AGORA International Journal of Juridical Sciences

http://univagora.ro/jour/index.php/aijjs/

Year 2010
No. 2

The consequences of European integration on the legal system in Romania

- *4th Edition* -

This journal is indexed in :
International Database
International Catalog
C.N.C.S.I.S. in category B+
Publisher: **AGORA University Editing House**

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ANALYSIS CONFLICTS OF JURISDICTION IN CRIMINAL PROCEEDINGS TO THE EUROPEAN UNION LEGAL FRAMEWORK

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Abstract

Because of the increase in the monument of persons and capital in the European Union, the extended scope of the national jurisdictions of states and the advancements in technology which took place in the last time, the criminal justice systems of the European Union States are increasingly confronted with situation where several states have criminal jurisdiction to investigate and bring to trial the same facts relating to the commission of criminal offences. For example, when two or more states may be able to establish their jurisdiction for the same facts in situation where the commission of a criminal offence crosses the territory of several European Union states or the effects of an offence are felt in the territory of several states or in situations where an offences is being committed in a state but the nationality or the place of residence of the perpetrators persons or victims points to another state in the European Union. Such situations may lead to a conflict of jurisdiction, when two or more states have initiated parallel proceedings for the same facts or when none of the states concerned is willing to bring to trial certain of those facts. Thus, one may validly argue that the European Union legislator has to lay down rules which would deal with the consequences of such situations.

Key words: *"conflicts of jurisdiction", "criminal proceedings", "European Union legal framework", "ne bis in idem" (double jeopardy), "criminal laws"*

Introduction

The European Union legal framework needs to provide for rules which would determine how the states should exercise their competence in cases which may led to a jurisdiction conflict and for an effective procedure under which jurisdiction conflicts can be resolved if they arise. So, one should bear in mind Art.31 (1) (d) of the Treaty on European Union, according to which common action between judicial act other competent authorities of the states on judicial cooperation in criminal matters shall include preventing conflicts of jurisdiction between European states. About this, The Hague Programme

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for strengthening freedom, security and justice in the European Union which was approved by the European Council at its meeting on 5 November 2004, at point 3.3 noted that "with a view to increasing the efficiency of prosecutions, while guaranteeing the proper administration of justice, particular attention should be given to possibilities of concentrating the prosecution in cross-border multilateral cases in one European state."

A. The question which accordingly arises in whether the current legal framework facilitates a choice of forum for the trial which is appropriately placed. So, the European Union legislator can take measures which would improve the current legal framework.

What is the real situation?

Because of the increase in the monument of persons and capital in the European Union, the extended scope of the national jurisdictions of states and the advancements in technology which took place in the last time, the criminal justice systems of the European Union States are increasingly confronted with situation where several states have criminal jurisdiction to investigate and bring to trial the same facts relating to the commission of criminal offences. For example, when two or more states may be able to establish their jurisdiction for the same facts in situation where the commission of a criminal offence crosses the territory of several European Union states or the effects of an offence are felt in the territory of several states or in situations where an offences is being committed in a state but the *nationality* or the place of residence of the perpetrators persons or victims points to another state in the European Union. Such situations may lead to a conflict of jurisdiction, when two or more states have initiated parallel proceedings for the same facts or when none of the states concerned is willing to bring to trial certain of those facts. Thus, one may validly argue that the European Union legislator has to lay down rules which would deal with the consequences of such situations.

Otherwise, one could argue that European Union legal framework should also deal with the situations where a case which demonstrates links to another state is being dealt but has not yet been finalized in an European state or where such a case is being investigated or prosecuted in parallel in two or more European states.

Certainly, it has to be ensured that an individual is not subjected to a second trial, if he has already been convicted or acquitted for the same facts, in an European Union state. In other words, the individual has to be protected by an European Union wide principle of "ne bis in idem" (Double jeopardy). The European Union has sought to protect the *individual* from the risk of multiple trials through the *ne bis in idem* rules which are contained in Art. 54-58 of the Convention Implementing the Schengen Agreement.

These provisions prevent a second prosecution, for the same facts, if a person has already been finally judged in another state. The *ne bis in idem* principles applies when, it does not apply while proceedings are on going in

two or more states as it can only come into play, by preventing a second prosecution on the same facts, if a decision which bars a further prosecution has terminated the proceedings in a European Union state.

There is a lot of problems of the current legal framework, one should keep in mind the difficulties that may arise if it is decided to regulate the manner with which national apply establish their jurisdiction in cases which fall within their competence. It should be remembered that the stepping back from a case or the waiving of its right to prosecute so that to allow another state *to bring to trial* certain facts can give rise to questions of national sovereignty. In the second time, there is a significant diversity between the national legal systems of the European Union states as some adhere to the legality and other to the opportunity principle. On the other hand, one could argue that a need for such rules has not been demonstrated yet as the closer cooperation of the states in European Union, in area of criminal law is a relatively new phenomenon.

Fourth, one could also explain the fact that jurisdiction conflicts are relatively unregulated by referring to the specificities of criminal conflicts of jurisdiction in contrast to civil law conflicts. In the latter, as a general rule a choice of another forum would not change the identity of any of the parties to a case. On the contrary, in a criminal case the prosecuting authority would have a new identity when the forum changes. Also, in civil law a court can apply foreign substantive law, while in crime this is impossible.

B. The establish if in present there are rules which ensure that the trial takes place in the best placed jurisdiction and that this jurisdiction is chosen in a transparent and objective way it is helpful to mention and briefly identify the main characteristics of the relevant instruments:

First a reference has to be made to the Council Decision setting up Eurojust.[1] So, *the College of Eurojust may ask the* competent authorities of European Union states to undertake an investigation or prosecuting acts or to accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts.[2] The national members of Eurojust may also ask the competent authorities to consider such measures. These provisions can only be of use if a state has decided to inform Eurojust of a case or if a case is already before Eurojust when the *question* of jurisdiction arises. T*here is no* obligation to refer a case which raises *questions of jurisdiction* conflicts to Eurojust.

In the second time, in relation to certain criminal offences, the European Union obliges its states or their authorities to cooperate with each other for the purpose of coming to a decision as to the appropriate jurisdiction under which a case should be dealt with. For example, according to art 7 (3) of the *Framework Decision on Euro* Counterfeiting, art 9 (12) on the

[1] Decision of 28.2.2002, 06.03.2002, p. 1 amended by Council Decision of 16.06.2003.
[2] Art. 7 (a) of Council Decision, op. cit.

Framework Decision on combating terrorism, the states involved "shall cooperate in order to decide which of them will prosecute." But this rules don't provide for a specific procedure to resolve conflicts of jurisdiction and they are generally quite vague. They are only applicable to specific types of criminality.

At last, under the Council of Europe Conventions on Transfer of Proceedings of 15 May 1972, the contracting states can request each other to take proceedings under certain conditions. But this Convention has only entered entirely in eleven member states and it does not provide for a shared, common and multilateral procedure for determining jurisdiction.

Thus, the national authorities of the European Union states can open on investigation or bring to trial certain facts which are linked to another state jurisdiction without any duty to notify the of that other jurisdiction. Furthermore, normally, the authorities dealing with such cases would not contact another at their own initiative from an early stage when they identify links. Therefore, adequate contacts for the purpose of discussing the question of the best paced forum are not established at an early stage and as a result the jurisdiction question may never be raised. It needs to be noted though that sometimes or even on many occasions, there is a need to send *mutual legal assistance* requests to another authority abroad and thus direct contacts are established between the authorities of the European Union states which could be concerned by the same facts. This can not be described as being adequate in ensuring that the question of forum will be raised and considered by the respective authorities of the European Union states concerned. First, the officials who would deal with such request are not competent to raise or discuss jurisdiction issues and second such request would not necessarily be handled at the moment that jurisdiction needs to be discussed. Third, there are a large number of cases with links to another state where there would be enough evidence to prosecute in the state where a person is arrested or where a crime is detected.

It is clear that at present two or more national authorities are free to institute their own prosecution, in parallel on the same facts. This can lead to detrimental effect on procedural efficiency and on individual rights. The only legal barrier to this in the European Union principle of *ne bis in idem*, laid down in art. 54-58 of the Convention implementing the Schengen Agreement which prevents a second prosecution, for the same facts, if a person has already been finally judged in another European Union state. However, as stated above this principle does not prevent or resolve conflicts of jurisdiction. Moreover, if can not determine the best placed state (in the European Union) jurisdiction as it does not apply while proceedings are ongoing in two or more states. So, preference is given to whichever jurisdiction can first take a final decision.

C. Furthermore, the current European Union legal framework on conflicts of jurisdiction can not ensure that the authorities of states know

about each others' ongoing proceedings when the facts of a case could lead to a conflict of jurisdiction. There is no binding procedure in place which would facilitate joint discussions on the best place for the trial in such cases. It can credibly be argued that at present choice of criminal jurisdiction in the European Union depends on chance. In that reason, The European Commission gave consideration to the current legal framework in the Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem*. Additionally in that instrument of work, the Commission outlined the possibilities for the creation of a mechanism which would facilitate the choice of the most appropriate jurisdiction, because was based on the premise that in criminal matters every case is unique and thus it is not possible to determine in advance the best placed jurisdiction for the trial for each case. It is suggested that the relevant authorities should jointly decide to concentrate trial proceedings for the same facts in a single jurisdiction for the situations where a conflict may arise, after having regard, in a transparent and objective way, to the specific circumstances of each case. They suggest that a legislative instrument could complement the existing legal framework. The ideas are based on the following ultimate improvements to the current legal framework:

- guarantee a sufficient level of information exchange between European Union states on proceedings which deal with facts which are significantly linked to another jurisdiction and could be tried by two or more states. This can be achieved through the creation of a duty to inform the authorities of other state when criminal proceedings are being launched for facts which are significantly linked to another jurisdiction.

- ensure that the authorities of the European Union states concerned, when necessary, *enter into direct discussions* in order to decide jointly on the best placed forum.

- lay down rules and common criteria to be applied when European Union states jointly decide on the question of the best placed jurisdiction.

- resolving effectively actual conflicts of jurisdiction by making sure that they always reach Eurojust, if the offence is within its competence.

- ensure that European Union states have the ability to close their proceedings when they have jointly decided that another is better proceed.

Improvements in the exchange of information and the creation of a procedural framework for entering into direct discussions could bring a number of direct and indirect benefits.

Direct benefits can relate to the establishment of a framework which would lead to better avoidance and better resolution of jurisdiction conflicts, to improved awareness for European Union states competent authorities of each other's proceedings, to a better determination of the place of the trial and to increased transparency, as well as greater objectivity, in the way the place for the trial is chosen.

Indirect benefits are:

- they can lead to better coordination of parallel investigations and more efficient allocation of resources between the authorities of the European Union states which are concerned by the same or related facts.

- there would be a more thorough consideration of the rights and interests of all individuals in relation to the place of the trial and less *likelihood* of parallel or repeated trials for the same facts.

- such changes could lead to better application of the principle of mutual recognition both in the pre-trial and post-trial stage as the European Union states concerned could be consulted on the place of the trial on early stage. This can lead to fewer instances where evidence is gathered in a manner which is incompatible with the law of the place where the trial will be conducted since the venue of the trial can be decided jointly by the states concerned before such measures are sought.

Conclusions

Is in the interests of justice and in order to improve judicial cooperation in criminal matters in the European Union it becomes necessary to ensure that situations were the facts leading to the commission of a criminal offence fall within the jurisdiction of several states *the trial would* take place in the best placed jurisdiction and that this jurisdiction is chosen in a transparent and objective way. It is imperative that the legal framework avoids as far as possible the creation of actual jurisdiction conflicts and when they arise to effectively resolve them.

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The European Convention on the Transfer of Proceedings in Criminal Matters (1972);

The European Convention on the International Validity of Criminal Judgement (1970);

The Convention between the member states of the European Communities on Double Jeopardy (1987);

The Treaty on European Union;

International Review of Penal Law (Vol. 77).

INTERNATIONAL SPECIALIZED BODIES AND THEIR ROLE IN COMBATING VIOLENT CRIMES

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Abstract

During these last few years crime has increased exponentially, therefore international cooperation plays a more important role in the fight against violent crimes. Justice is faced on one side by a rapid increase of cases, both civil and criminal, and on the other with new questions to which it must answer

Key-words: *criminality, violence, justice, international cooperation.*

Introduction

Because the phenomenon of violence crime exists beyond borders, extending its tentacles like an octopus, many states have proceeded to create bodies with the authority to take action towards configuring a legal, institutional and operational framework of maximum efficiency, which would eliminate this scourge. Such a thing imposes itself the more a thorough analysis of the criminal phenomenon in the form of organized crime shows us that it grows and new methods of perpetrating crimes appear[1]*. The criminality rate has been increasing and criminals have perfected their skills to commit felonies. They have adopted new methods, thus tending by all means to put the authorities bent on tracking and capturing them at a disadvantage.*

When referring to criminality, we mean the sum of all criminal actions committed within a given time and space[2], which may be grouped either depending on the interest of criminological research, as well as the level of knowledge of these criminal actions by the criminal justice authorities[3]. However, the legal system proves itself inefficient in the fight against criminality. Justice is faced on one side by a rapid increase of cases, both civil and criminal, and on the other with new questions to which it must answer[4]:

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[1] V. Lăpăduşi, *Consideraţii privind crima organizată*, în "Revista Română de Criminalistică" no. 5/2009, vol XI, p. 195-197.

[2] I. Oancea, *Probleme de criminologie*, Ed. All, Bucharest, 1994, p. 3.

[3] V. Cioclei, *Manual de criminologie*, Ed. All Beck, Bucharest, 2003, p. 19-20.

[4] G. M. Ţical, F. S. Bobin, *Implicaţiile cooperării internaţionale poliţieneşti în combaterea criminalităţii organizate*, în "Revista Română de Criminalistică" no. 2/2007, p. 15-18.

"We must be mindful in the future; the systems that serve us today cannot last unchanged for much longer. There will come a day when we are overwhelmed by the number of wrong-doers that appear more and more in today's morally rotten society and by the arts and sciences, to which people turn to commit their crimes and avoid detection, our agents and police officers will not be able to cope with the duty they have been entrusted with. It is time to step forth into a new age and found a school of scientific policing and an identification service organized in modern databases, wherein the file of any individual should contain their prior records of problems with the Law, his fingerprints on record and a physical description sheet"[5].

Therefore, the United Nations have adopted a series of protocols and conventions to counter criminality, among which there is the *United Nations Convention against Transnational Organized Criminality*[6] and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons*[7], whose main objective is the cooperation of states in the common effort to combat human trafficking, especially focusing on the situation of women and children, as well as on the protecting and helping the victims of human trafficking (art.2). In order to use these international instruments, the Convention recommends that the states must conclude bilateral or multilateral agreements to regulate the direct cooperation of their services of investigation and reprimand (art.27, c of the Convention)[8].

Following the ratification of the *United Nations' Convention against Transnational Organized Crime* by Romania, Law no. 39 was passed on the 21st January 2003 relating to preventing and combating organized crime[9], which stipulate the specific measures for preventing and combating organized crime at a national and international level. This piece of legislation clarifies the meaning of certain specific terms, such as organized criminal group (art.2,

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[5] C-tin Georgescu în V. Lăpăduşi, L. Tăuţ, *Consideraţii privind evoluţia unor metode şi tehnici criminalistice*, în "Revista Română de Criminalistică" no. 2/2006, p. 5-7.

[6] I. Hurdubaie, *Cooperarea internaţională în combaterea infracţiunilor cu violenţă*, work published in the volume International Sympozium The Criminal Investigation of violent Felonies, organized by the Association of Criminologists of Romania and the Inspector General of the Romanian Police (4-5 November 2008), Bucharest, 2009, p. 205-219.

[7] Ratified by Romania also by Law no. 565 from 16th November 2002 published in the Official Monitor of Romania issue 813 of 8th November 2002. The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children* was ratified by the same Law, added to the *United Nations Convention against Transnational Organized Criminality* and the *Protocol against illegal migration by land, sea or air*, added to the *United Nations' Convention against Transnational Organized Crime*, adopted in New York, the 15th November 2000.

[8] N. Lupulescu, *Formele de cooperare internaţională în lupta împotriva criminalităţii*, in "Revista Română de Criminalistică" no. 1/2005, p. 7-10.

[9] Law no. 39 from 21st January 2003 concerning the prevention and combating organized crime, published in the Official Monitor of Romania, issue no. 50 of the 29th January 2003.

a)[10], but it also classifies the serious offences (art. 2, b), since most of them are committed with violence (murder, felony murder, aggravated murder; unlawful detainment; offences against patrimony that have especially grave circumstances; pimping; felonies regarding human trafficking and offences relating to human trafficking etc.).

With regard to human trafficking, the United Nations has drawn up a Global Program against Human Trafficking, which can allow interested states to initiate a number of effective and practical measures and to develop certain common strategies for the fight against the commerce of human beings[11]. Domestically, several pieces of legislation have been passed, which contain regulations referring to protecting and combating human trafficking[12], Law no. 211/2004 on certain measures of ensuring the protection of crime victims[13], Law no. 565/2002 concerning the ratification of the UN Convention against Transnational Organized Crime[14], Law no. 272/2004 for promoting and protecting children's rights[15].

The Council of Europe has an important role in preventing and combating international crime and criminal offences committed with violence, whose main objective is to defend human rights and to find the most efficient solutions to any problems afflicting society today, namely organized crime, terrorism, human trafficking, sexual abuse and exploitation of children. To this effect, *a number of additional conventions and protocols* have been adopted: European Conventions for the Prevention of Terrorism (2005), Convention on the Fight against Human Trafficking (2005), Conventions for

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[10] *Organized crime group* – a structured group, formed by three or more persons, which exists for a period of time and acts in a coordinated manner with the purpose of committing one or more serious crimes, in order to directly or indirectly obtain any financial or material benefit; a group organized occasionally with the purpose of committing one or more criminal actions , but it has no continuity or a determined structure with roles assigned to each member does not constitute an organized crime group.

[11] I. Hurdubaie, *Cooperarea internaţională în combaterea infracţiunilor cu violenţă*, work published in the volume International Sympozium The Criminal Investigation of violent Felonies, organized by the Association of Criminologists of Romania and the Inspector General of the Romanian Police (4-5 November 2008), Bucharest, 2009, p. 205-219.

[12] Law no. 678/2001 on protecting and combating human trafficking, published in the Official Monitor of Romania, Part I, no. 783, 11 December 2001.

[13] Published in the Official Monitor, Part I, no.505 4 June 2004, and modified most recently by the O.U.G. no. 113/2007 concerning the indexation of the total sum granted monthly for placements, the Official Monitor no.20, 10 January 2008.

[14] The Law for the ratification of the *United Nations Convention against Transnational Organized Crime,* of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children,* added to the *United Nations Convention against Transnational Organized Crime,* as well as the *Protocol against illegal migration by land, sea or air,* added to the *United Nations' Convention against Transnational Organized Crime*, adopted in New York on 15th November 2000, published in the Official Monitor no. 813, 8th November 2002.

[15] Published in the Official Monitor of Romania, Part I, nr 557 from 23rd June 2004 and modified by H.G. no. 9/2008.

the Protection of Children against Sexual Exploitation and Abuse (2008), and a number of conferences have also been organized in support of the protection of children in European justice systems. During these conferences different measures were proposed for combating violence against children, by adopting a much more efficient legal framework and a legal system adapted to children.

The role of INTERPOL (International Organization of Criminal Police) in international legal cooperation, in the field of criminal justice, is an essential one, as it involves the assurance of mutual assistance between police services in member states in the effort to prevent and stop common Law crimes; the international exchange of information useful to the police; identifying internationally wanted criminals and arresting them based on a warrant, but also the coordination of surveillance activities and apprehending internationally wanted criminals[16]. In this capacity, EUROPOL plays an important role in supporting the efforts of hunting down of criminals. EUROPOL's mission is to increase efficiency and improve cooperation between State Members in preventing and combating serious forms international organized crime, among which human trafficking is also included. Tightly connected to EUROPOL is EUROJUST. Both act on the strength of the European arrest warrant. EUROJUST is more efficient, having jurisdiction to handle all types of crimes on a vaster territorial scale.

In order to more efficiently make the perpetrators account for their crimes it is necessary, in most cases, to have cooperation between states. For this reason applying the criminal Law of a state is tightly interdependent on the application of the criminal Law of other states. Therefore it is necessary to ask other states, on the basis of conventions and declarations of reciprocity, *to enact certain acts and measures* such as: identify and arrest criminals, interview witnesses, to compile expert studies, to allow the extradition of refugees in their territory etc[17]. However, this cooperation must be strictly observed, not only in this type of operations, but also in other aspects. The international fight against crime actually means, the addition of actions of national police forces of all countries that adhered to conventions, treaties or on the behalf of international organizations, specialized in the fight against crime[18].

Therefore, the entire *police cooperation* must take place in a well defined framework, respecting certain provisions of domestic and international Law, and having as main objectives the international legal assistance and the exchange of information[19]. Thus, an important role of this

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[16] Further information can be found on www.mai.gov.ro, last accessed on 17.02.2010.

[17] V. Lăpăduși, *Considerații privind crima organizată*, în "Revista Română de Criminalistică" no. 5/2009, vol. XI, p. 195-197.

[18] Gh. Pele, I. Hurdubaie, *Interpolul şi criminalitatea internaţională*, Ed. Ministerului de Interne, Biroul Naţional Interpol, Bucharest, 1983, p.5-7.

