask them to explain, orally or in writing, as well as to put in their debate all circumstances of fact or of law, even if there aren`t mentioned in the application form or counterstatement;

- The obligation of the Court to order, ex officio, the management of the evidence as it considers necessary, even if the parties resist. Precisely because of this judges commitment, the action cannot be rejected as unproved, but only as unfounded, groundless or baseless.

- The Court may put in the parties' discussion the need to broaden the procedural framework by introducing in the trial other persons, but only in accordance with the law. The Court, however may not dispose of its own motion the third parties introduction, because by that it would violate the principle of availability.

- The Court's obligation to put the parties in view of their own rights and commitments under their capacity of parties in the trial, and also the obligation to persist, in all the procedural phases for resolving amicable the process.

- The Courts right to give or restore legal qualification of the acts and facts that were deducted by judgement, even if the parties had given them another denomination; for all that, the judge may not pass over the qualification given by the parties, when they understood under a certain accord regarding the legal qualification, the motives in law and they agreed to

[4] Idem.

[5] Mihaela Cristina Mocanu, *Manual de procedură civilă: teoria generală*, "Universitară" Publishing House, Bucharest, 2012, pp. 18-20, manual consulted in September 12th 2012, 10:29 a.m., at. http://www.editurauniversitara.ro/media/pdf/4f2a29eff2c32Manual_de_procedura_civila_..._-_pag._1-40.pdf.

restrict the debates on those, so that the legitimate rights and interests of others couldn`t be encroached.

The active role of the judge must not lead to the abatement of the initiative of the civil parties in the process. The judge, under the pretext of promoting an active role, he cannot substitute for the main parties by modifying for example the nature of a suit (action for the recovery of possession, action in evacuation) or changing the matter of defense of the defendant. That because the active role of the judge mustn't encroach the principle of availability, just like I said earlier. The parties have the obligation to prove their defense, the Court having not the possibility to substitute on their will.

The fundamental principles of the civil lawsuit must be seen as a single whole. They must be interpreted and implemented through one of another. *Their interdependence makes that, by* going it with looseness *the case judge or by the* participant*s at the judicial procedures will attract* for the most part *several effects because overriding a fundamental rule entails disrespect for other/others*[6]. Towards the rich jurisprudence or case law, of the Supreme Court in matter of ignoring the essential rules of civil lawsuit, the express settlement of fundamental principles represents a tocsin that confirms the vital role that they have in the display of the civil lawsuit.

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[6] Georgeana Viorel, L.A. Viorel, *op. cit.*

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GENERAL CONSIDERATIONS ON THE EUROPEAN AND NATIONAL PROVISIONS ON JURISDICTION, APPLICABLE LAW, RECOGNITION AND ENFORCEMENT OF DECISIONS RELATING TO MAINTENANCE OBLIGATIONS

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Abstract

On 18 December 2008, the Council of Europe has adopted Regulation No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. In 2011, in Romania, in this area of expertise, we note the project of law[1] on measures necessary for the application of the Council's regulations and decisions, as well as on private international law instruments in the area of maintenance obligations.

Key words: *regulation, protocol, maintenance obligation, enforcement.*

Introduction

Regulation No 4/2009 states that in Member States (except Denmark and United Kingdom of Great Britain and Northern Ireland) the law applicable to maintenance obligations is determined in accordance with the Protocol on the law applicable to maintenance obligations[2] concluded on 23 November 2007 at the Hague Conference on Private International Law. In exercising the exclusive external competence implicitly established in jurisprudence according to Opinion 1/03 of the Court of Justice of the European Union of 7 February 2006, the European Union concluded, in the name of its Member States, the 2007 Hague Protocol[3], by Decision 2009/941/EC[4].

[1] On 8 August 2011, the Legislative Council, based on Art 2 Para 1 Point a) of the Law 73/1993 republished, and Art 42 Para 2 of the Internal Regulations of the Legislative Council, voted the project for a law on measures necessary for the application of EU Council regulations and decisions, as well as of private international law instruments relating to maintenance obligations.

[2] See Camelia Şerban Morăreanu, Raluca Şerban, *Condiţia copilului oglindită în instrumente juridice internaţionale* – article published in the Volume of the International Scientific Conference *"Integrare şi globalizare"*, organized at the University of Piteşti, 15-16 April 2005, pp. 389-393.