[19] G. M. Ţical, F. S. Bobin, *Implicaţiile cooperării internaţionale poliţieneşti în combaterea criminalităţii organizate*, în "Revista Română de Criminalistică" no. 2/2007, p. 15-18.

cooperation in combating organized crime is reflected, internally, by the *activity* of specialized structures within the structure of the Ministry of the Interior, but, also by the extremely relevant *contribution* of specialists working at the Institute of Criminology in decisive operations undertaken in justly solving the cases, such as: *investigating the crime site, searches, scientific* or *expert findings*. Therefore, the mutual recognition between states of the right to incriminate actions, which they deem as a social danger, seems indispensable. For this reason, they will proceed to grant mutual support in delivering justice, notwithstanding the place where the actions were committed[20], as it is necessary *to know the facts exactly* and *to attentively examine all evidence.*

This is an argument based on which Romania proceeded to conclude certain cooperation agreements for combating violent crimes, meaning the prevention and combating offences that threaten the life, health and liberty of an individual[21]. Romanian efforts to keep up with the level imposed by international standards have made themselves noticed not only by *adhering to a number of international documents*, but also by creating the *Centre for International Police Cooperation*[22] (C.C.P.I.), including in its structure the National Focal Point and the National Interpol Office. All channels of international police cooperation have been assembled, with a single centre for monitoring received and transmitted requests and operative information, while respecting the principle "one way in, one way out"[23]. The exchange of information and messages aimed at combating cross-boarder offences of the Law was rendered more efficient in this way and the creation of this body shows evidence of much expeditiousness

Conclusions

Therefore, by beginning from the complexity of crimes, but also keeping in mind the exponential increase of the crime rate, the normative criminal activity of the European Union must take on the form of a variety of illegal activities, active in various field, which pertain to organized crime, human trafficking and the sexual exploitation of children, computer crime or cybercrime, crimes against humanity etc., which demands that the member

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[20] R. M. Stănoiu, *Asistenţa juridică internaţională în materie penală*, Ed. Academiei, Bucharest, 1975, p. 14.

[21] I. Hurdubaie, *Cooperarea internaţională în combaterea infracţiunilor cu violenţă*, work published in the volume International Sympozium The Criminal Investigation of violent Felonies, organized by the Association of Criminologists of Romania and the Inspector General of the Romanian Police (4-5 November 2008), Bucharest, 2009, p. 205-219

[22] The Centre of International Police Cooperation is a central national authority, in the field of international police cooperation, specialized in the exchange of information in the field of international crime. This centre maintains the flow of information useful in international police cooperation, undertaken by the Ministry of the Interior or other enforcement bodies in Romania, through available channels.

[23] G. M. Ţical, F. S. Bobin, *Implicaţiile cooperării internaţionale poliţieneşti în combaterea criminalităţii organizate*, in "Revista Română de Criminalistică" no. 2/2007, p. 15-18

states mobilise all their efforts in order to efficiently and with perseverance fight against all types of felonies[24].

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[24] G. Antoniu, *Activitatea normativă penală a Uniunii Europene (III*), „Revista de Drept penal" no. 3/2007, p. 9-10

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THE CAUSE OF THE JUDICIAL ACT– MARK OF THE NOMOTHETE WILL

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Abstract

As a subject is considered to be more problematic, the interest to discuss it grows. Judicial interpretation and its guiding principles represent a conclusive example in this case, keeping in mind the fact that in order to apply laws or to solve litigations; we cannot avoid an appeal to interpretation. In general terms, law can be considered to be at the service of interpretation, because laws and the entire judicial system depend on a just and equitable interpretation, according to the citizens' lawful needs, aspirations and objectives.

Key Words: *judicial act, justice, positive law, gentlemen's agreements,*

Introduction

Regardless the multitude of shapes in which it can be built, the cause of a judicial act presents an extraordinary constant, connecting valence between the expressed will of the parts and the judicial effects it can give birth to, between subjective and objective, allowing a judicial existence and insuring the conceptual unity of the contract, the duality of its essence as judicial act – subjective regarding the source and objective regarding its effects. But which is the ingredient that can coagulate the subjective and objective elements of the judicial act? I believe the answer is offered by the judicial act cause, considered to be one of the most chameleonic categories and the theory of the cause, which has a special meaning in the science of positive law.

Reasoning of a practical nature between consent and cause

In law we deal not only with different findings, which are only the initial points of a judicial reasoning, but also with appreciations, which establish if an action is or not just[1]. This is why confounding observation sciences with normative appreciation sciences, as Jhering does and as Djuvara observes, represents an error. Historical errors of law happen often, but it is one thing to observe that there exists an institution of law and another to see if it is just or nor. Modern consciousness blames, for example, slavery as an

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[1] P. Vasilescu, *Relativitatea actului juridic civil*. *Repere pentru o nouă teorie generală a actului de drept privat*, Rosetti Publishing House, Bucharest, 2003, p.65.

unjust institution. Here we find the true meaning of law. We hopelessly underline the fact that slavery exists, because this observation can not result into eternal judicial norms.

At the level of a theoretical synthesis, we must retain a simple fact: contract, as the judicial will – emanation of free and rational subject – represents more than the sum of its components. Thus, tied to the cause functionality, as element of the contract, judicial intentionality of the will represents an abstract element that transcends the contract looked at according to all its aspects, inspiring and offering the primordial substance.

The distinction operated by the legislator between the consent and the cause serves, without a doubt, practical reasoning, facilitating an analytical vision of the contract[2]. The cause explains why the individuals' manifestations of will may generate recognition and are recognized and protected by the law order. Placed from a functional point of view in the centre of the contractual mechanism and in relation to all its articulations, the cause supplies a synthetic expression of the nature and of the judicial justification of the act[3]. Thus understood, the cause is faced as a criterion and a measure of the judicial act[4], but also as a control instrument for its judicial value.

The legislators shift from offering a definition and fixing the conditions of the cause in a positive manner. As a mark of nomothete will, of the intention to produce judicial effects, the cause is not reduced to the sum of its functional aspects[5]; and in the angle of the act judicial intentionality, the cause is not a technical notion, a series, more or less unitary, of conditions that need to be fulfilled together[6]. The accent is not put on what the cause should be, but on how it shouldn't be, so that it will not be sufficient to verify the exact opposite of the vices of the cause aimed at by the legislator (the lack, falsity, illegal or immoral character) in order to establish the existence of a judicial cause. More over, the necessity of the cause judicial character should be imagined as a supplementary, which, by the simple addition to the ones expressly provided by the legislator, is capable to *up-grade* a convention that was initially non-judicial to a veritable contract.

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[2] J. Rochfeld, *Cause*, Rép. Civ. Dalloz, January. 2005, p. 45.

[3] P. Hébraud, *Rôle respectif de la volonté et des éléments objectifs dans les actes juridiques*, Mélanges J. Maury, t. II, Dalloz&Sirey, Paris, 1960, p. 245.

[4] P. Vasilescu, *op. cit*., p. 81.

[5] As it is provided in art. 948, 966 and 968 Civilian Code, but these do not cover entirely the notion of contract cause.

[6] A. Sériaux, *Droit des obligations,* 2e éd., P.U.F., Paris, 1992, p. 27-29. For an analysis of the contract by verifying the existence of an *animus contrahendi*, by avoiding an appeal to the judicial cause (seen as a "conceptual hypsographic"), see A. Popovici, *De l'existence d'un contrat*, in *La couleur du mandat*, Éd. Thémis, Montréal, 1995, p. 502 and the following. The verification of *animus contrahendi*, of the intention to engage in a judicial relation, of assuming contractual obligations, the same road is taken, even if empirical ways are used, of decelerating a judicial cause that animates the wills expressed by the parts.

The effort of decelerating the substantial elements of the judicial act is orientated towards two different objectives: one representing the delimitation of the judicial act from other non-judicial acts or, at least, non-compulsory, respectively the other following the demarcation line between the judicial act and obligations[7]. The accord of wills, realized in order to satisfy different instincts of the subjects that emitted them, won't be capable of producing full judicial effects, unless it is animated by a judicial cause, the force that engages the entire substance specific to the theory of a civilian judicial act. In the same time, the will animated by the intention to produce these effects, must be the results of the parts consent, in order to speak about the contract, as a paradigm of the sources of compulsory rapports.

Interpretative delimitations of the rational foundation of an ideal justice

To say that historical facts stand at the basis of a judicial conception means clotting law in an eternal crystallization, deepen it into a perpetual death. Still we are aware that if we let aside today's law, with the greatest ease, the historical fact of slavery, we can see what is characteristic to law, the consciousness of law and not to external observations. Starting from judicial institutions that exist today and from their historical evolution in the past, the judicial realities and what they mean should result from this, so that the problem a rational foundation of an ideal justice can be put forwards.[8]

Saying that everyone has its law also means that the virtue of justice doesn't know person discrimination. It gives the right to each holder, regardless who it is. Justice refers to the law holder, regardless the circumstance; it does not give what belongs to the owner, because it belongs to certain social classes, ignoring. Nowadays, in the judicial profession a subtle form has been introduced, but un-equivoque of discrimination or of accepting persons under the title of "*alternative use of law"* according to which we keep in mind the membership of the subject to the "bourgeois" class (oppressive) or to the "proletarian" class (oppressed) in order to pronounce a decision in a way or the other. The old form of justice is just disguised into new clothes. In the same manner, it is a brutal form of injustice to appeal to "human rights of the people" in order to claim power, and thus obtained, to refuse the most elementary rights of the "oppressive class", which is eliminated by the "popular justice".

Because these are holders of some rights, justice considers the poor and the rich equal, the innocent and the guilty and the oppressor and the oppressed. It frees the oppressed from oppression, but does nor refuse the rights of the oppressor, it defends the poor in front of the power of the rich; it

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[7] A. Buciuman, *Semnificaţia excepţiei de joc din contractul de joc sau joaca de-a contractul*?, Studia Universitatis Babeş-Bolyai, no.1 din 2007.

[8] Idem, p. 160.

protects the innocent in front of the guilty, but also offers the latter a just trial and watches the proportion of punishments. In the justice balance, each weights the same as its right.

This is why justice is insufficient for the development of life in the society and in order to solve social problems: we need solidarity, love, freedom etc.; only like this we can find a solution to social problems and social life can receive a human face. To limit oneself, to offer to each what is just would dehumanize human conviviality. Thus we must not confound these two things. Thus said, not to realize injustice to the judgment means not to favor anyone from the greatest ones; and judge each of your fellows according to justice. Justice doesn't have any measure besides human dignity, on which any possible law is founded on this is why, on the plates of justice balance, all human are perfectly equal.

It results that the first injustice would be discrimination[9]. Leon Duguit also speaks in the same line about "social interdependence" and "solidarity", this being at the basis of the entire law, "because contemporary judicial consciousness underlines more and more the postulate that the advancing of each is the condition of advancing, to which the others have a right to. No one is thus free to renounce his own development, without hearting the others' rights.

To share what is yours can also be interpreted according to the non-objective conditions or circumstances connected to the law in cause. Or, in other words, when the treatment offered is not exclusively subjected to an objective reasoning of the law holder to its exercise.

But, offering to each what is appropriate doesn't mean "offering the same thing to everybody", because this is not the formula of justice, but "give each what is his". Justice treats everyone in the same manner, but it doesn't necessarily offer to everyone the same things or the same thing, if they are not all holders of the same thing.

Judicial consciousness imposes the obeying of the contract in an imperative manner, but with other levers of constraint – as the objective norm. The latter has the role of recognizing integration in the system of a private norm, which individual wills create and offers a supplementary support, in considering its conformity to the principles that govern and insure the cohesion of the judicial order ensemble.

The contract is compulsory first of all because it represents the emanation of nomothete will. Once formulated, it breaks from its immediate source, private norm, that justifies its compulsory force offered by the objective norm and in relation to criteria and surroundings independent from the parts will. "*The objective norm regulate the compulsory force and*

[9] M. J. M.Doral, *La estructura del conocimiento jurídico*, Pamplona, Universidad de Navarra, 1963,p. 18). For justice, the last man in Florence – poor and miserable, who doesn't have but the weight of his own soul – he weights the same as de Medicis, with all his richness, prestige and political position: but he weights the same, not more, nor less.

obligatory to the private norm, by using instruments, mechanisms and reasons that are strangers to the parts will. This is a matter of judicial politics, of social interest and legislative technique"[10]. The obligation of a private norm is presented as the result of a composition of two vectors, not always in the same direction, the power of the nomothete will and the force of the objective norm. The action of the latter is circumstantial, adapting the degree and the direction of the intervention according to necessities, in order to insure and maintain the functionality of a judicial system: from the support of the constraint force, to the realization of mechanisms able of leading to the reestablishing of a commutative justice.

This intervention of the objective norm on the private norm is also visible, we believe, in the case of gambling contracts. The gambling exception is thus a specific mechanism that the objective norm formulated for the adjustment of the obligatory force of the contract, without entirely thinking badly about the subjective component of the act – the parts will.

The search of a foundation for a judicial treatment with which the legislator assorts games and bets is not susceptible for a simple solution. The trying to identify an answer in the dichotomy of law-non-law or in a classical judicial mechanism is not satisfactory.

Once the decision from the *Von Colson case was pronounced, there was no doubt regarding the existence of an internal court obligation to interpret internal law according to the community objectives. For this matter, the obligation* results from the obligatory character of the provisions of article 249, paragraph 3 of the Treaty establishing the European Union, which statutes that directives are compulsory regarding the objective that must be fulfilled, for each member state to which it addresses, leaving to their decision the methods used in order to fulfill the objective mentioned.

National courts, as any national authority of the Member States, are kept by the obligation provided by article 249, paragraph 3 of the Treaty establishing European Union, having the task of ensuring the realization of the directive mentioned, by different means, one of them being, as we will see, interpretation.

And when the period prescribes for the implementing of the directive hasn't expired, national courts are obliged to interpret it, in the possible limit, according to the provisions of the directive, all internal norms in force, meant to implement the directive. In such a situation, the obligation to interpret results not from the expiration of the due date of the directive implementation, but from the task of national courts to cooperate with the other national authorities in their wish to implement that directive, according to the provisions of article 10 of the Treaty establishing the European Union.

Thus, a situation of uncertainty from a legal point of view will easily be scaled because national courts won't interpret national legislation in an

[10] P. Vasilescu, *op. cit.*, p. 188-190.

improper/inconsistent manner with the provisions of the directive not yet implemented.

The tied premises of a proper interpretation do not represent only the sources mentioned, but also the principle of community law supremacy, because directives, as part of community judicial order, have priority in the application process regardless any provision of internal law of any Member State.

Without a doubt, the temporal factor contributes, in the context of the proper interpretation context, to the creation of a degree of judicial uncertainty.

The idea that the interpretation obligation can be applied even before the expiry of the implementation term for the directive has been discusses, proposing an equilibrated solution, which makes a distinction between a restraint meaning (*internal norms of implementation of the directive, which, if they have been adopted before the expiration date of the implementation, must be interpreted in the light of the directive provisions. It is about the so called interpretation appropriate from a temporal point of view)* and in the developed meaning (situations of directive non-implementation that refer to the entire national legislation) of the obligation to interpret.

Regarding the developed meaning of the obligation to interpret, it has been shown that courts are obliged to interpret national legislation in the light of the directive only after the expiration date for the implementation, in order to avoid uncertain situation regarding the legislative activity from the Member state interested.

Still, regarding the notion of post-dating, the approach of the European Court of Justice has remained ambiguous regarding the essential and nonessential character of the temporal factor in the context of proper doctrine interpretation.

It is true that the key judicial deciphering of a social reality supposes rigor, but this bring with it the temptation of simplicity. Where simplicity doesn't offer a coherent solution, it must be abandoned. It is the case to recognize that the amusement or flax, immorality or weakness can, neither of them, represent the exclusive foundation of rules in the domain of games and bets, but we can neither deny their incidence on them.

Seen individually, extracted from the social and judicial-economic context in which these are produced, games and bets are neutral in comparison to moral values.

In the moment in which the development process of the contract was ended, the *alea* element disappeared, was consumes, the proper game has been played, the initial incertitude was wasted. The effort of building such complicated constructions is the consequence of incapacity to conceive obligatory – judicial rapports, the respect of which is circumventing from the coercive force of the state.

Conclusions

Beyond the legislator's reserve towards the dangers generated, in the social plan and at the individual's level, the development of the game and bet practice, and the difficulty to control it successfully, is another argument that supports the solution of positive law. As a social activity, the game represents an escape from reality, an intentioned assuming of a proper and distinct order, with a limited application, not only in time and space, but also in rapport to the receivers of its rules. Regarding the reasons offered, the game and bet convention is seen as a commitment of honor. Also called *gentlemen's agreements*, honor commitments are conventions the fulfilling of which is guaranteed only by the honor and reputation of the parts, being removed from the state coercive order.

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LINGUISTIC RULES APPLIED IN THE INTERPRETATION OF LEGAL NORMS

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Abstract

Considering that legal language is a technical language with particularly close ties to the common language, and culture, the experience in the field of translation and interpreting of legal texts needs a framework of linguistic theory, methods and strategies receiver oriented and also in accordance with the era of globalization and multilinguism.

The work of these legal translators can be affected by the communicative aspects of reception in bilingual and multilingual jurisdictions. The success of an authenticated translation depends on its interpretation and application in practice it is important for us to encourage interaction between translators and the judiciary.

Key words: *globalization, translation, framework, theory, interpretation*

Introduction

According to Berteloot[1] *there has been a growing interest in legal translation, especially over the past ten years. This interest, from different points of view, is shared between linguists and lawyers and it is a result of globalization. Years ago both lawyers and linguists attempted to apply the rules of general translation to legal texts namely Catford's concept of situation equivalence*[2] *Nida's theory of formal correspondence*[3]*, and also Vermeers's skopos theory.*

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[1] Berteloot, Pascale (1999), *Der Rahmen juristischer Ubersetzungen, in G-R de Groot and Schulze*, R, Recht und Ubersetzen, Nomos, Baden-Baden.

[2] Kielar Barbara (1977), *Language of the Law in the Aspects of Translation*, Warszawa, Wydawnictwa Uniwersytetu Warzawskiegi.

[3] Weisflog, Walter (1996), *Rechtsvergleichung und juristische Ubersetzung*, Zurich, Scultess.

Legal translation requires a special theory[4] and also new special methods and techniques and also a theoretical framework, practice oriented. Legal translation needs to be considered an act of communication in the mechanism of law.

Law, legal translations and culture

The translation of legal texts should be receiver oriented. In the age of globalization and multilinguism focusing on the reception of parallel texts in the mechanisms of the law, showing how legal texts authenticated in two or more languages are interpreted and applied by courts in various plurilingual jurisdictions.

Legal translators are confronted with the asymmetry of legal systems, the relativity of concepts, and have to deal with inconsistent categorizations and classifications. The tasks of the legal translators as cultural mediators is to communicate information about the foreign law specifically taking into account the target audience in order to avoid misunderstandings. The work of these legal translators can be affected by the communicative aspects of reception in bilingual and multilingual jurisdictions. The success of an authenticated translation depends on its interpretation and application in practice it is important for us to encourage interaction between translators and the judiciary.

The authenticated translations, vested with the force of law, give the mechanism the power to function in more than one language. The translation of legal norms, treaties and conventions, judicial decisions and contracts are authoritative if they have been approved or adopted in the manner prescribed by the law. We should also mention that the authenticated translations are just as inviolate as the original texts.

Robert Cover[5] considered that: "The creation of legal meaning takes place always through an essentially cultural medium".

According to Cover the legal translation is viewed as a cultural transfer in order to render possible an effective communication between cultures. Law is a cultural domain, occupying a very important place among the cultural practices of society.

The roles of legal institutions need to be seen as part of the culture and at the same time a culture cannot be fully understood without attending to its forms of law. Law as a socio-cultural phenomenon is always linked to the culture of a particular society and jurisdiction. The national legal systems are deeply rooted in a specific legal tradition and

[4] Weston, Marin (1991), *An English Reader's Guide to the French Legal System*, New York, Oxford, Berg.

[5] Rosen, Lawrence (2006), *Law as Culture. An Invitation*, Princeton & Oxford, Princeton University Press.

legal culture.[6] The asymmetry of legal systems, the relativity of legal terminology, the inconsistence of categorizations and classifications between different branches and fields of law, distinguishes between the terminological and conceptual levels as well as the complexities of conceptual and terminological change.

The European legal culture can be observed in On Perspectives of Culture and EU Law[7] which presents the implications of the legal-linguistic interaction together with autonomous developments of national legal cultures. The European terminology adopted new terms when expressing new concepts.

Translating Strategies Concerning Legal Translations

The legal translators are bound to the letter of law for the sake of the principle of fidelity to the source text. The translator's task is to reconstruct the form and substance of the source text as closely as possible. The issue of authenticated translations, whether they are literal or free is controversial. Translation techniques and methods vary from jurisdiction to jurisdiction even for the same type of texts. Authenticated translations should be comprehensible and written in the target language. In Weisflog's view it is the word-choice that counts in the translations of normative texts, other researchers consider that the sense has its own importance considering that legal translators can be creative with the language while stylistic diversity should be tolerated.

According to Sacevic[8] authentic legislative texts are translated differently in different jurisdictions, thus suggesting that generalizations about translation strategy are insufficient in legal translation.

The decisive criteria in determining a translation strategy for legal texts needs a deep analysis. If we regard the legal translation as an act of communication between text producers and text receivers we need to make the distinction between direct and indirect receivers or addressees. According to Kelsen[9] the indirect receivers of legislation include all persons affected by the particular instrument including the general public. The direct receivers are the specialist empowered to interpret and apply the particular instrument.

The process of interpretation becomes considerably more complex when more than one legal system comes into play. In such a case the

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[6] Pommer, S., E., (2008), *Translation as Intercultural Transfer: A Case of Law*, in the Journal of Translation and Interpretation (on-line) vol. 3.

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source and target legal system differ and pose the threat that the text or parts of it can be interpreted according to conflicting legal systems.

More and more states and courts are participating in the interpretation process. The plurilingual countries had succeeded in promoting uniform interpretation and application by establishing effective controls in their judicial systems, but this has not been achieved in international law where most disputes are resolved by national courts. The decisions of the national courts can have devastating effects on international treaties and conventions because the diversity of decisions is inevitable.

According to Pommer[10] the most decisive parameters for legal cultural communication are functionality and relevancy in the framework of contextualization. These are also the basic principles which can be found on both comparative law and legal translation methodologies but with several significant differences.

Conclusions

In the field of law the idea of translation as a form of transferring aiming at achieving equivalence between the source and target texts is severely challenged. The transmission of legal information about one's own or other legal systems has to be understood as a mix of practices of producing meanings and ways in which systems of meanings are negotiable in and across legal cultures.

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THE ROMANIAN LEGISLATIVE FRAMEWORK FOR OBTAINING THE INTERNATIONAL WORK PERMIT

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Abstract

Our paper intends to present a different kind of change in the Romanian legislative system. As a result of the increased migration towards the countries of Western Europe the European Commission proposed a set of norms in order to get the international work permit named EUROPASS.

This paper contains information regarding this tool used in the countries member of the European Union to help people get a work permit easier and also to help them preserve their identity while they are included in other cultural communities.

The EUROPASS is and will be used in order to facilitate a real communication between the employer and the employee or between universities and their students.

Key words: *communication, certificate, labor, linguistic skills*

Introduction

The laws of the European Union regarding free mobility should normally be allowed to live and work in any other of these countries. Everyone will need a valid identity card or passport.

When Romania and Bulgaria joined on 01 January 2007 (forming the current EU 27), restrictions were kept in place in most countries, including the UK and Ireland, but were eased or unlimited in some others.

EU nationals from old member states wishing to work in new EU member states will have to check with each country regarding their ability to work there. Some new Member States have chosen to impose equivalent restrictions on the nationals of Member States that have themselves imposed restrictions.

The European Labor Law

Labor law is a body of legislation that defines the rights and obligations as workers and employers in the workplace.
At Community level, labor law covers two main areas:

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- Working conditions, including working time, part-time and fixed-term work, and posting of workers
- Information and consultation of workers, including in the event of collective redundancies and transfers of undertakings.

Several aims of the European Union are: achieving a high level of employment and social protection, improved living and working conditions and economic and social cohesion.

In this framework, the role of the European Community (EC) is to support and complement the activities of the Member States in the area of social policy, in line with the provisions of the EC Treaty, particularly Articles 136-139. As Romania is a member state of the EU we submit to the European Labor Law.

It is the EC adopts legislation that defines minimum requirements at EU level in the fields of working and employment conditions and the information and consultation of workers. The Member States then transpose the Community law into their national law and implement it, guaranteeing a similar level of protection of your rights and obligations throughout the EU. The adoption of legislation setting minimum requirements has improved labor standards and strengthened workers' rights and is one of European Union's main achievements in the field of social policy.

National authorities, including courts, are responsible for the enforcement of the national transposition measures. The Commission controls the transposition of EU law and ensures through systematic monitoring that it is correctly implemented. The European Court of Justice plays an important role in settling disputes and providing legal advice to questions formulated by national courts on the interpretation of the law. The Labor legislation has a key role in ensuring that a high level of employment and sustained economic growth is accompanied by continuous improvement of the living and working conditions throughout the European Union.

The EUROPASS – A European Passport Meant in Order to Get a Job

The Romanian academic environment is based on the Bologna Process so according to these laws we have an educational system student-centered and brought to the European standards. There are three cycles of studies: license, bachelor degree and Phd. According to the Romanian legislation regarding student mobility there are several programs used by the universities to encourage EU scholarships: SOCRATES, ERASMUS, and LEONARDO DA VINCI.

For those who want to attend universities or other bodies for personal development, or those who are looking for a job the European Council proposed EUROPASS which was accepted and included in the Romanian legislation. EUROPASS offers a set of instruments meant to support the mobility, through recognizing studies and qualifications, all over Europe.

The EUROPASS contains five documents:

- EUROPASS Curriculum Vitae
- EUROPASS Linguistic Passport (both completed personally)
- The Diploma Supplement
- The Supplement at the Professional Competences Certificate
- The Mobility Certificate (all given by the Educational Institutions attended)

The EUROPASS is written in two languages, at the choice of the individual. Even if a potential employer, or an institution is situated at a certain distance, they can understand easily which is the professional preparation, qualifications and experience of the person in question. It is a new dimension of the recruiting process considering that an employer car be everywhere in Europe.

1. CV service. The portal – run by the European Centre for the Development of Vocational Training (Cedefop) and available in 26 languages – provides an interactive tool to complete the EUROPASS CV and the EUROPASS Language Passport.
The EUROPASS CV highlights people's skills and abilities, including those acquired outside of formal education and training. Language skills are described with the help of the commonly used reference framework established by the Council of Europe.

Users can download the CVs that they create in several formats, including XML which enables direct uploading to on-line employment databases.

2. The EUROPASS Linguistic Passport records the linguistic ability and it is normally accompanied by one or more certificates of linguistic competence.

3. EUROPASS Mobility records a learning experience abroad, such as an academic exchange or a stage in a company – making it more visible for employers.

4. The EUROPASS Diploma Supplement.The Europass Diploma Supplement is extremely valuable for academic recognition. Developed by the European Commission, the Council of Europe and UNESCO, it describes in a standardized way the nature, level, context, content and status of any higher education courses that an individual has successfully completed. New qualifications proliferate worldwide and countries are constantly changing their qualification systems and educational structures. With an increasing number of mobile citizens seeking fair recognition of their qualifications outside their home countries, the non-recognition and poor evaluation of qualifications is now a global problem. Since original credentials alone do not provide sufficient information, it is very difficult to gauge the level and function of a qualification without detailed explanations.

A description of the national higher education system within which the individual named on the original qualification graduated has to be attached to

the Diploma Supplement. This description is provided by the *National Academic Recognition Information Centers (NARICs).*

The supplement is designed as an aid to help recognition – it is not a CV or a substitute for the original qualification, and it does not guarantee recognition.

The 48 European countries taking part in the Bologna Process have agreed that each graduate in their respective country should receive the Diploma Supplement automatically, free of charge and in a major European language

5. The EUROPASS Certificate Supplement explains vocational training certificates in terms of skills and abilities, enabling employers to better appreciate what their holders can do.

Conclusions

The Importance of the EUROPASS - The fact that Romania is a member of the European Union opens new horizons and opportunities for the Romanians, especially for young people who graduated school and want to continue either with work so they are looking for a job or they want to study abroad. The gates of Europe opened for the adults who lost their jobs as a result of the crisis or had worse-paid jobs. In fact Europe became wide open for every of its citizen who wanted to change jobs, life style, exchange experience.

For all the categories that chose to live and work abroad the European and the Romanian laws offered a way of doing it legally and we can say protected. We can also mention that the laws of migration, minorities, cultural identity, multilingualism complete the Labor Law enhancing the hopes of peoples to have better lives. It expanded horizons for study and learning, giving the people opportunities to find jobs ant a continental scale.

The European Commission set up a portal on the Internet called "Your Europe", providing on-line information and advice about living, working and learning in Europe.

Recently a feasibility study concerning the creation of a European Agency for linguistic diversity and language learning was carried out by Yellow Window (2005) and offered to the European Commission. The Yellow Window opened a door for the inclusive approach towards languages respecting the diversity of the languages used in the EU. This is one of the ways of having a future of multilingual Europe.

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PROCEDURAL ASPECTS REGARDING THE REVOCATION ACTION OF THE DONATION

Robet Bischin*

Abstract

Article 833 paragraph 2 of Civil Code institutes the strictly personal feature of the revocation action for ingratitude, by stipulating that the donor is the only one who can demand the donation revocation because he or she is the only one who suffered from the grantee's ingratitude and who can decide his or her exemption. If we consider the intuitu personae feature of the donation contract, respectively the fact that the owner makes the donation considering certain qualities of the grantee, and the fact that the effects of this donation contract are an indirect benefit for the heirs of the ungrateful grantee, the action started against the grantee may be also continued against his or her heirs.

Key words*: donation, revocation, contract, creditor, donor, grantee, commissoria lex.*

Introduction

The Civil Code consecrates three cases when the donation may be revoked: revocation for the non-accomplishment of the duties, revocation for ingratitude and revocation in case of children. ("The donation between living persons is cancelled for the non-accomplishment of the conditions in which it was made " art. 829 of Civil Code.)

The stipulation of a duty in the donation content has the effect of loss of the donation gratuitousness that, within the limit of the duty imposed to the grantee, becomes a synallagmatic contract.

1. Cases. The Civil Code consecrates three cases when the donation may be revoked: revocation for the non-accomplishment of the duties, revocation for ingratitude and revocation in case of children.

Even if in the legal formulation we use the word "conditions", ("the donation between living persons is cancelled for the non-accomplishment of the *conditions* in which it was made " art. 829 of Civil Code), the doctrine and the jurisprudence have unanimously admitted that the legislator refers to the duties that may affect the donation and that may be imposed to the grantee

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either for the advantage of the donor, or for the advantage of a third party, or even for the advantage of the grantee.

2. The loss of gratuitousness. The stipulation of a duty in the donation content has the effect of loss of the donation gratuitousness that, within the limit of the duty imposed to the grantee, becomes a synallagmatic contract.

One of the effects specific to the synallagmatic contracts is the possibility, according to the stipulations of art. 1020 and 1021 of Civil Code, to demand the revocation of the contract, if one of the parties fails to guiltily execute its contractual duties. The creditor has also the possibility to demand the forced execution of the duties, if he or she is interested in maintaining the contract.

3. Application. The donation revocation may be qualified as an application of the principle according to which the solving condition in the synallagmatic contracts is always self-understood, the principle instituted by the stipulations of the art. 1020 of Civil Code according to which the settling condition is always self-understood in the synallagmatic contracts, if one of the parties does not execute its obligations.

Within the stipulated duty, by becoming a synallagmatic contract, donation will follow the juridical system of a certain contract. As a consequence, in case of total or partial non-accomplishment of the duty, the donor can choose between demanding the forced execution of the duty and settling (cancelling) the contract with damages-interests. [1]

In order to support this idea, the most important are the stipulations of art. 830 of Civil Code, according to which "*When donation is cancelled for the non-accomplishment of the conditions, the goods belong to the donor again, having no duty and no mortgage*" that represents certainly an application, regarding the donations matter, of the rules that lead the tacit solving condition in the synallagmatic contracts. [2]

Moreover, art. 832 of Civil Code provides that the donation revocation for the non-accomplishment of the duty "never happens by right", but it has to be pronounced by the judicial court. The general stipulation included in art. 1021 of Civil Code also applies to this case of the donation revocation, so that the judicial court invested with the settlement of the revocation demand can grant, at demand, depending on the circumstances, a grace term to the grantee for the accomplishment of the duty.

*4. Express provisions regarding contract settlement***.** By being subordinated to the juridical system of a synallagmatic contract and in case of the donation with duties, the parties may insert in the contract content certain express contractual provisions regarding contract settlement for non-execution, that constitute the so-called express commissoria lexes. Depending

[1] TS, s. civ., *dec. no. 1573/1971* in *Repertory ...1969-1975*, p. 135.

[2] Ion Dogaru and the staff, *Civil Law. Special Contracts,* All Beck Press, Bucharest, 2004, p. 369.

on the effects of certain provisions, the role of the judicial court may remain the same as in case of the judicial settlement, including the approach of a grace term (a first degree commissoria lex); it may only find if the duty was or was not executed correspondingly, without being able to grant a grace term (a second degree commissoria lex); it only finds that the settlement occurred (a third degree commissoria lex); it will find that the donation is cancelled by law by non-executing the duty without being late and with no other formalities (a fourth degree commissoria lex).[3]

5. The availability principle in the matter. As the right to demand the donation revocation is a right recognized as being in the donor's advantage, he or she is free to dispose as a holder so that it does not contradict to the nature of the donation contract, being completely valid the provision by means of which the parties stipulate the donor's renunciation to the right to demand the donation revocation for the non-execution of the duty[4] in contract.

The aforementioned solutions apply both if the duty is stipulated in the advantage of the donor and if the duty is stipulated in the advantage of a third party or even of a grantee himself or herself.

6. The revocation may be demanded only by donors. As in the case of settling a synallagmatic contract and in the donation case, the revocation for the non-execution of the duty may be demanded only by the donor who, as we have already shown, has also the possibility, if the duty execution is still possible, to demand the execution of the contract and not the revocation from the judicial court.

If the duty is stipulated in the advantage of a benefitting third party, in case of non-execution, this can demand the obligation of the grantee to forced execution. Because he or she is not a party in the donation contract, he or she cannot demand the donation revocation for the non-execution of the duty in his or her advantage, but this right belongs only to the donor, to his or her heirs and creditors.

The right to demand the donation revocation is not recognized to the grantee who cannot release himself or herself from the execution of the duty, giving up the liberality benefit because this would be equal to a unilateral denunciation of the contract, but donation is a contract and can be cancelled only with the consent of both of the parties.

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[3] D. Alexandresco, *Theoretical and Practical Explanation of Romanian Civil Law. First Part. Donations between living persons*, the fourth volume, Bucharest, 1913, p. 428.

[4] Tr. Suceava, *dec. no. 1569/1956* with a note by B. Diamant in JN no. 2/1957, p. 329, quoted by C. Turianu, *op. cit*., p. 130. In case of a donation with the duty of supporting the donor by the grantee, if the grantee dies before the donor, the donor cannot demand the donation cancellation for non-executing the duty, because by the donation contract, he or she gave up this right, by keeping the right to demand the cancellation for the other legal causes stipulated by art. 829 of Civil Code.

7. Contracting risk transmission. As the ownership right over the donated good is transmitted from the moment of enforceable conclusion of the contract, the contract risk will be borne by the owner, according the principle *res perit domino*. This is how we justify the fact that the grantee's obligation to execute the duties imposed by the contract subsists in case of the fortuitous fall of the good that was the object of the liberality as well.

In case of the donation revocation it is also necessary that the non-execution of the duty be imputable to the party forced in this sense, respectively to the grantee.

The action in the donation revocation for the non-execution of the duty will not be admitted if the non-execution of the duty is imputable to the donor or if it is imputable to none of the parties (if the non-execution was hindered by a fortuitous case or a case or force majeure).[5]

8. Conditions. In conclusion, in order to operate the judicial revocation of a donation bearing encumbrances, we have to cumulatively accomplish the following conditions:

- The grantee does not have to execute the duty stipulated in the contract;
- The non-execution has to be imputable to the grantee;
- The grantee has to be delayed, in the conditions stipulated by the law.

As we have already shown, the donation revocation may be demanded only by the donor as a party of the contract. There was the question if the donor's heirs may also demand the donation revocation or the execution of the duty. The doctrine has appreciated (a point of view also shared by the judicial practice) that the donation revocation, as the execution of the duty, may be demanded also by the donor's heirs because the action in the donation revocation is a patrimonial action that is transmissible on the successional way. For the same reason, according to the stipulations of art. 974 of Civil Code, the donor's creditors may also demand the revocation through oblique action.

Moreover, if the heir debtor does not give up the action, the donation revocation may be demanded, still through oblique action,[6] by the heirs' creditors.[7]

*9. Unique solution***.** The only way by means of which we can accomplish the elimination of the donation for ingratitude is the donation

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[5] Fr. Deak, *Civil Law. Special Contracts*, Actami Press, Bucharest, 1996, p. 172; D. Chirică, *Civil Law. Successions,* Lumina Lex Press, Bucharest, 1997, p. 163; Tr. Arad, *dec. no. 851/1981* in RRD no. 12/1982 with note by L. Mihai, p. 42-48; Ion Dogaru and staff, *Civil Law. Special Contracts*, All Beck Press, Bucharest, 2004, p. 370.

[6] D. Alexandresco, *Theoretical and Practical Explanation of the Romanian Civil Law. First Part. Donations between Living Persons,* the fourth volume, Bucharest, 1913, p. 430.

[7] Ibidem.

revocation. This results implicitly from the stipulations 832 of Civil Code according to which the revocation for ingratitude “never happens by right".

10. Notion. The revocation action is the procedural means recognized by law at the donor’s disposition that sanctions the grantee’s incorrect attitude, who is guilty for not having complied with the gratitude obligation. Practically it constitutes a civil punishment to which the legislator consecrated a special juridical system. In conclusion, the revocation for ingratitude is judicial so that the revocation operates only if it was demanded in front of the judicial court by means of the revocation action for ingratitude, a court that will appreciate depending on the case the gravity of the imputed actions. The judicial feature of the donation revocation for ingratitude is totally justified if we consider, on one hand, the fact that the donation is an irrevocable contract, the revocability being the exception, and on the other hand, it is justified by the need to avoid the abusive behaviour of the donor that can avail himself or herself of these legal stipulations in order to obtain the revocation.

The procedure regarding the revocation action

11. Features. Enumeration. As we have shown above, the action in the donation revocation has a special juridical system, characterized by: it is a personal action, it is sued only against the ingratitude action and aspects regarding the exertion term and the nature.

12. It is a strictly personal action. In this sense, art. 833 paragraph 2 of Civil Code institutes the strictly personal feature of the revocation action for ingratitude, by stipulating that only the donor may demand the donation revocation, being the only one who suffered from the grantee’s ingratitude and who can decide his or her exemption or not. Because it implies the settlement of a moral problem regarding the exemption of the enforcement of the punishment, the action can be exerted neither by the donor’s heirs, nor by his or her creditors through the oblique action.

Exceptions from the strictly personal feature (of the donor).

The stipulations of art. 833 paragraph 2 of Civil Code admit exceptionally to the donor’s heirs the right to exert this action in two cases, namely:

a**)-** when the action was introduced by the donor, and the latter one died during the lawsuit, the action is continued by his or her heirs.

b)- when the donor dies before the expiration of the term for introducing the revocation action. This exception finds its justification in the assumption that, if the donor was alive until the term expired, he would have introduced the action himself or herself.

These exceptions, having a strict interpretation, the revocation action for ingratitude cannot be introduced by the donor's creditors and cannot be even continued by them.[8]

Being about the enforcement of a punishment that is never accomplished by the law, the holder of the action, the donor or, depending on the case, his or her heirs can forgive the guilty grantee. The exemption is tacit when the holder of the action, knowing about the grantee's ingratitude, does not introduce the action within the term stipulated by art. 833 paragraph 1 of Civil Code in order to demand the revocation. But the donor cannot give up his or her right to demand the revocation for ingratitude in advance, before ungrateful actions were accomplished.

The renunciation to the effects of the judicial decision's effects of the donation revocation is not an exemption of the ungrateful grantee, if the decision was executed in fact by the parties, at will or by force. This "renunciation is equal to a new goods transmission to the ex-grantees and needs the conclusion of a new donation document ".[9]

13. We may sue only the author for the ingratitude action. The punishment feature[10] of the revocation for ingratitude leads to the conclusion that "the revocation action cannot sue the grantee's fallacies...", but only against the author of the ungrateful action, so of the guilty grantee.

If, regarding the donor, as a plaintiff, we admit exceptions from the strictly personal feature, in case of the processually passive quality such exceptions are not admitted. The action will not be able to sue the heirs of the guilty grantee because they are not guilty for the ungrateful action of their author and, on the other hand, by having a punishment feature, the revocation action may sanction only the person who is guilty for ingratitude. The heirs of the ungrateful grantee cannot be sued for the donation revocation neither if they committed the action that represents ingratitude, because they are not grantees.

14. Doctrine. Opinions. The opinions in doctrine were different regarding the possibility to continue the action started against the grantee if he or she dies in contradiction with his or her heirs. Some authors, such as Alexandresco have answered positively, saying that the donor expressed his or her will to cancel the donation, and the revocation judicial decision is to be pronounced.

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[8] Ion Dogaru and staff, *Civil Law. Special Contracts*, All Beck Press, Bucharest, 2004, p. 374.

[9] T. S., col. civ., *dec. no. 719/1955* quoted by Fr. Deak, *Civil Law. Special Contracts*, Actami Press, Bucharest, 1996, p. 177; Ion Dogaru and staff, *Civil Law. Special Contracts*, All Beck Press, Bucharest, 2004, p. 374.

[10] D. Chirică, *Civil Law. Successions*, Lumina Lex Press, Bucharest, 1997, p. 165; Fr. Deak, *Civil Law. Special Contracts*, Actami Press, Bucharest, 1996, p. 177.