[3] When the instrument was submitted, the European Union declared that the 2007 Hague Protocol shall be applicable between Member States for a period previous to the entrance into force or temporary application of the 2007 Hague Protocol in the EU, where, in accordance with Regulation 4/2009, the claims are filled, judicial transaction are approved/concluded, and authentic acts are concluded starting with 18 June 2011, the date when Regulation 4/2009 enters into force.

[4] Council Decision 2009/941/EC of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, published in the Official Journal L 331/16.12.2009.

I. European institutional steps for the harmonization of regulations on the jurisdiction, applicable law, recognition and enforcement of decisions and cooperation relating to maintenance obligations

The European Council of 4-5 November 2004 adopted in Brussels a program called "The Hague Program: the partnership for European renewal in the field of freedom, security and justice". The same Council adopted on 2-3 November 2005 an action plan of the Council and the Commission which transposes The Hague Program in specific actions and emphasizes the need to adopt proposals relating to maintenance obligations.

On 18 December 2008, the Council has adopted Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. According to Art 15 of the Regulation, the law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations in the Member States bound by that instrument.

The Hague Protocol on the law applicable to maintenance obligations was concluded on 23 November 2007. Its purpose is the modernization of the Hague Convention of 24 October 1956[5] on the law applicable to maintenance obligations towards children and of the Hague Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations which will amend the Hague Convention of 23 November 2007 on the international recovery of child support and other forms of family maintenance. The main objective of the protocol is to improve the security and judicial predictability by creating a common provision on the law applicable to maintenance obligations.

The main purpose of harmonizing the norms on the law applicable is to allow the creditors to act in full knowledge of the situation, without being affected by different national systems. The Protocol aims to establish a balance between the rights of the creditor and those of the debtor of the maintenance obligations. The Protocol determines the law applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child regardless of the marital status of the parents (Art. 1 Para. 1). According to this general rule, maintenance obligations shall be governed by the law of the state of the habitual residence of the creditor (Art 3 Para 1). Nevertheless, special norms insure the protection of the creditor of the maintenance obligation if he is unable to obtain maintenance in accordance with the legislation of his state of habitual residence. For maintenance obligation between spouses, any of the parties can claim the application of the law of another state, which has a closer connection to the marriage. A special rule on defense offers the debtor, in certain conditions, may contest a claim from the creditor on the ground that there is no such obligation under both the law of the state of the habitual residence of the debtor and the law of the state of the common nationality of the parties, if there is one. The application of the law determined under the Protocol may be refused only to the extent that its effects would be manifestly contrary to the public policy of the forum.

I. Brief consideration on the way in which the internal provisions are in accordance with Regulation (EC) No 4/2009[6]

Starting from the idea that the maintenance creditor should easily obtain, in a Member State, a decision which will be automatically enforceable in another Member State without

[5] For details relating to the "Convention on the International Recovery of Child Support and Other Forms of Family Maintenance" signed in New York on 20 June 1956, ratified by Romania by Law No 26/1991, see Camelia Şerban Morăreanu, *Prevenirea şi combaterea violenţei intrafamiliale*, "Hamangiu" Publishing House, Bucharest, 2009, pp. 34-35.

[6] Published in OJ L 7/10.01.2009 (hereinafter called Regulation No 4/2009).

further formalities, it was considered that the present Regulation aims to the creation of a community instrument in the area of maintenance obligations which will gather provisions relating to jurisdiction or law conflicts, to the recognition and enforcement of decisions, legal assistance and cooperation between central authorities.

This Regulation shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity in order to guarantee equal treatment for all maintenance creditors.

Regarding the project of the internal legislation on some measures for the application of Council regulations and decisions, as well as private international law instruments on maintenance obligations, it has, among objectives, the designation and determination of the role of the Romanian Ministry of Justice as central authority in relation with EU Member States and with other third-countries, namely based on Regulation No 4/2009 and on 2007 Hague Convention. The structure on two parts of the internal norm aims the attributions of the Ministry, courts and liberal legal professions resulted from the application of Regulation No 4/2009 and of the 2007 Hague Protocol, from both perspectives, namely as a *requested state* (claiming maintenance obligation in Romania), and as a *requesting state* (claiming maintenance obligation abroad).

In order to ensure swift and efficient recovery of a maintenance obligation decisions in matters relating to maintenance obligations given in a Member State should in principle be provisionally enforceable.

Therefore, it is appropriate to be noted that the court of origin should be able to declare the decision as provisionally enforceable, even if the national law does not provide for enforceability by operation of law and even if an appeal has been or could still be lodged against the decision under national law.