The opinion of the majority[11] appreciates that, once the guilty grantee is dead, the action cannot be continued against his or her heirs because of several reasons: on one hand, by art. 833 of Civil Code does not authorize this solution (unlike the case of the donor's heirs), and on the other hand, the revocation, having the feature of a punishment, cannot be directed against the heirs that are not guilty for their author's ingratitude. The judgement exposed above is logical and perfectly legal, but it is not fair. If we consider the intuitu personae feature of the donation contract, respectively the fact that the owner makes the donation considering certain qualities of the grantee and the fact that the effects of this donation contract are an indirect benefit for the heirs of the ungrateful grantee, we appreciate that the action started against the grantee may be also continued against his or her heirs. Beside these arguments, there is also the fact that the civil sanction has patrimonial effects and the patrimonial rights are transmitted on a successional way. We may motivate this solution by analogy with the effects of the lack of dignity in a successional matter, even if the descendents of the undignified person are not at all guilty in front of the dead man, they can come to the heritance only on their behalf and not by representation, namely they are not called to the heritance if there are other heirs in the same class with the undignified heir. The situation is similar to the ingratitude so that, if the grantee is guilty for an ungrateful behaviour in front of the donor, his or her heirs cannot benefit from the good obtained by donation, motivating that the action cannot be continued also against them. It is true that the legal stipulations in matter does not consecrate a certain possibility, as it happens in case of the donor, a reason why we appreciate that it is imposed, *de lege ferenda* the legislative consecration of the solution analysed above with the motivation exposed on this occasion.

If there is a plurality of grantees, but only some of them are guilty for ingratitude, the revocation for ingratitude is directed only against the guilty ones and the donation remains in force for the innocent ones.[12]

*15. The performance term of the action and its nature***.** Art. 833 paragraph 1 of Civil Code stipulated a one-year term since the day of the action or since the day the donor knew the action, a term within the donor may exercise the action in the donation revocation for ingratitude.

The doctrine affirmed that the one-year term was not a prescription term, but a decline term, because it is not subordinated the rules applicable

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[11] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Romanian Civil Law Treaty*, The third volume, Restitutio Collection, All Beck Press, Bucharest, 1994, p. 498; G. P. Petrescu, *Donations between Living Persons and Irregular Donations*, the first volume, Bucharest, 1981, p. 430; Fr. Deak, *Civil Law. Special Contracts*, Actami Press, Bucharest, 1996, p. 178; M. B. Cantacuzino, *Civil Law Elements*, All Educaţional Press, Bucharest, 1998, p.359; Ion Dogaru and staff, *Civil Law. Special Contracts*, All Beck Press, Bucharest, 2004, p. 375.

[12] T. S., col. civ., *dec. no. 681/1955* in CD, p. 81 quoted from C. Turianu, *op. cit*., p. 109.

in the matter of the flow of the prescription term, respectively suspension, interruption or reposing in term.

Non-exercising the action within the term or after reaching the one-year term is seen as the grantee's tacit exemption by the donor and his or her right to demand the revocation disappears, and the introduced action is to be[13] rejected as being belated.

The moment when the one-year term starts is represented either by the date of the accomplishment of the ungrateful action, or by the date when the donor knew the accomplishment of the action.

In case of committing several successive ungrateful actions by the grantee, the one-year term will start with the date of committing the last action or with the date when the donor became aware of the action being committed.[14]

A different analysis is required if the revocation action of the donation is based on the grantee's refusal to give food to the donor. Starting from the fact that the grantee's obligation is a continuous obligation, the judicial practice[15] has decided that the stipulations of art. 833 paragraph 1 of Civil Code are not applicable regarding the moment when the one year-term starts.

16. Doctrine. In doctrine, it was specified that this thesis should not be generalized because, if after period of needs, the donor gets the necessary means in order to support himself or herself, the term for the revocation action will be the one established by art. 833 paragraph 1 of Civil Code.[16]

For the one-year term to begin, it is necessary that the donor know both about the performance of the action that attracts the ingratitude, and the fact that the grantee is the author of this action.[17]

If the ungrateful actions and also the fact that the grantee is guilty for them are discovered after the donor is dead, according to the stipulations of art. 833 paragraph 2 of Civil Code, his or her heirs may introduce the revocation action within a year since the date they became aware the action[18].

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[13] T. J. Hunedoara, *dec. no. 429/1988* in RRD no. 5/1989, p. 61.

[14] D. Alexandresco, *Theoretical and Practical Explanation of the Romanian Civil Law. First Part. Donations between Living Persons,* the fourth volume, Bucharest, 1913, 461; C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Romanian Civil Law Treaty*, the third volume, Restitutio Collection, All Beck Press, Bucharest, 1994, p. 498.

[15] T. S., col. civ., *dec. no. 1572/1968* in RRD no. 4/1969, p. 178.

[16] L. Mihai, Alice Kolicher, *Term of the Donation Cancellation for Ingratitude* in SCJ no. 3/1985, p. 248-249; D. Chirică, *Civil Law. Successions*, Lumina Lex Press, Bucharest, 1997, p. 166.

[17] D. Alexandresco, *Theoretical and Practical Explanation of the Romanian Civil Law. First Part. Donations between Living Persons,* the fourth volume, Bucharest, 1913, p. 461.

[18] I. Dogaru and staff, *Civil Law. Special Contracts*, All Beck Press, Bucharest, 2004, p. 375.

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THE HARMONISATION BETWEEN NATIONAL LEGISLATION AND EUROPEAN JUDICIAL NORMS CASE STUDY: CLIMATE CHANGE

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Abstract

An essential condition needed to fulfill the commitments toward the European Unionis realising a new type of economic growth. This growth, which is inovative, renewing and protective towards both the environment and the individual, will be accompanied by the use of clean technologies.

The aquis communautaire has over 450 environmental directives, rules and decisions, which constitute the horizontal legislation and the sectorial legislation in the area of environmental protection. The horizontal legislation includes rules concerning transparency, the spread of information, the process of decision-making, activity development and the involvement of the civil society în environmental protection.

Key words: *acquis communautaire, climate change, Kyoto Protocol, 20/20/20 legislative package.*

Introduction

According to the Fourth Global Asessment Report of the Intergovernmental Panel on Climate Change[2](2007), human activities contribute significantly to the rise of global levels of greenhouse gas emissions in the atmosphere, causing changes in its composition and heating up the planet. To fight climate change, on December 13, 2008, the European Council approved the „Energy – Climate Change" legislative package, also called the 20/20/20 package, being adopted by the European Parliament's plenary reunion of April 23, 2009. It was then published in volume 52 of the European Union's Official Journal, number L140 of June 5, 2009.

This package contains a series of concrete actions and a set of objectives that must be fulfilled by the year 2020, representing the EU's firm comitment, and thus the commitment of member states to fight climate change, preparing the transition towards a low carbon (CO_2) emission economy.

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[2] http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf

Member states are to ensure that, by the mandated deadlines, they will have harmonized national legislation with the articles of the legislative package.

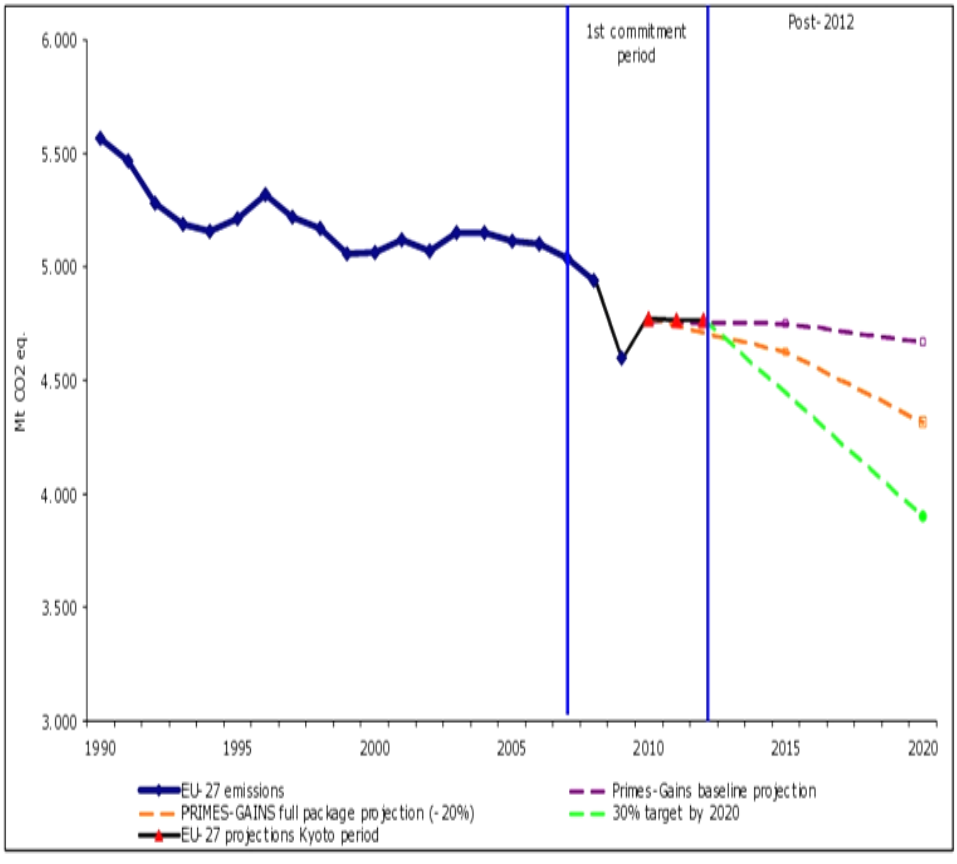

fig. 1 Greenhouse gas emissions - current levels and predictions

Source: Report nr. 569 from the Comission to the European Parliament, published on 12 October 2010, *Progress towards achieving the Kyoto objectives*.

1. The method of legislative harmonisation

The *acquis communautaire* represents the set of rights and obligations shared by Member States of the European Union and is based on the Treaty of Rome, the Single European Act, the EU Treaty, etc., as well as secondary legislation (Directives, Regulations, Decisions, etc.). The aquiring of the acquis is done through a process called *legislative harmonisation*, process through which the newly adopted legislation is made to conform to the acquis communautaire.

The contextof legislative harmonisation in pre-accesion Romania

Romania's Association Accord with the European union , which came into effect on 1 February 1995, set the framework and the objectivesof the association. In May 1995, the European Comision

adopted the „Preparing associate countries of Central and Eastern Europe for the integration into the Internal Market of the Union" White Book, which identifies key measures in each sector of the Internal Market and proposes an order in the handling of the legislative harmonisation. Once the laws are passed, the monitoring of its compatibility is done using the „Harmonigrame".

The assimilation of the **acquis** into the national legislation was among the requirements for joining the EU on 1 January 2007.

Legislative harmonisation in Romania's post-accesion period

The Government of Romania, through its Department for European Affairs (DAE), which includes the Bureau for European Law and Legislative Harmonisation (DDEAL), is required to analyse and advise about all the normative act projects, that seek to implement EU law. In this cateory, of normative act projects that are subject to this requirement, one finds: bills, ordinances, emergency ordinances, Government decrees, notes, memorandums, instructions, normes, etc. issued by the ministers' offices or by any other branches of the central public administration. DDEAL notifies the European Commision about the national measures regarding the implementation of EU law.

The Bureau for Coordonated Translations (DCT) within the European Institute in Romania manages the translation of the acquis into the romanian language.

2. The legislative framework in the domain of climate change

The legal basis of the EU's environmental policy is made up by the articles 174 and 176 of the CE Treaty, as well as articles 6 and 95.

The part of the acquis communautaire pertaining to the environment is made up by more than 450 environmental directives, rules and decisions, which constitute the horizontal legislation and the sectorial legislation in the area of environmental protection. The horizontal legislation includes rules concerning transparency, the spread of information, the process of decision-making, activity development and the involvement of the civil society în environmental protection. The vertical legislation includes sectors that are the domain of environmental policy (air quality, climate change, waste management, water quality, nature conservation, control of industrial polution, chemical substances, genetically modified organisms, noise, civil protection). All normative acts are drawn up by the European Commision, as it's the only EU institution with the right to initiate law. After being presented by the Commision, normative act projects are passed through a process of codecision or comitology (the use of comitees in the executive process)

A.United Nations Framework Convention on Climate Change (Rio de Janeiro 05 June 1992)

Implementation in Romania:

- Law nr. 24/06.05.1994 – ratifying the United Nations Framework Convention on Climate Change (M.O. nr. 119/12.05.1994);
- HG nr. 1275/1996 – regarding the establishment of the National Comission on Climate Change

B. The Kyoto Protocol (Kyoto 11 December 1997)

EU Implementation:

- Council *Decision 2002/358/EC* of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfillment of commitments there under.;
- *Decision No 280/2004/EC* of the European Parliament and of the Council of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol
- Commission *Decision 2005/166/EC* of 10 February 2005 laying down rules implementing Decision No 280/2004/EC;
- Commission *Decision 2006/944/EC* of 14 December 2006 determining the respective emission levels allocated to the Community and each of its Member States under the Kyoto Protocol - pursuant to Council Decision 2002/358/EC;

Romanian Implementation:

- Law nr.3/02.02.2001 – the ratification of the Kyoto Protocol of the United Nations Framework Convention on Climate Change; became mandatory on 16 February 2005 (M.O. nr. 81/16.02.2001);
- HG nr. 645/2005 for the approval of the National Strategy regarding Climate Change (M.O. nr. 670/27.07.2005);
- HG nr. 1877/2005 for the approval of the National Action Plan regarding Climate Change (M.O. nr. 110/06.02.2006);
- Order nr. 1122/17.10.2006 for the approval of the Guide for the use "joint implementation" (JI) mechanism, based on module II (art. 6 of the Kyoto Protocol) (M.O. nr. 957/28.11.2006);
- Order nr. 297/21.03.2008 concerning the approval of the National Procedure regarding the use of the JI mechanism on the basis of module I (M.O. nr. 308/21.04.2008);
- Order nr. 1170/29.09.2008 concerning the approval of the Guide for adapting to the efects of climate change (M.O. nr. 711/20.01.2008);

European Union Greenhouse Gas Emission Trading System (EU-ETS)

1. *Directive 2003/87/EC* of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council

Directive 96/61/EC. It came into effect on 1 January 2005. (fully implemented);

2. *Directive 2004/101/EC* of the European Parliament and of the Council amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms. (implemented by 2 February 2010);
3. *Decision No. 280/2004/EC* of the European Parliament and of the Council of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol (fully implemented);
4. Commission *Decision No. 2007/589/EC* of 18 July 2007 establishing guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council;
5. *Directive 2008/101/EC* of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (fully implemented);
6. *Directive 2009/29/EC* of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (to be implemented by 31 December 2012);
7. Commission *Directive 2010/26/EU* of 31 March 2010 amending Directive 97/68/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery (to be implemented by 31 March 2011);

Implementation:

- H.G nr. 780/16.06.2006 concerning the establishment of a trade scheme of greenhouse gas emissions (M.O. nr. 554/27.07.2006);
- Order nr. 1008/25.09.2006 regarding the establishment of responsibilities and of the procedures needed for the emission and review of greenhouse gas emission authorization (M.O. nr. 845/13.10.2006)
- Order nr. 1175/31.10.2006 regarding the Guide for the monitoring and reporting of greenhouse gas emissions (M.O. 926/15.11.2006
- Order nr. 1768/21.08.2007 regarding the approval of the Procedure for the accreditation of bodies that verify greenhouse gas emission monitorisation reports (M.O. nr. 635/17.09.20007);

- Order nr. 1474/25.09.2007 regarding the management and operation of the National Registry of greenhouse gas emissions (M.O.nr. 680/5.10.2007);
- Order nr. 1897/29.11.2007 regarding the approval of the procedures needed for the issueing of outhorisations concerning greenhouse gas emissions (M.O. nr. 842/08.12.2007);
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- Order nr. 254/12.03.2009 regarding the approval of the Methodology concerning the alocation of greenhouse gas emission certificates from the
- Order nr. 254/12.03.2009 for the approval of the Methodology regarding the the way greeenhouse gas emission certificates are allocated from the Reserve for newly inroduced instalations 2008 - 2012 (M.O. nr. 186/25.03.2009);
- HG nr.133/23.02.2010 modifying and completing HG nr. 780/2006 estabishing the trade scheme of greenhouse gas emissions certificates (M. O. nr.155/10.03.2010)
- HG nr. 399/2010 modifying and completing HG nr. 780/2006 privind estabishing the trade scheme of greenhouse gas emissions certificates (M.O. nr. 286/30.04.2010)
- The guide regarding the framing of instalations based on cathegories of activity, based on Directive 2009/29/EC, developed by the National Agency for Environmental Protection

Green Investment Scheme-GIS)

- Emergency ordonance nr. 29 of 31 March 2010 regarding the exploitation of the surplus of units attributed to Romania through the Kyoto Protocol;
- HG nr. 432 of 28 April 2010 regarding the initiation and development of green investment schemes;

Procedures regarding Joint Implementation procedures

- *Order 1122/17.10.2006* for the approval of the Guide regarding the use of the Joint Implementation mechanism based on module II (art. 6 of the Kyoto Protocol) (M.O. nr. 957/28.11.2006);
- *Order nr. 297/21.03.2008* for the approval of the National Procedure regarding the use of the Joint Implementation mechanism based on module I (M.O. nr. 308/21.04.2008);

Proposed EU objectives of this legislative package are:

Reduction of greenhouse gas emissions by 20% until the year 2020, comparred to 1990

- A 20% share for renewable energy in EU final consumtion, including a 10% target for biofuel in transportation
- A 20% reduction in energy consumtion as estimated for 2020, through increased energy efficiency

The normative acts that make up this package are:[3]

- Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community *(to be implemented by 31 December 2012);*
- Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources *(to be implemented by 05 December 2010);*
- Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide *(to be implemented by 25 June 2011);*
- Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020;

The package also includes two legislative bills about which an accord was reached at the same time:

- Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions *(to be implemented by 31 December 2010);*.
- Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles *(to be implemented by 04 December 2010);*

[3] *General Report of Activities of the European Union in 2009* published on 15 January 2010 http://europa.eu/generalreport/en/2009/files/rg2009_en.pdf.

Conclusions

The implementation of the environmental acquis communautaire by the end of the year 2018 (the last available year for the transition period needed to implement the environmental acquis) has a total estimated cost of 29,3 billion Euros.

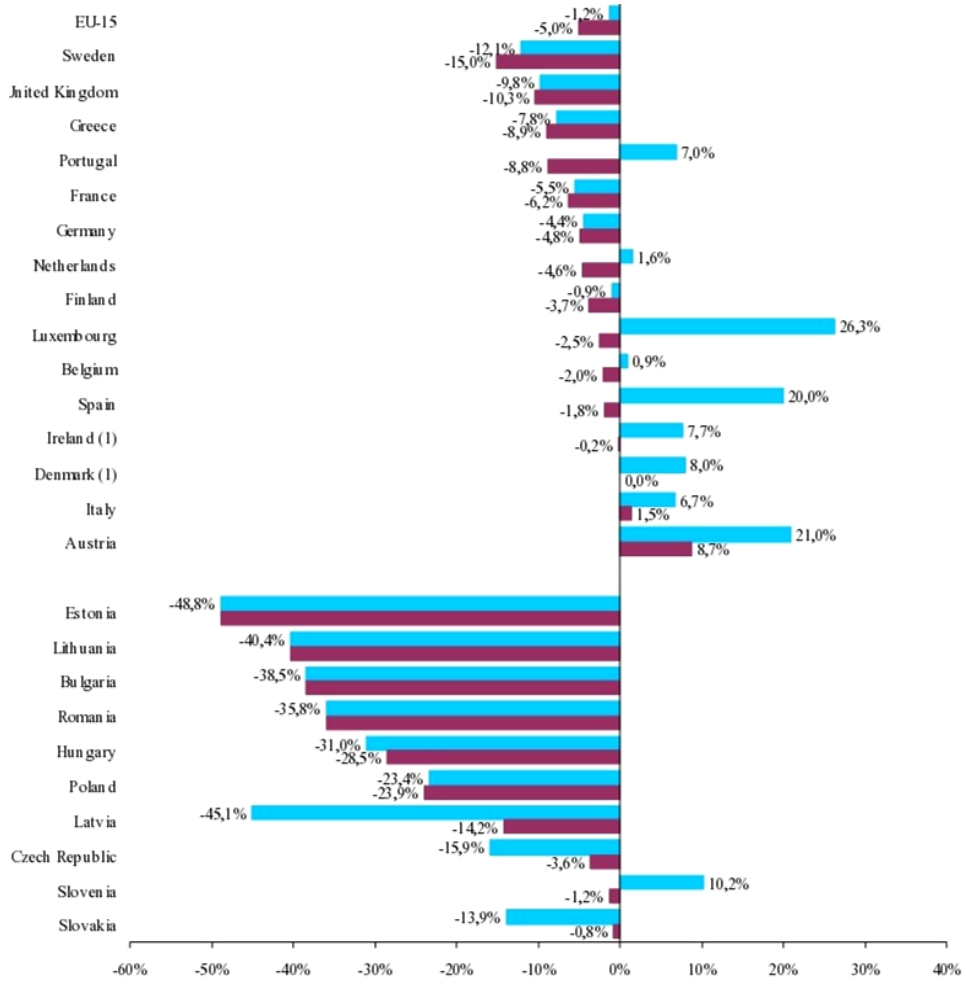

fig. 2 Percentage (%) of emission surplus (-) or deficit (+) related to the anual alocated quota to non ETS sectors[4]

Estimated emissions from non-ETS sectors

Estimated emissions from non-ETS sectors as by the Kyoto protocol

source: Report nr. 569 from the Comission to the European Parliament, published on 12 October 2010, *Progress towards achieving the Kyoto objectives*.

[4]The European Union Emissions Trading Scheme (EU ETS), set up through Directive 2003/87/CE, represents the main EU instrument used for the implementation of the commitments made through the Kyoto Protocol. The economic sectors unafected by this scheme as of 2013 are: agriculture, services, tourism, specific instalations.

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ADMISSION OF GUILT IN THE CRIMINAL TRIAL

Petre Buneci*

Abstract

The mitigation of the inquisitorial nature of criminal procedure and the taking over of dimensions specific to the accusatory system constitute an ongoing process, which materialized in the provisions of the new Criminal Procedure Code adopted by Law no. 135/2010, published in the Official Gazette, no. 486/15 July 2010, which in Title IV, entitled "Special Procedures", regulates plea bargaining in articles 478-488 of the Criminal Procedure Code.

As regards the object of plea bargaining, it must be pointed out that it concerns admitting to have committed the deed and accepting the legal classification due to which the criminal proceedings were set in motion, the amount and form of enforcing the punishment.

Obviously, this agreement can only be concluded with regard to offences for which the law provides imprisonment for a term not exceeding seven years or fine payment, and only if there is sufficient data on the crime and the defendant's guilt.

Key-words: *guilt admission, plea bargaining, agreement type, court notification, proceedings.*

Introduction

Historically speaking, guilt admission initially occurred in the mid-nineteenth century in the U.S. due to the overload of cases brought before the courts. At first, admission concerned charge bargaining, fact bargaining, or sentence bargaining. In the first case, the prosecutor would agree not to hold certain charges against the accused in return for the accused pleading guilty for the rest of the accusations. Fact bargaining is a negotiation between the prosecutor and the defender on the facts to be legally classified, by which the prosecutor agrees not to retain all the facts that could be imputed to the accused in exchange for the accused pleading guilty. Sentence bargaining is a negotiation normally initiated after the pronouncement of conviction, but before the sentence is determined and pronounced, by which the prosecutor agrees to request a milder

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punishment, if the convict has helped investigators or agrees to be subject to an accelerated procedure (a "fast-track program")

It is worth mentioning that, in the U.S. procedure, the distinction between verdict and punishment is often formally recognized (as in replacing the death penalty), the verdict and the punishment involve two distinct trials, even if the trial for sanction is conducted before the same jury shortly after the first trial for guilt. Sentence bargaining takes place especially in important and highly publicized cases, when the prosecutor does not want to reduce the charges to the accused for fear of the media reaction. [1]

According to a dictionary definition, guilty pleas and bargaining is "an agreement negotiated between a prosecutor and an accused in terms of which the accused pleads guilty to a lesser offense or to several counts in exchange for concessions from the prosecutor, usually a less severe punishment or abandonment of other charges", [2] "a procedure under which persons accused of committing a crime plead guilty to less serious offenses, in exchange for a predetermined sentence or a reduction of the allegations against them". [3]

From the foregoing, it is clear that a more or less formal procedure has been followed, consisting in a negotiation conducted by a written agreement presented for approval to the judge, in open court, the prosecutor and defense attorney agreeing on requesting a sanction lower than the maximum penalty provided by law in exchange for a renunciation by the accused of a jury trial and of the corresponding rights regarding defense.

In the U.S. the practical ways of carrying out this procedure are varied, depending on the jurisdiction, in some cases only the indictment may be negotiated, when the state pursues a criminal policy of mandatory sentencing. Negotiation may be explicit or implicit, in the latter case the accused may reasonably expect certain favours, in some cases, even if no negotiation has actually taken place. [4]

This procedure is based on the model of the contract in which individual rights are considered as instruments freely available for their holder to improve his situation and, as such, everyone should recognize the greatest possible autonomy for the holder and any restrictions from the

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[1] Stephen A. Saltzburg, Daniel J. Capra , *American Criminal Procedure. Cases and Commentary*, fifth edition, West Publishing Co., 1996, p. 816-850.

[2] Bryan A. Garner (ed.), *Black`s Law Dictionary*, 7 ed., St. Paul (Minesota), West Group, 1999.

[3] Anne Deysine, *La justice aux Etats-Units* , Presses Universitaires de France , 1998 , p 109.

[4] Mircea Duțu – *Guilt Admission and Sentence Bargaining*, Bucharest , The Economic Publishing House, 2005 , p. 12.

outside regarding the ability of disposing of his instruments should be denied.

The following arguments were brought in favour of using this procedure for guilt admission by the defendant:

- delays are avoided and the probability of applying sanctions against other offenders increases;
- it helps ensuring the prompt and certain enforcement of correctional measures;
- the defendant admits his guilt and manifests a desire to be held responsible for his conduct;
- avoids public trial when the consequences go beyond any legitimate requirement in this regard;
- makes it possible to ensure concessions for him when cooperating or having offered to cooperate in the prosecution of other offenders;
- prevents excessive damage to the accused, through the condemnation form.

The following arguments may be invoked against this procedure:

- the existence of a real danger of convicting innocent people;
- prosecutors negotiate primarily to accelerate the settlement of the case;
- the bargaining inequitably and inadequately distributes among criminals the opportunity of obtaining a transaction ensuring a decision more favourable to them;
- may reduce the deterrent effect of law, by applying lesser convictions;
- make correctional rehabilitation more difficult by limiting the possibilities of conviction;
- those who choose the ordinary procedure usually receive higher penalties.

The evolution of guilt admission in the United States of America, especially after the events of 11 September 2001[5] led to the establishment (the memorandum of 22 September 2003 by the Minister of Justice) of six exceptions to the prohibition on negotiating penalties, thus emphasizing the control of the executive in the criminal phenomenon and its repression. Negotiation of the sentence is possible only in exceptional cases and after obtaining the written approval of a Ministry of Justice official, in only six cases expressly and exhaustively provided for.

[5] A number of amendments have been adopted to comply with the requirements of the draconian anti-terrorism law USA Patriot Act 2001, approved by the Bush II administration, in the aftermath and under the influence of the events of 11 September 2001. Zacaris Moussaoui, the only suspect indicted in U.S. for the attacks of 11 September 2001, pleaded guilty on April 22, 2005, before the District Court of Alexandria (Virginia) on all six counts against him.

The American procedure has taken root in Europe as well and we refer primarily to the United Kingdom. This practice is beneficial to all parties, the accused as well as the police and the judge, English law providing a series of measures meant to encourage the accused in pleading guilty. They consist especially in a reduction of charges or a reduction in penalty which in both cases is the subject of negotiations between the parties. Even if, officially, the latter cannot find a place in English law, however, practices have been developed in this respect, informally, and we have been witnessing lately negotiation practices of the old institution of guilt admission. [6] The charges are negotiated between the prosecutor and defense attorney, who, after discussing the content thereof, can reach a mutual agreement, in exchange for a promise of a declaration of guilt. As reagards the penalty reduction, the attorney informs himself on the penalty reduction the judge is willing to grant if the attorney's client pleads guilty or the judge himself takes the initiative to call in his office the prosecutor and the defense attorney for a sentence bargaining. The evolution of the English system finally led through Criminal Justice (Public Order) Act of 1994 to a recognition of the principle of sentence reduction in exchange for a guilty plea (article 48).

The Italian Criminal Procedure Code of 1988 introduced two procedures based on the legal acknowledgement of certain effects of the agreement between the prosecution and the accused. [7] In fact, a procedure existing since 1981 was formalized, thus establishing a special procedure based on documents filed without producing any investigation documents, by which the accused voluntarily renounces to benefit from the presumption of innocence provided by article 27 of the Italian Constitution when challenging the accusation in exchange for a sentence reduction, the judge ratifying the agreement between the parties (for sentences of imprisonment not exceeding two years). If the judge does not accept the agreement of the parties, the procedure continues without treating the request of the accused as a confession. The Italian Criminal Procedure Code also established the abbreviated trial, applicable to all crimes, regardless of their severity and with no limit on the amount of penalty, except for life imprisonment.

Also in French law, by Law no. 2004-204 of 9 March 2004 (entered into force on 1 October 2004) on the adaptation of justice to developments of crime, a new criminal procedure was introduced, namely that of "appearance on prior admission of guilt", aimed at speeding up and simplifying the judicial handling of correctional cases, where offenders admit their commitment. In this way, the criminal settlement procedure

[6] J. Baldwin, M. McConville, *Negotiated Justice*, London, 1977, p. 39.

[7] M. Chiavario, *La justice negociée: une problématique à construire*, APC, nr.151 , 1993, p. 29; D.Siracusano, A. Galati , G. Tranchin, E. Zappala, *Diritto processuale penale*, volume secondo, nuova edizione, Giuffre editore, 2004, p. 239-261.

continues, which exists in French law since 1999, and by which the prosecutor suggested the offender to admit guilt in exchange for serving a lighter sentence approved by a judge in open court.

It covers much the same category of offenses and allows the prosecutor to suggest the offender, who pleads guilty, to undergo "measures of criminal settlement", i.e. light punishments such as fines, forfeiture or community work.

If this agreement is accepted by the perpetrator of the crime, the prosecutor notifies the president of the High Court for validation. [8]

In terms of people, this procedure applies only to adults, children under 18 years being excluded. It concerns primarily misdemeanors punishable by a maximum prison sentence of five years, excluding crimes of voluntary manslaughter, political crimes or those whose follow-up procedure is provided through a special law.

From a procedural perspective, the procedure is basically applicable only to persons convened for that purpose, before the prosecutor, or brought before him according to article 393 of the Criminal Procedure Code., which allows the prosecutor to choose between starting the information gathering process or bringing the notified person before the court through the procedure of immediate appearance.

French law proceedings are conducted in two phases, namely:

a) before the prosecutor, the procedure involves three main phases:

- prior admission of the acts by the accused, through a statement addressed to the prosecutor, in the presence of his lawyer;
- the recommendation of penalty, in which field the prosecutor has considerable discretion to choose, proposing one or more main or additional punishments. The general principle governing the prosecutor's action of choosing the nature and amount of punishment, is that of punishment personalization depending on the circumstances of the crime and the punishment of the perpetrator;
- acceptance (a period of reflection may be required) or refusal of the proposed penalty (in case of refusal, the case is resumed through the normal procedure). According to articles 495-498 of the Criminal Procedure Code, the party may ask for a respite of 10 days before expressing its option, and the prosecutor will compulsorily inform the party about this possibility.

If the person refuses the penalty proposed by the prosecutor, the special procedure stops, and the prosecution will be resumed under the normal procedure. If the person concerned accepts the penalty, the

[8] Mircea Duțu – *Guilt Admission and Sentence Bargaining*, Bucharest , The Economic Publishing House, 2005 , p. 43.

proceedings continue before the judge who will be notified by the prosecutor through an application for homologation.

b) before the judge of the homologation, the procedure involves two phases, namely:

- hearing of the person concerned by the judge (either the president of the High Court or the deputy judge);
- delivery of a reasoned order, which, upon homologation, must necessarily include references to the consent of the person concerned and the proposed penalty for which the judge's assessment that it is justified is necessary, both as regards the circumstances of the crime and the personality of its pepetrator.

In the case that the application for homologation has been rejected, the criminal proceedings continue in accordance with the common law procedure. Also in French law there are procedural rules of inviting both the victim and the perpetrator (with or without his defender) before the judge for homologation, the victim having the right to civil claim, to seek compensation and to appeal against the decision of homologation. If the matter remains unsolved, the victim may subsequently separately petition the correctional tribunal which will decide on the civil side of the case.

In Romania, the mitigation of the inquisitorial nature of criminal procedure and the taking over of dimensions specific to the accusatory system constitute an ongoing process, which materialized in the provisions of the new Criminal Procedure Code adopted by Law no. 135/2010, published in the Official Gazette no. 486/15 July 2010, which, in Title IV, entitled "Special Procedures", regulates plea bargaining in articles 478-488 of the Criminal Procedure Code.

A precursor to this development was the prior complaint procedure, considered as an exception to the principle of the formality of criminal proceedings, under which, for the prosecution of certain offenses, expressly and exhaustively defined, the prior complaint of the victim is required. In such cases, criminal proceedings shall be initiated on prior complaint of the victim, addressing the criminal investigation body or the prosecutor.

The first signs of the new trend were mainly shown through the introduction of article 278^1 of the Criminal Procedure Code, on the complaint before the court against the resolutions or ordinances of the prosecutor not to proceed to trial, a text that was introduced by Law no. 281/2003. [9]

The text in question, drawing on a decision of the Constitutional Court no. 486 of 2 December 1997, [10] grants the victim of a crime a power to indict

[9] Published in the Official Gazette of Romania, Part I, no. 468 of 1st July 2003.
[10] Published in the Official Gazette of Romania, Part I, no. 105 of 6th March 1998.

(through the right to initiate criminal action and civil claim), to notify the court (against the wishes of the prosecutor), and to prescribe (by supporting prosecution until indictment when the prosecutor does not exert his function of promoting the criminal prosecution).[11]

The above-discussed regulations are trying to mitigate the excessive nature of the inquisitorial system, so the introduction of the guilt admission procedure in our country is completing the ongoing process which meet the needs of Romania's integration into the Euro-Atlantic system .

It is a procedure which can be defined as a decision taken early in a preliminary hearing, which favours the defendant because it provides a reduction of sentence on conviction.

*It is actually an anticipatory trial that can lead to the same results as one in which public debates have taken place***.**

This procedure involves essentially an agreement between the prosecutor, on the one hand, and the defendant assisted by his lawyer on the other hand, for the purpose of acknowledgement by the accused of the crime that he was incriminated with.

The intention for the future is that the agreement recorded in the referral document be subjected to strict control by the judge who verifies the existence of a factual basis for conviction and the free expression (without defect of consent) of the defendant's position of acknowledging to have committed the act that is subject to such an accusation procedure.

The introduction of this institution is strengthened, as I noted above, by the regulation of a legal cause which reduces the penalty for the defendant who freely consented to undergo this procedure.

Thus, article 478 of the new Criminal Procedure Code provides that, during the prosecution, after the criminal action was set in motion, the defendant and the prosecutor may conclude an agreement as a result of guilt admission by the defendant. The effects of a plea bargain agreement are submitted to approval by the hierarchically superior prosecutor, noting that it can be started either by the prosecutor or the defendant. The limits for concluding the plea bargain agreement are established by prior written advice of the hierarchically superior prosecutor.

If the criminal proceedings were initiated against several defendants, a plea bargain agreement can be concluded separately with each of them, without undermining the presumption of innocence for the defendants for whom no agreement has been concluded.

Juveniles accused cannot enter a plea bargain agreement.

A plea bargain agreement may be concluded only with regard to offenses for which the law provides the penalty of fine or imprisonment

[11] M. Duţu, *op. cit*, p. 58.

not exceeding seven years, and it is concluded when, from the evidence adduced, it results that there are sufficient data on the existence of the deed because of which the criminal proceedings were started and on the defendant's guilt. In a plea bargain agreement, legal assistance is mandatory.

The defendant receives a reduction of one third of the limits of punishment prescribed by law, for imprisonment, and a reduction by one fourth of the limits of punishment prescribed by law, for punishment by fine.

The plea bargain agreement is concluded in written form, and in this situation, with regard to the defendants who concluded the agreement.

After the proceedings before the prosecutor, there follows the second phase, that of notifying the court of the plea bargaining agreement governed by the new Criminal Procedure Code, articles 483-488.

Thus, after the conclusion of the plea bargain, the prosecutor notifies the court that would have the power to hear the case on the merits and sends the plea bargain agreement, together with the criminal prosecution file, to that court.

When the agreement is concluded with regard to only some of the facts or only some of the defendants, and for other offenses or defendants starting the proceedings is ordered, the court is notified separately. The prosecutor only submits to the court documents of criminal proceedings relating to the criminal acts and to the persons subject of the plea bargain agreement.

The court pronounces sentence on a plea bargain agreement, following non-contradictory open court proceedings, after hearing the prosecutor, the defendant and his lawyer and the civil party, if present.

In terms of solutions of the court, they may be as follows:

- accepts the plea bargain agreement and sentences the defendant to a term whose limits have been reduced under article 480 paragraph (3), if the conditions laid down in articles 480-482 on all the facts adduced against the defendant, which made the subject of the agreement, are met;

- rejects the plea bargain agreement and sends the file to the prosecutor for further criminal prosecution, unless the conditions laid down in articles 480-482 are met.

The court may accept a plea bargain agreement only on some of the defendants.

The foregoing provisions lead to a reduction in social and human costs, sometimes considerable, and facilitate a quick and efficient decision-making process in a criminal case.

Also, there are crimes excluded from the application of this procedure, serious crimes such as those against life or national security (e.g. requesting a deal in India is permitted only in cases of offenses punishable by a maximum of seven years imprisonment, being excluded

for crimes affecting the economic conditions of the country or for crimes committed against women or children under 14 years old. In England, Wales and Australia, it is allowed to achieve an agreement but only in the sense of reducing the charges, the court ordering the punishment. There may be situations where the accused pleads guilty of a lighter offense and the prosecutor will not pursue impeachment for a more serious offense. In Pakistan, the specificity of this legislation is to approve charges against the defendant and to repair the damage determined by investigators. If the court accepts the achievement of an agreement, the defendant will not be convicted and will not receive any punishment but instead will be curtailed some civil rights).

Conclusions

We appreciate that there are some legal drawbacks which should be clearly regulated, namely:

- is the victim's participation to the negotiation and / or consent necessary?
- if the judge who checked the guilt admission by the defendant finds that it was flawed, will he use the confession anyway?
- if the position of the litigating parties or of the court later modifies, would this allow waiving the deal?
- can the defendant be granted a period of reflection to communicate his response, and can the judge for liberties take one of the preventive measures regarding him in such situations?

We appreciate however that this procedure is revolutionizing the Romanian criminal law, since it addresses a number of crimes of medium social gravity for which the law provides imprisonment not exceeding seven years or a fine, and the Criminal Code confirms this by setting jail sentences within this amount for much of the crime.

This institution which is consistent with the practice of European courts, is also beneficial because the parties can deal with regard to the civil action, and the court is obliged to take note of this agreement.

Thus, the court may accept a plea bargain agreement or reject it, decision which is subject to appeal within 10 days of notification, as stipulated in article 488 of the new Criminal Procedure Code.

The plea bargaining agreement can be applied only to major defendants, concluding such an agreement with underage defendants is prohibited.

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TAX HEAVENS IN THE CONTEXT OF GLOBALIZATIONS

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Abstract

In the context of globalization, tax planning becomes more important not only for companies but also for individuals. The main actors of the tax heavens are the multinational companies through which takes place the off-shore activities, individuals who are seeking the peace of mind deposit their capital funds, honorably acquired, in safe banks.

Key words: *offshore, tax heaven, multinational companies, market*

Introduction

Tax havens represents nowadays a reality even in this conditions when a series of efforts are made for the renormalization of this oasis for putting on the same fiscal plan with the other states. Tax havens were born hard, but they multiplied quickly. In economical and juridical literature are few and timid attempts to define tax havens although circumscribing the area which they cover is not very difficult to achieve. [1]

General considerations about tax havens

In December 2008 a report on the use of tax havens by American corporations the U.S. Government Accountability Office was unable to find a satisfactory definition of a tax haven but regarding the following characteristics as indicative of a tax haven:

1. zero or nominal taxes;

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[1] Mircea Ştefan Minea, *Fiscalitatea în Europa la începutul mileniului III,* Ed. Rosetti, Bucureşti, 2006, p.276-278.

2. lack of effective exchange of tax information with foreign tax authorities;
3. lack of transparency in the operation of legislative, legal or administrative provisions;
4. no requirement for a substantive local presence;
5. self-promotion as an offshore financial center.

Arrangements considered the most modern and safer to shelter some contributors from the national taxation are the complete installation in a tax haven and doing business through offshore companies.

International organizations, political and legal have made, at least theoretically, rules and recommendations for all the 35 tax havens (Andorra, Anguilla, Antigua & Barbuda, Aruba, Bahamas, Bahrain, Barbados, Belize, British Virgin Islands, Cook Islands, Dominica, Gibraltar, Grenada, Guernsey, Isle of Man, Jersey, Liberia, Liechtenstein, Maldives, Marshall Islands, Monaco, Montserrat, Nauru, Dutch Antilles, Niue, Panama, Samoa, Seychelles, St. Lucia, St. Kitts & Nevis, St. Vincent & the Grenadines, Tonga, Turks & Caicos, US Virgin Islands, Vanuatu).

Tax havens correspond on the one way to a development policy and insertion into modernity and on the other way they correspond to a capitalist logic of conservation and are often supported by legitimate items. In the context of globalization, tax planning becomes more important not only for companies but also for individuals.

Analyzing the states or territories jurisdictions which are the true tax havens, The Organization for Economic Cooperation and Development identified a number of main factors that can be sufficiently precise criteria for the determination and delimitation of special zones in which it is realized a very privileged tax system. It is important to remember that in any tax heaven legislation on taxes or is missing or is insignificant.

As the methods of tax enforcement are less transparent and the information necessaries to determine the amount of tax due by some taxpayers get heavier to the tax authorities, we are closer by the concept of tax heaven."[2]

A general secret is specific to tax heaven, the opacity embodied in the lack of communication and the refusal to exchange information. The essential element of such exchanges of information is ensuring the confidentiality of tax statements and the protection of the taxpayers. The main actors of the tax heavens are the multinational companies through which takes place the off-shore activities, individuals who are seeking the peace of mind deposit their capital funds, honorably acquired, in safe banks.