The parties may agree that the following court or courts of a Member State shall have jurisdiction to settle any disputes in matters relating to a maintenance obligation which have arisen or may arise between them: a) a court or the courts of a Member State in which one of the parties is habitually resident; b) a court or the courts of a Member State of which one of the parties has the nationality; c) in the case of maintenance obligations between spouses or former spouses: c1) the court which has jurisdiction to settle their dispute in matrimonial matters; c2) a court or the courts of the Member State which was the Member State of the spouses' last common habitual residence for a period of at least one year.

According to the provision of the new legislative act, the competent judicial authorities are the courts and tribunals, depending on the existence of a foreign decision/transaction, namely a foreign authentic act; on the date when the decision or when the transaction was approved/concluded or when the authentic act was dated; the state of origin where the decision, transaction or authentic act were given (EU Member State or third-country) and on the date when the proceedings were initiated. Thus, the courts have, if Romania is a requested state, competences in solving litigations relating to maintenance obligations (establishment, modification, enforcement) claimed by creditors or debtors habitually residing abroad. Tribunals have, if Romania is a requesting state, the competence in solving litigations relating to maintenance obligations (exequatur) claimed by creditors or debtors habitually residing abroad. According to Art 9 of the Regulation, a court shall be deemed to be notified: a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court; b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service.

The recognition by another Member State of a decision relating to maintenance obligations has as single purpose the recovery of the maintenance obligation settled by the decision. This does not involve the recognition by that Member State of the family

relationship, parentage, marriage or affinity on which the maintenance obligation is based on and which led to that decision.

Legal aid granted under this Chapter shall mean the assistance necessary to enable parties to know and assert their rights and to ensure that their applications, lodged through the Central Authorities or directly with the competent authorities, are fully and effectively dealt with. It shall cover as necessary the following: a) pre-litigation advice with a view to reaching a settlement prior to bringing judicial proceedings; b) legal assistance in bringing a case before an authority or a court and representation in court; c) exemption from or assistance with the costs of proceedings and the fees to persons mandated to perform acts during the proceedings; d) interpretation; e) translation of the documents required by the court or by the competent authority and presented by the recipient of legal aid which are necessary for the resolution of the case; f) travel costs to be borne by the recipient of legal aid where the physical presence of the persons concerned with the presentation of the recipient's case is required in court by the law or by the court of the Member State concerned and the court decides that the persons concerned cannot be heard to the satisfaction of the court by any other means.

The Regulation identifies the situations in which the requested Member State grants free legal assistance for the creditor of a maintenance obligation resulting from the parent-child relationship, for the benefit of a child under the age of 21.

Solving claims based on the principles of the international legislation also contributes in the prevention of offences against minor children (as passive subject). For instance, trafficking in human beings has become both a national and an international major problem, involving a big number of persons, having social and economic implications in numerous states, favored by globalization[7], by the use of Internet or by free movement of persons.

Art. 13 of the national regulation re-states the provisions of the European Regulation by identifying the following categories of creditors who are the beneficiaries of free legal assistance, in accordance with the principle of equal and continuous treatment they receive in their state of origin, according to Art 6 and 8 Point 1 of the Government Urgent Injunction No 51/2008[8] regarding legal aid in all civil proceedings, for applications through central authority, in the conditions stated by Art 46 of Regulation No 4/2009, namely Art 15 of the 2007 Hague Convention: a) maintenance creditors who are not aged 18 or are continuing their studies, but no longer than the age of 21; b) maintenance creditors who are defined as vulnerable persons by Art 3 Point f) of the 2007 Hague Convention. The competent authority of the requested Member State may refuse free legal assistance if it considers that the claim or any mean of attack are obviously groundless.

A creditor[9] seeking to recover maintenance under this Regulation may make applications for the following: a) recognition or recognition and declaration of enforceability of a decision; b) enforcement of a decision given or recognized in the requested Member State; c) establishment of a decision in the requested Member State where there is no existing decision, including where necessary the establishment of parentage; d) establishment of a decision in the requested Member State where the recognition and declaration of enforceability of a decision given in a state other than the requested Member State is not

[7] Elena-Ana Mihuţ, *Metodologia investigării infracţiunilor*, Agora University Press, Oradea, 2009, p. 28.

[8] Approved with amendments by Law No 193/2008 (hereinafter called Government Urgent Injunction No 51/2008).

[9] The term "creditor" shall mean any public institution acting in behalf of an individual to whom maintenance is owed or is alleged to be owed or of an institution to which reimbursement for services unfolded in exchange of maintenance is owned. The right of a public institution to act on behalf of an individual to whom maintenance is owned or to claim the reimbursement of services unfolded in exchange for maintenance is subjected to the law applicable for the institution.

possible; e) modification of a decision given in the requested Member State; f) modification of a decision given in a State other than the requested Member State.

A debtor against whom there is an existing maintenance decision may make applications for the following: a) recognition of a decision leading to the suspension, or limiting the enforcement, of a previous decision in the requested Member State; b) modification of a decision given in the requested Member State; c) modification of a decision given in a state other than the requested Member State.

The Regulation solves the issue of cooperation in the area between central authorities[10]. According to Art 2 of the national law, the Ministry of Justice is the Romanian central authority appointed based on Art 49 of Regulation No 4/2009, for the relation with EU Member States, namely based on Art 4 of the 2007 Hague Convention, for the relation with third-countries, part of the 2007 Hague Convention.

When a Member State has appointed more than one central authority, it will also appoint the central authority to which any communication may be addressed for transmission to the appropriate central authority within that Member State. Central authorities have general and special functions. Specifically, are emphasized as general functions:

a) sending to the European Commission all information stated by Art 70-71 of Regulation No 4/2009, as well as those stated by Art 4 and 57 of the 2007 Hague Convention.

b) the cooperation with each other[11], including by exchanging information, and promotion of cooperation amongst the competent authorities in their Member States to achieve the purposes of this Regulation. Concretely, according to Art 2 of the national norm, as Romanian central authority, the Ministry of Justice cooperates with central authorities from other Member States or with other international central authorities and collaborates with courts, court enforcement officers, lawyers, notaries, mediators, as well as with other Romanian institutions and authorities competent in the area covered by Regulation No 4/2009 and by the 2007 Hague Convention. Regarding the competences of central authorities, they take the appropriate measures in order to provide or facilitate the provision of legal aid, where the circumstances require; to help locate the debtor or the creditor; to help obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets.

According to Art 12 of the Romanian law, the Ministry of Justice sends to the Ministry of Administration and Interior, Ministry of Public Finance, Ministry of Labor, Family and Social Protection or, as appropriate, to other institutions or authorities with competences in managing personal data, the claims[12] for specific measures, having as object: a) the location of the debtor or creditor; b) the obtain of relevant information concerning the income of the debtor or creditor. The answer from the Romanian authorities or institutions managing personal data is sent to the Ministry of Justice by the central authority either from an EU Member State, or from the third-country part of the 2007 Hague Convention; c) the encouragement of amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes. In this regard, the national norm states mediation, conciliation, cooperation and judicial dialogue between the Ministry of Justice, courts, lawyers, court enforcement officers and other liberal professions, in different stages of the international civil litigations, being established in the

[10] Art 49 states that Federal Member States, Member States with more than one system of law or Member States having autonomous territorial units shall be free to appoint more than one Central Authority and shall specify the territorial or personal extent of their functions.

[11] In this regard, it is used the European Judicial Network in civil and commercial matters, founded by Decision 2000/470/EC.

[12] When the claims for specific measures are received, the authorities or institutions managing personal data apply, where appropriate, the provisions of the Law no. 677/21 November 2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data, amended and completed.

superior interest of the child, but also for the specific situation determined by the recovery of a civil claim, namely a successive and cross-border maintenance obligation; d) the obtaining of documentary or other evidence, without prejudice to Regulation (EC) No 1206/2001; e) the assistance in establishing parentage where necessary for the recovery of maintenance; f) the service of documents, without prejudice to Regulation (EC) No 1393/2007, etc.

Conclusions

Regulation No 4/2009, the 2007 Hague Protocol and the 2007 Hague Convention does not state civil procedural norms or family law norms, but only provisions for easing the transfer of claims through central authorities. When the claim is received central authorities and courts apply the internal civil procedural norms and family law norms, as well as international private law stated by Regulation no. 4/2009, the 2007 Hague Protocol and the 2007 Hague Convention. This is why all these norms are directly applicable, this application being based only in the area of private international law. The application of all the above mentioned and analyzed regulations, shall guarantee the application in all EU Member States of a unitary and harmonized legislation in the area subjected to our analysis.

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