[2] Petre Brezeanu, *Finanţe europene,* Ed.C.H.Beck, Bucureşti, 2007, p.239-241.

Other beneficiaries are the fund holders obtained in unclear, incorrect or misleading circumstances, such as the different types of Mafia or those who receive income by robbery or drug trade

The advantages of tax havens for the individuals and legal persons in Romania

The advantages offered by the tax havens are zero or low taxation for the individuals.

There are many ways to reduce the tax burden. A legal way is the tax planning using offshore companies registered in jurisdictions with tax haven status. Faced with a worrying increase in taxation, the traders in Romania are looking for all sorts of ways to circumvent IRS. [3]

If tax evasion is not only dangerous but also risky, the use of offshore companies is an ideal, legal and efficient way, through which the taxation of companies may be significantly reduced or even eliminated. Moreover, the specialized companies in such operations may be possible within 24 hours, for any citizen of Romania, to become the owner of an offshore company.

An offshore company may operate under conditions of favorable taxations only if it is registered in a tax haven. In accordance with the principle which says that "tax haven" means the tax shelter, a company must operate outside the land registrations. In the traditional tax havens the operations of the companies is supported by an extremely well organized legislative mechanism, meaning that in that country the tax law provides favorable conditions for offshore companies.

It should be noted that, by not paying taxes, the company does not break the law, on the contrary, the law exempted partially or wholly, from paying the taxes. Offshore companies can be used to reduce the profit of the parent companies located in high tax areas, and transfer those profits to offshore companies. The use of offshore investment companies provides more options in choosing the investment targets allowing the investors to focus on the best projects or to select areas that provide high income potential. Moreover it guarantees the confidentiality of transactions completed between the company and customers.

The ownership of an offshore credit company, give the opportunity to have a low credit policy, minimizing taxes on loans and the borrowed funds. Also it is getting better the credit and financial services offered to customers. In addition, through an offshore company may be granted credits with high interest rates to the firm located in a specific area with higher taxes. Currency transfer of resources is achieved in a third country, without breaking the tax laws and monetary circulation.

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[3] Adrian Mănăilă, *Companiile off-shore*, Ed. All Beck, Bucureşti, 2008, p. 2-4.

The offshore companies can be used to minimize the taxes of joint ventures. In this case, the same person is the owner and the manager of both companies (offshore), one local and the other one located abroad establishing the joint venture. This creates the possibility to transfer, in a third country, the profit of the foreign company in form of non taxable dividends. Later, the money can be return in the country where the joint venture is registered (investments and credits).

Contrary to popular views, having an offshore company, not exempts the owner from all personal tax obligations in their country of origin. An intelligent use of an offshore company, may reduce, defer or completely eliminate some taxes that otherwise would have been paid for his business.

Practical implementation of an offshore strategy will almost always encounter some laws anti – fraud which may be in force in the country where the beneficial owner resides. For this reason it is recommended that anyone who's interested in registering an offshore, to consult above all a tax advisor from client's home country and from the country where occur the proposed business operations. In the case of the offshore companies, the offshore jurisdiction laws will generally be considered together with the laws and regulations from other countries, especially in countries where the offshore company will have sales, contracts and assets.

In Romania, the most part of the offshore companies is operating in wood industry, agriculture, construction, trade advice, etc.

Income tax zero or very small, annual tax returns relatively simple, low costs of setting up and maintenance are just some of the advantages offered by an offshore company. Even if in our country are activating many offshore companies, data about their number and activities are not been centralized. As a result, are impossible to estimate the amounts of money into or out of Romania.

There was a slight setback in the creation of offshore companies because in 2007 Romania became a new EU member and businessmen have preferred to wait. Multinationals have come to Romania through offshore companies not by parent company.[4]

Advantage - making handsome profits. Offshore company can buy goods from the parent company at a ridiculous price and offshore company completed contracts for the sale of these goods at a higher price. Thus, the parent company will have a lower profit and the profit tax will decrease. Finally offshore company profits will increase. The companies incorporated in tax havens may transfer to a third country the foreign company profits.

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[4] Rada Postolache, *Drept financiar public*, Ed.C.H.Beck, Bucureşti, 2009, p. 355-356.

An offshore company may act as an intermediary trading company, distribution, import / export, purchase or sales. Offshore company would specifically buy directly from a manufacturer and could arrange for goods to be delivered directly to the final customer. This may be of particular interest where the goods originate from a country are sold in another, but the principal owner of the transaction is located in a third country.

An acquisition offshore company can be used by a national importer to export goods abroad and a sales offshore company can be used by a national importer to distribute goods abroad.

Commercial profits from the difference between buying and selling prices in an environment offshore without taxes are obtained by a rapid increase and more funds are available for re-investment and development. Private funds held and accumulated by an offshore investment company may be invested or deposited anywhere in the world and earnings accumulated in a tax free environment. Using an offshore private investment company would provide additional confidentiality for investors and investment gains. Investment in many countries with high taxes would be subject to withholding tax at capitals gains level. There are sufficient instruments of investment to which no tax is applicable. Earnings accumulated in an area without tax or low tax would add flexibility to their re-allocation or investment. An offshore company can buy or it may be transferred possibility to use the copyright, patent, trademark or know – how by the originally receivers.

An offshore company can be used for internet business to hold domain names and to operate websites in an environment without tax. An offshore can be extremely useful for sales activities of any non-material products through the Internet. In fact the operation of a high-tech business, global, internet-based, through an offshore base is probably the best implementation of an offshore company, ever existing.

An offshore holding company can be used to hold shares of subsidiaries located in countries with high taxes. Most of the countries with high taxes impose withholding tax on dividends paid to non-residents. In these situations the existence of a double taxation avoidance treaty between the country in which the subsidiary is and the country where the holding company is established can help avoid the double taxation.

Many of the difficulties and expenses associated with investment in properties abroad such as vacation villas can be avoided by using an offshore company to hold the title to property.

Property resale can be made quickly simply by selling the shares of the offshore holding company.

The representatives of companies that mediate the establishment of such companies in tax heaven say that is an increasing number of newly established offshore in Romania. More and more Romanian businessmen

realize that the restructuring of business is required in order to maintain the competitiveness on the domestic market (for importing the products) and on the international market (export operations, know-how, consulting). There are also business people working in fields where the fight with competition is fierce and maintaining the confidentiality of their external suppliers is very important. In this respect they resort to some advanced structures in order to loss their real suppliers, their employees being in contact only with the first company of importation.

In terms of setting up an offshore company this can take several hours or several months depending on the chosen jurisdiction. Usually it is not required too many documents, in many cases a simple copy of a passport is sufficient. Annual fees for an offshore also depend on the chosen location, ranging between 1,000 and $ 3,000. On how fast it can establish an offshore it is easy to get rid of him. Each jurisdiction has specific procedures. Normally, the closing of a company may take up to 3-4 months. Must be taken into account the fees that are paid for giving up an offshore company. For example, the OCRA Worldwide perceive 500 pound, for all the fees, authorities and the honorarium. Even some of the multinationals established in Romania from the offshore companies, not by the parent company.

Can be controlled the offshore sites? The State may request information about offshore sites unless it has the evidence of their illegal activities. The authorities of each country may provide certain information to the Romanian authorities. If the Romanian authorities provide clear evidence of a certain company which carries out criminal activities - such as people trafficking, drugs, weapons, terrorism, money laundering - then the respective authorities and the local banks investigate those involved.

If the company's activities are legal, the authorities must not pursue the activities. Offshore companies are incorporated in different forms but not in a great variety of forms, only a few categories are permitted to operate under special jurisdiction of tax havens. The most common companies or groups of companies working in spaces with symbolic tax are:

*Non-resident Companies***,** legal bodies that can be installed in a center "off shore" but who have their registered office in another country whose nationality it owns (which is also a tax haven) depending on the interests of the shareholders. The obligations of the society to the State which is registered are extremely low, this type of company is common especially in the area of influence of the British law.

Exempt Companies are normal companies benefiting from some facilities in jurisdictions with a normal tax regime.

International Business Company (IBC) represents a new similar category to the exempt companies which is composed primarily of U.S.

companies operating in the British Virgin Islands having a preferential tax regime.

Limited Liability Companies are actually associations of individuals engaged in partnership.

Captive Insurance Companies are used to collect the insurance fees for a predetermined number of companies which are legal related. These companies are actually closed-end investment funds for only a fixed number of participants.

Conclusions

We have two types of offshore activities: the property investments in foreign banks (free of national taxation) and the organizations of ghost structures which runs some activities in order to obtain bigger profits. These activities typically require: doing business outside the territory where have been incorporated companies achieving and maintaining an office in the respective jurisdiction, ensuring the right to benefit from a reduced tax. This office can be represented by a single mailbox or a law firm office, management or consultancy, hiring an agent etc.

The European Union will offer, at the demand of his members, an analysis on the directive 2005/60/CE of the European Parliament on preventing the use of financial system for use and financing of terrorism. This is known as the Third Money Laundering Directive. There is also an exception, for some EU members practicing banking secrecy and for non-EU countries such as Switzerland, San Marino who have obtained the right to disobey the directive.

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THE ROLE OF THE PREDECESSORS IN THE DEVELOPMENT OF THE CONTEMPORARY FINANCIAL LAW

Diana Cîrmaciu[*]

Abstract

The „judicial phenomenon" which regulates the sphere of public finances, the complex problems raised through it, accentuates the dynamics of this domain which had developed intensely among the years.Today the existence of financial law is an unquestionable reality, but by its outlining as an autonomous discipline a series of theorists and practitioners had contributed and their role must be accentuated.

Keywords: *financial law, doctrine, history.*

Introduction

Through the years professors and specialist like G. N. Leon, I. Cojocaru, G. Zane, C. Tăutu, I. Rădulescu, R. Peretz, I. N. Stan, I. Lupaşcu, I. Răducanu have contributed to the foundation of financial science and financial law[!]*, taking into consideration the complexity of this domain which studies the problematic of financial institutions and relations.*

We have to notice that taking into consideration the legal regulations which contain dispositions that are applicable to social connections from this domain, the judicial science of public finances contains and elaborates the following categories of judicial norms: financial judicial norms and fiscal judicial norms – these two being in a close relationship.

The studies of professor I. Cojocaru [1] elaborate mainly the domain of fiscal law, its norms and principles, the importance of fiscal law among the laws and not at least insists upon the autonomy of the discipline of fiscal law, based on the following considerations:

- Fiscal law is based on an own system of fundamental judicial principles which create its unity and independence;

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[!] Important role in the outlining and development of the *judicial science of public finances*.

[1] I. Cojocaru, *Dreptul fiscal şi obligaţiunea de impozit: studii de doctrină şi legislaţie fiscală*, Ed. Administraţia Fiscală, Bucureşti, 1936.

- Taxation law is a law of public power;
- The origin of the judicial fiscal relation is the law (the obligation to pay taxes being a legal one, originating form the law, independent from the will of the tax-payer).

The professor of the Faculty of Law from Iaşi, G. Zane had structured his lecture of Fiscal law[2] according to the following aspects: *the study of direct taxation in Romani,* based on the analyze of advantages and disadvantages of the proposed solutions by the fiscal reform from 1921; *general principles of the direct taxation; the main direct taxes,* for example the agricultural taxes, the taxation of buildings, of salaries, of personal goods; *administrative-fiscal aspects; the analyze of the system of direct taxation from European states like* France, United Kingdom, Italy.

An other author who accentuates the importance of studying fiscal law was "the general inspector of finances", C. Tăutu[3]. His work is mainly addressed to the practicing, but taking into consideration the concise character of the information and the accessible language used in these, we can affirm that it constitutes a useful "instrument" even for students who are willing to research among other things: the financial and fiscal terminology, the evolution of direct taxation in Romania; aspects regarding to the declaration obligations of the tax-payers, technical aspects regarding to the disposal and perception of the salary taxation; the problem of avoiding double taxation.

An other author who recognizes the diversity of the domain of financial legislation and sustains the autonomy of fiscal law is I. M. Rădulescu[4], invocating in the benefit of his conception also the fact, that the evolution of doctrines and the movement of contemporary ideas had contributed to the specialization of the judicial disciplines.

This way, fiscal law is defined as being "the branch of public law which is preoccupied with the norms according to which the organs of fiscal administration is organized in order to realize the necessary incomes for the functioning of public services, resulting from taxes".

R. Peretz, in his work *Biruri la români*[5] notices the risks of fiscal fraud generated even by the great number of regulations in the fiscal domain (disposition which are often contradictory, a great diversity of contributions contained by different fiscal laws). The author recognizes the fundamental role of researching the dimensions and the implications in the society of fiscal evasion, so that based on these, the efficient actions and measures of prevention and combating can be established.

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[2] G. Zane, *Legislaţie fiscală romînă şi comparată*, curs predat în anul 1936-1937, Ed. Institutul de Arte Grafice „Albina Românească", Iaşi, 1937.

[3] C. Tăutu, *Impozitele directe în România*, Atelierele Grafice SOCEC, Bucureşti, 1939.

[4] I. M. Rădulescu, (PhD in political-economic sciences), *Funcţiunea jurisdicţională în dreptul fiscal*, Tipografia I. C. Văcărescu, Bucureşti, 1938.

[5] R. Peretz, *Biruri la români*, Ed. Vremea, Bucureşti, 1938.

Among the specialists of the analyzed domain we must focus our attention also on the studies of I. N. Stan, who using a synthesizing of information presents us the modalities of making more efficient the fiscal administration in the period of economic crisis. The author invites those who are interested to study a real „guide of fiscal administration”[6] – useful not only for the tax-payers but even for the fiscal organs (stimulating these to lead „an intense and fair activity in the domain of fiscal administration”). His varied creation contains researches like: „*Finanţele locale în cadrul economiei publice*” (1933), „*Controlul financiar*” (1934), „*Impozitul pe veniturile întreprinderilor comerciale şi industriale*” (1934) etc.

In the frame of the „High Academy of Commercial and Industrial Studies Bucharest”, professor I. Răducanu sustained a lecture of „Finances”, occasion through which he affirms his persuasion regarding to the importance of financial science, insisting to present the incidental legislation in the domain. He also attracts the attention of the legislators upon the high “challenge” of the evasion phenomena.

Also, for the correct interpretation and application of the financial legislation, we must consider the work of I. Lupaşcu entitled „*Legile financiare rezumate şi sistematizate metodic completate cu tablouri sinoptice pentru întrebuinţare practică şi rapidă*”[7]. The research presents itself under the form of a practical manual which can be used by fiscal organs in case of the activity of some fiscal inspections. The this way summarized laws are those for the unification of fiscal procedure, the law of direct contributions, the law of taxation on luxury and on the amount of incomes, the law of the taxation of shows, respectively the law of taxation of vehicles.

Professor Gheorghe N. Leon had important contributions in the domain of public finances and the eloquent expression of his intense scientific activity are represented by his works of references which had crowned his didactic activity and even his political activity, both remarkable, proving his high professional status. The study of works of Gheorghe N. Leon presents great importance because his ideas and concepts were and are adopted and analyzed by both theorists and practitioners, economists and jurists.

Having elaborated knowledge of specialty and showing a great interests for the research of economic-financial problems (including the legislative aspects in this matter) Gheorghe N. Leon explored a variety of subjects, fact that offered him the attribute of draftsman of knowledge and educator of many jurists and economists.

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[6] I. N. Stan, *Fraude şi sancţiuni fiscale*, Ed. de Lucrări Financiare, Bucureşti, 1935.
[7] Published in Bucharest, Ed. Bucovina, 1939.

The complex sphere of public finances was approached in the work „Elements of Financial Science" (1925) – the first Romanian treaty of financial science, where, based on some detailed researches, the author had created: *in the first volume*, a history of public finances, a detailed presentation of the structure and evolutional perspectives of the public incomes and expenses and also created a radiography of the announced reform of the system of indirect taxes, and in *volume II* there are compromised conceptual clarifications upon the notion of budget and it's execution, respectively upon the notion of public credit.

From the economic-financial doctrine we take the idea that to the notion of public finance there were attributed more meanings, according to the dimensions considered to be significant for it's definition. This kind of activity had developed professor Gheorghe N. Leon, who had written that „the economic activity, arranged according to a certain order, which aims for procuring and usage of goods for collective needs is named *financial economy*, and the study of financial economy is called *financial science*. In other words, financial science is preoccupied with the administration of the state or of other public organizations: provinces, districts, villages, etc."[8] In the earlier mentioned work there is also interesting the approach of theories regarding to the establishment of the judicial nature of the budget of the state – beginning with it's consideration as being an administrative document, a legislative document or a law, or having all these features. After the presentation of the doctrinal opinions and from the point of view of revealing some jurisprudential aspects, Gheorghe N. Leon have reached the conclusion that the budget of state from Romania had the character of a document of foresights regarding to the part concerning with incomes, and it's administrative character was even more accentuated in the part concerning with expenses. Also, the author presented the importance of respecting some regulations/principles in the matter of creating budgetary incomes, among which collecting the taxes, fees and other contributions only according to law (making a reference in this matter to the text of the fundamental law, the Constitution of Romania from 1923 which had foreseen in article 109 that „no tax of any kind can be established only based on a law").

Gheorghe N. Leon had a great contribution also regarding to the presentation of the historical evolution of the Romanian public finances, publishing the work „The history of the public economy of the Romanians" (1924), in a moment when the financial history of the Romanian state was not very well-known. The author shows that at that moment the referential works in this matter were written by N. Iorga and Xenopol (though including some doctor's degree thesis or license works),

[8] G.N. Leon, *Elemente de Ştiinţă financiară*, Ed. Cartea Românească, Cluj-Napoca, 1925, p. 5-6.

but all the documentary sources were referring to the period of 18th, 19th and 20th century, so that the period before the establishment of the Romanian Principalities, the one between the establishment of these and until the Phanariot period, were not present in these works. The option for the title of this work is firmly motivated by the author, who had written that in case when he would be occupied with „the structure of the financial economy of the Romanians, only beginning with the establishment of the Principalities", there would be more opportune the title „The history of the Romanian Finances" because only beginning with that period we can talk about concrete relations between the competent authority in the domain (fiscal), on one side and the Romanian tax-payer on the other side, but taking into consideration that he had also chosen to analyze the contributions due by the Romanians under the domination of foreign power, he had chosen the more comprehensive variation of the history of public economy[9]. Under the aspect of research and processing methods of his own works, Gheorghe N. Leon promotes analyze and synthesis, induction (based on perception of facts) and deduction (based on generalizing the consequences of certain facts), the statistic method, etc. even more, the professor reveals the fundamental importance of the research methods in the scientific process, stating that: „method is indispensable for the scientific research. Without it's help the most elementary truths can be ignored by our attention. No one must trust in good judgment, in the brilliance of the intelligence … because one with no so much intelligence, but armed with a good method will succeed easier, than one with a special intelligence and without any method"[10]. From the approached studies we can observe, that professor Gheorghe N. Leon promoted in his expositions from the professor's chair the use of all the theories (regardless of the fact whether these are or not in concordance with his principles or concepts, implying his political views – being a doctrinaire of the liberal movement – we mention here the lecture „The economic politics of the National Liberal Party" sustained in Bucharest in the Liberal Club) just because of his wish to cultivate an adequate environment, based on scientific knowledge.

Conclusions

In conclusion, we can affirm that the financial discipline have evaluated continuously, suffering some changes and through their prism and those of the researches of specialists its contain have enriched, reaching the thing which is represented nowadays by *public financial law*.

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[9] Idem, *Istoria economiei publice la români*, Bucureşti, Ed. Cultura Naţională, 1924, p. 7-8.

[10] Idem, *Cum se scrie o carte. Cu privire specială la economia politică*, Bucureşti, Ed. Cartea Românească, fără an, p. 85.

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FREE MOVEMENT OF LABOUR WITHIN THE COMMUNITY

Constantin Luiza Andra[*]

Abstract

Today more than ever, in a constantly evolving world, Europe must face new challenges: globalization of the economy, demographic change, climate change, the need for sustainable energy sources and new threats towards security. These are the 21st century challenges.

And these challenges do not respect borders. Member States are no longer able to cope with all these problems alone. To find solutions and to address the concerns of citizens, a collective effort is needed at European level. Europe needs to modernize, to have effective and consistent tools, adapted not only to the functioning of a recently extended Union from 15 to 27 Member States, but also to the rapid changes of today's world. Therefore, the rules underpinning cooperation between countries should be reviewed.

First of all, the affiliation to the European Union means the freedom of movement and, consequently, the right of every European citizen to work in any Member State. Unfortunately, Romanians are confronting with many problems due to the fact that there are still certain restrictions imposed. We will try to explain all these problems in this material.

Key words: *Right of entry and residence, equality of treatment, paid employment, discrimination, social security, residency, professional training.*

Introduction

The European union places the individual as its centerpiece, establishing citizenship and creating for him a space of freedom, security and justice.

The European Union contributes also to the preservation and development of these common values, while respecting the diversity of cultures and traditions of the peoples of Europe; as well as national identity of Member States and a sustainable and balanced organization by ensuring the free movement of persons, services, goods and capital, and freedom of establishment.

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This material will surprise legislative shortcomings in the direction of freedom of movement of labor within the community, treated under three aspects, which we consider essential:

- *Free movement of labor;*
- *Working conditions;*
- *Professional training and recognition stages.*

The concept of European citizenship was first introduced by the Maastricht Treaty (1993) granting the right of free movement and residence within the EU to all citizens of the European Union. Moreover, the treaty placed in the common interest of Member States also policy of asylum, external border crossing issues and policies relating to immigration.

The Amsterdam Treaty introduced provisions relating to these issues in the Treaty of Rome (Title IV - Visas, asylum, immigration and other policies related to free movement of persons) and provided a period of five years until they will apply Community procedures in these areas.

Through its policies, the EU plans to create a European area of freedom, security and justice in which there is no need for checks on persons at internal borders, regardless of nationality. At the same time, it develops a comprehensive process of implementation of common standards as regards the EU's external border controls and visa policies, asylum and immigration. Great Britain and Ireland have agreed to take part in measures under Title IV of the Treaty of Rome, and Denmark will participate only in the policies related on visas.

As it is known, free movement of persons is one of the four freedoms of the internal market and policies at EU level, along with free movement of goods, free movement of services and free movement of capital.

European citizens enjoy the fundamental right to travel and settle where they want. But to truly be of benefit to all, freedom of movement must be accompanied by an appropriate level of security and justice. In Amsterdam, this dual requirement was included in the Treaty in the form of progressive creation of an area of freedom, security and justice.

The abolition of border controls was not fully accomplished within the Union. The objective was achieved by only a few Member States under the Convention Implementing the Schengen Agreement (signed on 19 June 1990 and entered into force on 26 March 1995). Free movement of persons and the workforce is one of the four fundamental freedoms, which falls more under Pillar I incidence (Economic Communities).

It is easy to see that this fundamental freedom is more tangential to pillar III, since it involves human rights issues and ensures the security and access to justice in Europe

At the European Council of Nice (December 2000), EU Council , Parliament and European Commission have signed the Charter of Fundamental Rights, a document that brings in a single framework civil,

political, economic, social rights; stipulated in a number of international, national and European documents.

In terms of the scope of legal issues, the Charter makes no distinction between citizens, meeting the "first time" in a single document the rights of all persons who are lawfully within the European Union. In Article 15, paragraph 1, the Charter speaks of the right of any citizen of the Union to have the freedom to seek a job, to work, to establish a residence or provide services in any Member State.

We are in the year 2010 and we can say that we are directly related to all these great changes, we live day by day and step by step these great transformations, that marked and will mark also in the future the human history under all its aspects.

We can observe that for citizens of EU Member States, freedom of motion in the Union was principally achieved, and, now, people have the right to live, work and move freely. ID cards or passports are required to travel outside a Member State but no visa, no work permit or other document / permission is required inside the Member States. In most member states, however, stays which are longer than a vacation require registration.

When employing, employers are not allowed to discriminate potential employees on grounds of nationality (except for sensitive areas such as national security). They may, however, require employees to be fluent in certain languages in the period while working. It can act as a not – entry barrier."

One of the biggest barriers of people working outside their country of origin is the recognition of their professional qualifications. Even if some professions require several years of higher education, or traders that require some training, for workers it can be quite difficult to find a job in other countries than those in which they obtained their professional qualifications. Even when basic skills are similar, they find out that extensive preparations is required in order to "requalify" for a job in the Member State.

To resolve this problem, the EU has put in place a system of mutual recognition of diplomas, so that those qualified to work in a particular area in a Member State may enter the profession in the desired Member State, in the same terms as local. In some professions such as medicine, special arrangements have been made to ensure the highest standards of services throughout the Union.

For people who work in other countries than the own, a major barrier is the "portability" of pension rights, unemployment , health insurance and other aspects of social security. National systems have been established in such a way as to help people during the entire period of work, being able to withdraw the pension at time of withdrawal from work.

Those who work in different member states can partially accumulate benefits in one or two different national systems. Although EU rules dictate that such contributions, made in different countries, gathered over all the

professional work, provide benefits to the national level; this complexity remains a barrier to freedom of movement for people who want to work. Those in better paid positions may arrange their own pension and health scheme, so that such a barrier is likely to affect more the workers which are paid less.

Workers from the ten member states (excluding Cyprus and Malta) who joined in 2004, are still facing restrictions when searching for jobs in certain Member States. These transitional measures are detailed in the Accession Treaties: a transitional period of 2 to 7 years is applied, for which a specific work permit is required to work in the "old" member states. Germany and Austria are the only countries that intend to block access to their labor markets for up to seven years, until 2011.

From 1 January 2007, after a period of accession, Romania is, along with Bulgaria, EU member state.

For citizens of Romania and Bulgaria, EU members since 2007, restrictions of labor market will habe to be lifted by 1 January 2014. When and if Turkey joins, it is expected that some Member States ask for a significantly longer period of transition.

Conclusions

From the above observations, it is easy to realize that in the level of organization of European Union there are still serious deficiencies, even if the construction of its foundation day becomes stronger and safer day by day, leading to a United Europe, an unbreakable and invincible Europe.

Once the Treaty of Lisbon entered into force on 1 December 2009, we hope that these shortcomings will be gradually removed, so that we can finish this work in terms of major optimism for the personalities, who have left their mark in the creation of a Greater Europe.

As expressed in specific terms in the forefront of the Treaty of Rome:

"The Community has the task, by creating a common market and the gradual approximation of economic policies of Member States to promote a harmonious development of economic activities throughout the Community, a continuous and balanced expansion, increased stability, an accelerated raising of the way of living and establish much closer relations between the countries "

NEW WORLD ORDER

Vasile Creț[*]

Abstract

- The main logic of the international system in the XXI century was to be given not by the democratization but by the globalization, the element found by the 9 / 11 in the background of the international developments, but fully exploding on September 11, 2001. Then, the Western academic community fully understood that, together with the democratic revolutions, there had happened another one in the world, the First Global Revolution, and this would lead to the acceleration of globalization.

- The dispersion of power in the current international system occurs due to two causes: the increasingly obvious activism of the non-Western powers, especially the BRIC countries, but also by the increasingly easy access to technology.

- The second biggest cause of power dissipation is the diffusion of high technology and increasingly easy access to them. First, the qualitative transformation of higher education and more free access to knowledge made possible the creation of Silicon Valleys in other countries, too. During the '70s the revival of the scientific and technological research in South-East Asia, South Korea or Taiwan, after India and China is perhaps the most spectacular case.

Key words: *globalization, world order, political liberalization, dispersion of power, economy, high technology, international relations.*

Introduction

Globalization, as a phenomenon. In history books, the year of 1989 will have a similar meaning to 1789, 1918 or 1945 years which are ending or opening historical cycles. The events of 1989 have accelerated the course of history. The end of East-West ideological conflict and its geopolitical and geostrategic consequences raised the lid from the planet pressure pot. The Japanese teacher Rei Shiratori thinks that the period between 1989 and 1991, bounded by three significant events (revolutions of Central and Eastern Europe, the Gulf War and the disappearance of the USSR) constitutes a real gate towards globalization. 1989 was a revolutionary year not only by the transformations in Central and Eastern Europe, but these changes in turn resulted in what the Club of Rome considered to be the "first global

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revolution"[5]*. 1989 represents a new beginning, Alexander King and Bertrand Schneider, in their work, "The First Global Revolution", published in 1989, stated that mankind was in a great transition phase and by that referring to the beginning stage of a new type of global society, be it a post-industrial society, an informational one or the services society.*

The main logic of the international system in the XXI century was to be given not by the democratization but by the globalization, the element found by the 9 / 11 in the background of the international developments, but fully exploding on September 11, 2001. Then, the Western academic community fully understood that, together with the democratic revolutions, there had happened another one in the world, the First Global Revolution, and this would lead to the acceleration of globalization.

The most important consequence of the Cold War was that it *raised the lid from the planet pressure pot*. Thus, the decisive energies in the acceleration of globalization and its assertion that the main feature of the current international system have been issued. Year 1989, the peak year of the third wave of democratization, will not only remain the symbolic year of the revolutions in Central Europe, but also the time landmark of the globalization accelerating. The discharge of the ideological obstacle represented by the communist camp and the leadership's obsession for an authoritarian and centralized economy led to a very rapid spread of new liberal rules of political organization of some communities and to the constraint to impose the rules of a free market economy. Finally, the political liberalization, due to the revolution in communications, in particular to the Internet, brought with it an increased access to information.

If the Industrial Revolution evolved successively, its changes covering a long time (200 years), the Global Revolution produces frontal and simultaneous changes being characterized by high dynamics, also affecting the western countries and the rest of the international system.

Globalization reaches a critical point because two very serious and complex phenomena overlap: the radicalization of the oldest security risks alongside with the diffusion of power. In an interview for the "Business Week" magazine on the eve of the 2007 session[2], Klaus Schwab, the originator of the Forum in Davos, said that "*the world will radically change within the next decade*", saying that one of the biggest risks facing humanity currently includes the global warming, the terrorism and the oil prices. His estimates are based on the research carried out by representatives of the World Economic Forum together with Citigroup and Marsh & McLeann to identify hazards that threaten the world economy, discovering 23 major risks,

[5] A.King şi B.Schneider, *Prima Revoluţie Globală - o strategie pentru supravieţuirea lumi*i, Ed. Tehnică 1993.

[2] www.hotnews.ro , 22 ianuarie 2009.

including global warming, terrorism, shocks caused by the oil price evolution. Klaus Schwab also concluded that the power equation spheres were changing; they were the spheres that migrated from the center to the periphery. The control vertical structures of the power are easily eroded and gradually replaced by communities and various platforms, evolving towards a world which he called Web2.0. The XXI century will be one of great radicalism, of old factors, but it assumes a new significance and has the potential to destabilize the international system. Their list is not too long, but their complexity and management difficulties contribute to the current international agenda to make think of other similar moments in the European history, the XXI century may be more terrible than all the others "[3].

The list of large radicalisms includes the energy, the technology, the global climate change, the weapons of mass destruction, the religious radicalisms, especially the Islamic fundamentalism, and the strategic crime.

1.2 Globalization and the dispersion of power

The dispersion of power in the current international system occurs due to two causes: the increasingly obvious activism of the non-Western powers, especially the BRIC countries, but also by the increasingly easy access to technology.

BRIC stands for Brazil, Russia, India and China and it is an easy way to highlight those international, non-Western actors which are best placed to be able to claim the status of great power, making the Western club members take into account their opinion and interests. By the power resources they have, the territory, the population, the economic capacity, the control of natural resources and the military power and in terms of their political and strategic behavior, these four countries are considered to have the ability to distinguish as international actors having the chance of being accepted in the club of the great powers, some of them already having important successes. The handiest example is Russia, which has already been accepted in G 7.

The BRIC phenomenon is not only a symbol of multi-polarizing towards which we are heading, but it also suggests that the current time once again becomes one of the privileged relations between the great powers, and what is the most important for a country like Romania, even if in relative terms, by comparing the powers to each other, the power of the U.S., NATO or the EU decreasing due to the rise of the BRIC. When, in the mid '40s, organizations like UN, IMF, The World Bank or NATO were created, the U.S. were the undisputed hegemony of the Western world. These organizations were the essence of the Western power and domination, and

[3] Robert Cooper, Destrămarea Naţiunilor: Ordine şi Haos în Secolul XXI, Univers Enciclopedic 2007, p 21. În această lucrare, el apreciază că momente teribile ale Europei războaiele de 100 de ani (sec XIV), de 30 de ani (sec XVII) sau cele două războaie mondiale din secolul XX.

also a reflection of the transatlantic relationship. For the fact that France and Britain had been great powers for several centuries, the Europeans had won several leadership positions and permanent jobs in the UN Security Council, the General Secretary of NATO or the Director of the IMF. Today, the distribution of power is different. According to Goldman Sachs and Deutsche Bank Today, since 2010, the combined annual growth of the BRIC countries has been higher than that of the U.S., Japan, Germany, Britain and Italy taken together. Starting with 2005, the combined growth will be two times bigger than that of the G7. By 2050, it is possible that the combined economies of the BRIC countries should exceed the combined economies of the G7[4].

Brazil is the largest country of South America, in the last 20 years developing a thriving economy and having an evolving democracy. With a population of 160 million people, and having strong cultural and political ties in Europe and in Africa, Brazil has overcome the period of economic stagnation and corruption; today it has a diversified and significant economy, with cutting-edge achievements in some areas such as aviation. The biggest South American economy, Brazil carries a strong political and economic influence both on its continent and the world. It can significantly help the political and economic stabilization of some countries, such as Bolivia, Argentina and Venezuela, threatened by waves of populism and nationalism.

By 2025, Russia will overcome the economic countries like Italy or France, its GDP is estimated to reach the figure of $ 2,264,000,000[6]. In 2005 it was 581 billion dollars. Economic growth reached a peak of 7.3% in 2003 and it is expected to maintain a level in the next period of 5-6% (6.4% in 2005). It is the largest gas exporter, owning 6% of the global oil reserves. What is important is that Russia is becoming increasingly involved in the process of recovering strategic influence that it once had, at times openly defying the U.S. and the West. In 2007, Russian strategic bombers have resumed long-distance flights, the planes restarting the harassment of British, Norwegian, Finnish and American. Russia has stepped up pressure on former Soviet states who want to approach the West and even to join NATO or the EU. Moldova, Georgia and Ukraine are obliged to face this new reality of their boundaries. Moscow did not hesitate to punish the Georgian military, a former part of USSR, kidnapping and even national territories recent NATO members have been under pressure, trying to threaten and blackmail both Poland and the Baltics. Finally, Russia has already used the energy weapon, using the gas stops as a strategic tool in relations with countries that are not responsive to his claims. In Moscow, the "technological" Russians propose a new meaning for WWW - World Without the West.

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[4] The New Global Puzzle-What World for EU in 2025?, edited by Nicole Gnesotto and Giovanni Grevi, EU Institute for Security Studies, 2006, p 108.

[6] Ibidem, p. 50.

In 1820 India was the world's second-largest economy after China. Like China, India is a densely populated country with over 1.1 billion inhabitants and a very dynamic and active middle class of 150-200 million. India has 380 universities and 1,500 research institutes, annually producing 300,000 graduates and 10,000 PhDs[7]. In the IT industry, it hosts 25% of the offshore services, the computer sector is one of the fastest growing ones. With an average annual economic growth of 6-8% in 2025 India will be the fourth economy in the world after USA, China and Japan[8].

China will be "*a pivotal player by any standards*"[9] in the new international system. China is known primarily as the most populous country in the world, but at the same time China is a 5,000 years old civilization , up to 1820 being the largest economy on the planet[10]. Many years isolated from the rest of the international system, it is the most spectacular comeback of a former great power. China sold a total annual supply of 1.400 billion dollars. It has one of the most dynamic economies in recent years in addition to a low skilled workforce and developing an important sector of highly skilled workforce, producing 5% of world wealth. By 2025, it will become the world's second-largest economy after the U.S.. Although nuclear power since the early '60s, China has not given attention for many years to the military modernization. But in recent years, from budget surpluses, a part of the money was invested in significant weapons program, raising question marks over its real geopolitical ambitions. 2008 Beijing Olympics was a demonstration of "soft power"; as a moment of affirmation of a China that is increasingly interested in becoming a global player. With over 2,000 billion U.S. dollars foreign exchange reserves, China is the main purchaser of U.S. Treasury assets; Chinese companies have more aggressive policies for the acquisition of major companies abroad.

U.S. military supremacy is undisputed, but after the problems they had in Iraq, policy issues in their national strike, it is clear that Americans' ability to produce specific changes or international attitudes has diminished, especially through the loss of legitimacy. Files such as North Korea or Iran can not be managed without the support of Russia or China.

1.3 Diffusion of high technology

The second biggest cause of power dissipation is the diffusion of high technology and increasingly easy access to them. First, the qualitative transformation of higher education and more free access to knowledge made possible the creation of Silicon Valleys in other countries, too. During the '70s the revival of the scientific and technological research in South-East Asia, South Korea or Taiwan, after India and China is perhaps the most spectacular

[7] Ibidem, p. 165.
[8] Ibidem, p. 166.
[9] "The New Global Puzzle-What World for EU in 2025", cited publishing house, p. 155.
[10] Ibidem, p.155-162.

case. A number of technologies that during the Cold War had only uses in the military and civil industries became available and was subsequently offered for a fee. One example is the access to satellites and the widespread diffusion of GPS services. USSR dissolution and especially the very poor conditions of employment of various professionals forced them to seek work elsewhere, some of them of great value in the ballistic missiles or nuclear industry, contributing to the nuclear or missile programs of countries like Pakistan or North Korea. Finally, technology is much more to reach certain states or other international actors through illegal trafficking and proliferation. In recent years, international trafficking networks were discovered, some of which are under the patronage of senior government officials, such as Aga Khan in Pakistan.

Conclusions

This unique complexity of power relations has led academics around the world to seek explanatory models. One such possible model is the one proposed by Joseph Nye of Harvard University. In his view, power distribution model is a three-dimensional chess game[11]. The best plan is the military one, America as a dominating power is not in doubt. The in-between plan is the economic one, the balance being distributed among a few global players, the U.S. entered the game with the EU, Japan, China and India, Russia catching up. The final plan is that of international relations where we have a chaotic distribution of power, traditional players such nation-state coexistence with non-state actors or transnational new type. In the latter plan, access to technology more easily made a series of dramatic developments to change the map of international relations becoming increasingly non-state actors having a say in the course of international relations.

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EVENTS PRECEDING THE ESTABLISHMENT OF THE NORTH ATLANTIC ALLIANCE PACT

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Mădălina Pantea[**]

Abstract

This paper presents the events preceding the establishment of the North Atlantic Alliance and the role played by every international power in its accomplishment. There is also presented a chronology of international facts and factors taht led and influenced this major world treaty.

Key words*: alliance, doctrine, history, events.*

Introduction

Certainly, the statements of the victorious powerful promising leaders met the hopes of the people for peace, security, cooperation and also proclaimed the United Nations Charter Preamble.

Paradoxically, the noble goals to crush the aggressors unified the great powers which made an alliance that was strong (in which western democracies had fought with great power with the Communist totalitarian regime).

Unfortunately, this unit could not have continuity, because, before the end of the antifascist war between the West and the Soviet Union serious differences and disagreements appeared.

The way in which the Russians have fulfilled their military obligations, has made the West look with confidence to them, as true friends.

1.1 End of World War II

End of the Second World War on 8 and 9 May 1945 (for some units and Romanian including Austria and Czechoslovakia until 12 May) meant the victory of the Great Coalition (the given name): U.S., USSR, England and United Nations against the Axis powers.

There should not be overlooked that the capitulation of the Third Reich also counted France among the winners of the signatories.

Also, in the Pacific and Asia regions, the great conflagration ended on September 2nd with the Japanese surrender to the U.S., China, England and the USSR.

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Yalta myth has developed that, somehow or other, Roosevelt and Churchill gave Stalin Eastern Europe.

In the Yalta agreements, it was agreed that people in these countries should decide their own government through free elections.

Stalin, the Soviet political leader believed that the Red Army would be accepted as a liberating army.

Kremlin leaders have been very affected when they discovered that the red army was regarded by the Polish, Romanian and others as a new invasion force.

According to the Westerners, Stalin hoped to reach the Atlantic, this being one of the reasons for not having fulfilled the Yalta agreements.

One more reason which led the Soviets to believe in this, was the existence of the strong communist parties in France and Italy .

In these circumstances, the Communist leaders of these countries have reported to Moscow that they could take power, which is possible, if the U.S. had not helped to rebuild Western Europe.

General Marshall, Army Chief of Staff of the U.S., for example, in a telegram on September 9th 1944, acknowledges Harry Hopkins, the closest adviser and influential foreign policy of President Roosevelt, that the relations with the Soviets, now when the end of the war could be seen, took a surprising obvious turn evident in the last two months.[1]

1.2 Truman Doctrine

There should also be shown the role of President Truman and the Republican senator in Michigan, Vandenberg, who was chairman of the Foreign Relations Committee.

Actions taken have included aid to Greece which was subjected to the communist attack , and Turkey that was threatened in that period.

The Foreign Minister and the Prime Minister of Belgium, the future NATO General Secretary, Paul Henri Speak, assessing the Soviet positions in the war, said that: "One great power is out of the war by conquering other territories, an this power is the Soviet Union".

During the Second World War, with its policy, Stalin had managed to annex Estonia, Latvia, Lithuania, parts of Finland, Romania, Poland, Czechoslovakia, a total of 500 000 km2 with a population of over 23 million inhabitants.

After the victory over the Third Reich, this expansion has been strengthened by the establishment of the zone of influence and control in Albania, Bulgaria, Romania, Poland, Czechoslovakia, Hungary, East Germany, where, between 1945 - 1948 the pro-Soviet governments and Communist regimes were installed .

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[1] NATO-Partnership and Cooperation Handbook, Office of the NATO Information and Press, Brussels, Nemira Publishing House, Bucharest, 1997.

During the Yalta Conference, Churchill praised his that "Marshal Stalin's life is the most precious for the hopes and hearts of all".

Also in the spring of 1945, in the House of Commons, the British Prime Minister and Tory leader gave a blank check to the USSR, declaring: "I know of no other government to better fulfill its obligations than the government of Soviet Russia".

After the sudden death of President Roosevelt, the new U.S. chief executive, Harry S. Truman asked Harry Hopkins to go to Moscow to discuss with Stalin the new guidelines of the White House dweller and to clarify many rough sea appeared between allies.

Although health was very grave, he went to the Soviet capital, where he had several hours of talks with Stalin.

In the two weeks he exposed Stalin's new administration, the hopes and determination to go forward under the Yalta agreements, the so hard drawn new postwar policy towards cooperation and trust, clearly indicating a series of U.S. grievances for Soviet actions and attitudes including what happened in Romania by Dr. Petru Groza's government imposed in March 1945. Stalin recalled that the U.S. attitude toward the Soviet Union has cooled long after Hitler's defeat, alluding to the huge Soviet human sacrifices.

By the politico-diplomatic solutions found and the established arrangements, Hopkins's visit to Moscow was assessed as a success, though, there immediately reappeared new grounds and sources of tension.

By the views expressed by Stalin and the Soviet delegation to the Conference of Heads of State and government of the three great powers at Potsdam in July-August 1945, just six months after the Yalta Conference, they let the Soviet Union see clearly what was intended.[2]

If the argument on its security interests in Poland, Romania, Czechoslovakia, Bulgaria and Germany were seen as explanations of Anglo-American postwar Soviet policy, its applications to include Communists in the Greek government, the Soviet interests in Tangier and Libya as the desire to annex the two provinces of Turkey and to control the Black Sea straits, have been taken as warning signals to the West.

It was clear that substantial changes had begun to disintegrate the alliance and the political atmosphere.

It must be remembered that the overall political climate in the West was very supportive and friendly with Stalin and the Soviet Union.

The Potsdam Conference, which will be in effect (although the few common decisions taken by Heads of Governments of the three great

[2] Andre Fontaine - *History of the Cold War*, Military Publishing House, Bucharest, 1992.

powers), was rather a meeting of the disagreements than one of the agreements.[3]

This confrontation will be considered as a first point in the early Cold War history.

The World War II -the influential diplomat, Deputy Secretary of State, a member of the circle of political analysis of the interwar years in Riga, Joseph Grew, wrote that there was a transfer from totalitarian dictatorship and the power of Germany and Japan to the Soviet Russia.

The awakening of the West was a gradual process, but, they were puzzled at first by what was happening around them.

America was certainly unprepared for a political war, lacking the experience and tools - a famous analyst, Walter Laqueur, writes. He pointed out that "the West was essentially in a defensive posture - it had few means to cope with the dynamic and aggressive Soviet policy and the communist parties.

Awakening the West, which was really the way to create the North Atlantic Alliance, included a number of challenges in the Soviet and early post-war Western countermeasures. It included, however, the major political events that have forged a conception and gave birth to a project.

Such events were: the one on 6 March 1945 in Romania, Churchill's speech in Fulton, George Marshall's proposals, the study by George F. Kenan, the famous American diplomat who served in Moscow as head of diplomacy.[4]

The Truman Doctrine, practically a political statement submitted on 12 March 1947 by the U.S. President, stated that any direct or indirect aggression which threatened U.S. peace also involved U.S. security.

As for the above statement, it appears to be another important moment in which a large confrontation with the USSR began, a confrontation which appeared in the history for the next four decades as the Cold War.[5]

At the Potsdam Conference (July 17 to August 2, 1945) President Truman attacked in force, protesting that the Yalta agreements were not respected for Romania and Bulgaria.

Between 1945 - 1947, the Americans had already introduced in the European economy 14 billion U.S. dollars through international organizations or through bilateral agreements.

But instead of improving the economic situation of Europe - especially the agricultural and financial - it became worse.

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[3] NATO-Partnership and Cooperation Handbook, Office of the NATO Information and Press, Brussels, Nemira Publishing House, Bucharest, 1997.

[4] NATO-Partnership and Cooperation Handbook, Office of the NATO Information and Press, Brussels, Nemira Publishing House, Bucharest, 1997.

[5] Andre Fontaine - *History of the Cold War*, Military Publishing House, Bucharest, 1992.

1.3 The Marshall Plan

After the arrival of General George C. Marshall as the head of the State Department in January 1947, "impoundment policy" began to take shape.

On 5 June 1947, the Secretary of State officially launched the U.S. plan to help Europe. In that day at Harvard, he announced the European Recovery Programme (European Recovery Program - ERP). Their policy was not directed against a country and a doctrine but against hunger, desperation and chaos.

Its purpose had to be the revival in the world economy that would operate to allow the emergence of political and social conditions in which free institutions could exist. The aid came in the form of grants (85%) and long-term loans (15%).

For the European countries which could accept that, it was a huge incentive. Here is a statistic of the amounts - in dollars - which were received in April 1948 (when Congress passed a law) by June 1952: United Kingdom - 3.389 billion, France - 2.7 billion, Italy - 1.508 billion, Germany - 1.4 billion; Netherlands - 1.083 billion, Greece - 708 million, Austria - 677 million, Belgium and Luxembourg - 559 million, Denmark - 273 million, Norway - 255 million, Turkey - 225 million, Ireland - 147 million, Sweden - 107 million, Portugal - 51 million, Iceland - 29 million.

The Russian historian, Mikhail Narinski, based on his research in the Soviet archives, says that Moscow has reacted hastily and disorderly in announcing the Marshall Plan.

After the Paris Conference (June 29-July 2, 1947), the great wartime alliance ended and installed in its place a policy of confrontation.

On 11 July 1947, representatives of Austria, Belgium, Denmark, Switzerland, Greece, Iceland, Ireland, Italy, Luxembourg, Norway, Netherlands, Portugal, Sweden, Turkey, together with the originators, France and Britain, met in Paris.

The next day, the European Economic Cooperation Committee was created, whose role was to provide U.S. government information about resources and needs of the 16 participating countries, and to forecast for the next four years.

In September 1947, Stalin, who was on the offensive, created the Cominform, the new coordinating body of the communist parties.

On this occasion, on 5 October 1947, Andrei Jalanov resumed from the point of view of Moscow Truman's idea stated on March 12: "In the world two camps have been formed , on one side the anti-democratic imperialist camp whose main role is to establish global dominance of the American imperialism, and on the other hand, the anti-imperialist and democratic camp, whose main goal is to dig imperialism, strengthen democracy and liquidate the remnants of fascism".[6]

However, a positive solution of the relations between the USSR and the great powers was tried.

1.4 First steps towards the emergence of the North Atlantic Pact

In December 1947, the U.S. Conference of the Foreign Ministers of Great Britain, France and the USSR in London, ended in failure in the collaboration of the four great powers.

A milestone occurred on March 12, when important discussions initiated on April 16, 1948 between George C. Marshall and the Secretary of State Robert M. Lovett, together with Senator Vandenberg and Connolly, about safety issues in the North Atlantic.

In agreement with the State Department, Senator Vandenberg had prepared a resolution that recommended U.S. association based on a constitutional process, with such regional arrangements based on collective and mutual help and continuous and effective self-help.

It also recommended that the U.S. government's goal should be to contribute to peacekeeping, clearly stating their determination to exercise the right of individual or collective self-defense, that Article 51 (in the United Nations Charter), where there would be an attack that would threaten national security.[7]

On 17 March 1948 in Brussels, representatives of Belgium, France, Luxembourg, the Netherlands and the United Kingdom of Great Britain signed a common defense treaty, pledging to strengthen economic and cultural ties, to resist the dangers of ideological, political and military, which could become a direct threat to the signatories.[8]

On 11 April 1948, General George C. Marshall and Secretary of State Robert M. Lovett initiated discussions with Senator Vandenberg and Connolly on security issues in the North Atlantic.

On 16 April 1948, representatives of 16 countries and military commanders of the Western occupation zones in Germany have initialed the document that gave birth to the Organisation for European Economic Cooperation (OECE).

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[6] The North Atlantic Treaty, Washington, 4th of April 1949.
[7] United Nations Charter, San Francisco, 26th of June 1945.
[8] Andre Fontaine - History of the Cold War, Military Publishing House, Bucharest, 1992.

U.S. Senate adopted on June 11, 1948 a resolution advocating the right of individual or collective self-defense, where an attack might occur that would threaten national security.

From a legal perspective, the way was open for the establishment of the alliance, which was continued by the meeting held on 6 July 1948 in Washington between the State Department representatives and the ambassadors of Canada and Western European countries which signed the Brussels Treaty.[9]

On 25 January 1949, in response, the Council for Mutual Economic Assistance (CMEA), with the participation of Bulgaria, Czechoslovakia, Poland, Romania, Hungary, led by the USSR was created.

In February 1950 Albania also joined, in September 1950, the GDR and in July 1961, Mongolia. A spectacular series of events occurred between 1947 and 1949 which rushed things. Among these there were direct threats against the sovereignty of Norway, Greece, Turkey and other allies in Western Europe, the state attack in June 1948 in Czechoslovakia, the illegal blockade of Berlin, which began in April of that year.

There followed negotiations between the signatories of the Treaty of Brussels, Belgium, France, Luxembourg, the Netherlands and Britain on the one hand, the United States, Canada and Denmark, Iceland, Italy, Norway, Portugal with the aim of creating a single North Atlantic Alliance[10] based on security guarantees and mutual commitments between Europe and North America.

On 4 April 1949, a ceremony has established the North Atlantic Organization, after signing the Washington Treaty, which established a common security system based on a partnership between the 12 signatory countries.[11]

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NATIONAL AND EUROPEAN CITIZENSHIP

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Abstract

Faraway from abrogating national citizenships, the European citizenship completes them. Basically, the two types of citizenship shouldn't be confused. European citizenship is settled by the European Union law, while the national citizenship belongs exclusively to national law.

Key words: *citizenship, Romanian citizenship, European citizenship, rights*

Introduction

"There will come a day when you, French, Russians, Italians, Germans, and all you nations of the continent, without losing your distinctive qualities or your glorious individuality, you will establish a superior union and will built European fraternity", said Victor Hugo in 1849. Today we take part in the continuum development of what the great writer called "European fraternity", meaning the European Union and we are the holders of double citizenship in the virtue of our integration to this community.

To understand the concept of European citizenship we must first analyze the concept of citizenship.

The modern notion of "citizenship" coincides with the French Revolution[61] and with the birth of the modern and rightful state. It is obvious the fact that, alongside the French Revolution, the relations between the individual and the state registered severe transformations. So, the concept of rightful subject was consolidated, which can be defined as being the entity, both physical as well as juridical, "unitary, to which will undergo a series of rights and obligations"[2], reported to the state's politics.

A definition of citizenship, considered exact by the distinct professor Ioan Muraru, states that citizenship is "the permanent political and juridical bond between an individual and a certain state. This connection is expressed through the totality of mutual rights and obligations between a person and the

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[1] The year 1789.

[2] Cristina Pensovecchio – "*La cittadinanza europea. I diritti dei viltadinni dell'Unione Europea"*, Palermo, 1994, p.5.

state to which citizen it is, and more, there is a special juridical connection, reflected externally, kept and prolonged anywhere the person would be, in its state of origin, another state, on sea, in the sky or in space"[3].

The notion of citizenship can be used in two ways:

1. In a political sense, citizenship is regarded as an individual's place in a human collective (people, nation) organized in a state;

2. In a juridical sense, in the science of constitutional law, citizenship is analyzed first of all in its juridical sense.

Also the notion of citizenship is structured in two concepts:

1. The notion of citizenship used in designating a juridical institution;

2. The notion of citizenship used in characterizing the juridical condition.

In the first concept, the notion of citizenship is understood as a group of juridical rules with a common object of regulation. In the second concept, the notion of citizenship is based around the idea of rightful subject, concerning the citizenship of a person, the manner in which it was obtained and lost. Especially we are interested in the notion of citizenship from the second's conception point of view.

As a first opinion, citizenship is seen as the connection between the individual, group of individuals and certain belongings with a certain state. This opinion belongs to authors who consider that juridical reports can be established not only between persons but also between persons and assets. This opinion is formulated wrong because the juridical reports can be established only between people, sometimes ending on goods. The juridical regulations can never be set between people and goods.

In a second opinion, citizenship is defined as the amount of three elements: territory, population (nation) and sovereignty. In this conception, citizenship is either defined as a political or juridical connection or as the quality of a person, hence resulting the conclusion that any person is part of the population, this being one of the constitutive elements of the state.

Regarding the establishment of the juridical nature of citizenship, one must begin from the category of subject of juridical reports. The subjects of juridical reports are individuals or collective and juridical persons. Individuals appear as subject to juridical reports, as citizens, foreigners or stateless persons. But, in certain juridical reports, foreigners or stateless persons are not rightful subjects, so they cannot be holders of rights and obligations, because they lack a part of juridical capacity.

The juridical capacity represents the possibility of a rightful subject to have certain rights and obligations. The juridical capacity is regulated in the law and can differ from a law's branch to another. In certain branches of the law, the juridical capacity is divided between the capacity of use and that of

[3] Ioan Muraru, Simina Tanasescu – "*Drept constituţional şi instituţii politice*", edition IX-a, reviewed and completed, Pub. Lumina Lex, Bucharest, 2001, p.136.

exercise. In constitutional law we cannot speak of a division of the juridical capacity because if in civil law this distinction has a great importance, it is without meaning in other branches of law. The juridical capacity is then, a necessary condition to become a subject of the juridical report and to assume in the juridical report the subjective rights and correlative obligations.

Juridical capacity is structured in two elements: the quality of the individual or the juridical person and citizenship. The first element of juridical capacity is the quality of the individual or the juridical person, so it would come to the conclusion that even goods can become subject of juridical reports. The second element is citizenship. Juridical capacity in constitutional law is complete in the case of citizens and restricted in the case of foreigners and stateless persons. The individual citizen can be subject of all juridical reports.

The law acknowledges each citizen of the state as rightful subject but it does not mean it acknowledges its capacity to be holder of rights and obligations in every field of juridical reports. That is why Romanian citizenship has been defined as the quality of a person starting from the idea that it is a quality only to the extent in which it is recognized as constructive element of the juridical capacity as it is the quality of an individual. In conclusion, citizenship is an element of the juridical capacity but one only of the juridical capacities requested from subjects of juridical reports of constitutional law.

As regards to Romanian citizenship there are certain fundamental principles that govern this juridical institution.

1. Only Romanian citizens are holders of rights foreseen by the Romanian Constitution and other normative acts. From this we conclude that persons who do not have the quality of Romanian citizens cannot enjoy, under the law, but a part of the rights and duties foreseen by our country's constitution and laws. From the rights written in the country's constitution and laws, some can only be exercised by citizens, foreigners and stateless persons not having access to them. In the group of these people are included the following:

1.1. The right to vote (Art.36 of the Romanian Constitution) and the right to be chosen in the national representative authorities (Art.37 of the Romanian Constitution). These rights are political through which it is expressed and exercised the state's power and belong only to Romanian citizens;

1.2. The right to live on Romanian territory and to move freely in its territory. Foreign citizens and stateless persons can reside on Romanian territory and can move on it only in the particular conditions set by the authorities through the foreigner's law or through the regulation of free circulation on Romanian territory of the citizens of member states of the European Union;

1.3. The right of ownership in Romania. Article 44, paragraph 2 of the Romanian Constitution, states that stateless persons and foreign citizens can gain the right of private property over lands only in the condition of Romania's accession to the European Union;

1.4. The right to be employed in any function or political representation for which he meets the demands asked by the laws of the country. These laws specifically ask that the person have the quality of Romanian citizen (for example, for the position of judge);

1.5. The right to not be extradited or expelled from Romania. The Romanian citizen cannot be extradited at the request of a foreign state to prosecute or trial in a penal case or to execute a punishment. Also he cannot be expelled from Romania;

1.6. The right to be diplomatically protected, when being abroad. The Romanian citizenship represents for the Romanian state the obligation to protect its citizens when they, while being abroad, need such assistance against their rights being violated.

2. Only citizens are expected to fulfilling their obligations set through the Constitution and the country's laws. The quality of Romanian citizen makes them holders over rights and freedoms, at the same time having to fulfill the duties provided by the country's Constitution and laws. Romanian citizenship implies civic responsibility. According to this principle, certain obligations provided by the Constitution and the laws belong exclusively to Romanian citizens, because only they can be the holders of all rights and obligations. The persons who do not have this quality are not required to fulfill certain duties that only belong to Romanian citizens.

3. Romanian citizens are equal in rights and duties, without distinction of race, nationality, ethnic origin, language, religion, sex, opinion, political believes, wealth or social origin and indifferent of the way in which they gained their citizenship. The revised Constitution guarantees through the state the equality in rights between men and women (Article 16, paragraph3).

4. Citizenship is exclusively a matter of state. This principle sets itself apart with a special clarity from the constitutional and legal dispositions according to which the setting of rights and duties for the Romanian citizens, the ways of gaining and losing the Romanian citizenship are an exclusive attribute of the state.

5. Marriage does not produce any juridical effect on the spouse's citizenship. The marriage of a Romanian citizen and a foreign citizen does not represent any effect on the citizenship of the spouse who gained Romanian citizenship at the time of the marriage. The change of citizenship of one of the spouses does not produce any juridical effects over the Romanian citizenship of the other spouse.

Along with the European Union we could speak of a new citizenship – the European citizenship. Romania's citizens have also gained this

citizenship from the time of Romania's integration to the European Union in 2007.

The notion of European citizenship implies the fact that citizens of the European Union benefit, as such, of the same rights that are given traditionally to the citizens of the respective state. We have to keep in mind that the Union's structure involves the exercise of certain rights at the level of the European Union and the exercise of others at the level of member states.

After the European Council at Fontainebleau from 1984 another notion had developed, that of a Europe of the citizens. The ground idea is that the European citizen must be placed in the center of the European construction, to develop his sense of belonging to the European Union. In this sense, the Committee's gatherings regarding the citizen's Europe, also called the ADONNTNO Committee, created at the initiative of the European Council at Fontainebleau from June 25-26 1984, proposed "measures regarding the enforcement and promotion of identity and image of the Community towards its citizens in the world".

Among the special rights acknowledged in the perspective of a citizen's Europe are, without a doubt, the special rights inherent to the European citizenship and which establish a real political citizenship. But we can also find rights that result from economic integration, such as free access to employment in a country of own choosing and new rights which consecrate the broadening of the integration field, such as the right to culture or environment protection. These fall under the largest conception of citizenship. But this approach steals an extensive part of the concept's particularity, because the citizen's rights do not longer distinguish themselves from the rights of any other human being.

The Maastricht treaty introduces European citizenship in the goal of strengthening the existent relation between the European Union and the citizens of member states, but does not define this notion.

The treaty limits to provide that "it is a citizen of the Union each person who has the citizenship of a member state" and that "the citizens of the Union benefit of rights and are subject to obligations provided by the present treaty" (the CE treaty, Art.8, paragraph17 new). And paradoxically, inserts the dispositions consecrated to the Union's citizenship in the CE Treaty and not in the European Union Treaty.

This redaction which many have classified as "confused and hazardous" was not regulated by the Amsterdam Treaty.

In fact, the treaties from Maastricht and Amsterdam, although they are based on the 2 conceptions, consecrate a number of rights which are more similar to the notion of citizenship in a traditional way, than to that of a citizen's Europe.

European citizenship is essentially distinct from the national one, which, according to the formulation of the Amsterdam Treaty, "completes it

[…] and does not replace it" (the CE Treaty, Art.17 new, paragraph1). Still, by its conditions of assignment it derives, also as national citizenship, from the nationality given by the member states.

Article 17 states that, by the dispositions of the Treaty, citizens of the Union enjoy certain rights, but, equally, they have a number of obligations, without specifying from where we deduce that those obligations are correlated to the gained rights.

The second "news" brought by the Amsterdam treaty refers to Art.21 of the Treaty establishing the European Community, in which it stipulates that each citizen of the Union can address the institutions and can receive an answer in one of the 20 official languages of the Community.

The most important modifications refer to Art.18 of the Treaty establishing the CE, in which it is stated, regarding to the right of free circulation and the right of stay, that the Council's institution can take decisions regarding the favoring of exercising these rights, stated according to the procedure of co-decision, provided by Art.251from the Treaty establishing the CE.

In December 1st 2009, the Lisbon Treaty modifies the European Union and the CE Treaties (without replacing them) and sets at the disposal of the Union the legal framework and the juridical instruments necessary to face the future challenges and to answer to the citizen's expectations. The Charta of fundamental rights in primary European law provides new mechanisms of solidarity and ensures a better protection of European citizens. The Lisbon Treaty specifies and consolidates the values and objectives which are at the basis of the Union. These values are meant to serve as reference point for the other European citizens and to show what Europe has to offer to its partners from around the world. The Lisbon Treaty keeps the existing rights and introduces new ones. Especially, it guarantees the principles and freedoms written in the Charta for fundamental rights and gives its dispositions obligatory juridical force. It refers to civil, political, economic and social rights.

The Lisbon Treaty maintains and consolidates the "four freedoms", as well as the political, economic and social freedom of all European citizens.

The Union benefits of an extensive capacity to action in matter of freedom, security and justice, which brings direct advantages in regards to its capacity to fight crime and terrorism. The new provisions in matter of civil protection, humanitarian assistance and public health also have the objective of strengthening the Union's capacity to respond to threats against the security of its citizens.

The European Union citizenship offers a series of rights to the citizens of member states and strengthens the protection of their interests. Organized as such, they are: the right to free circulation, the right to stay and settle down, the right to work and study in all member states; the right to vote and the right to run for elections in the European Parliament and in local

elections in the resident state, with the same conditions as those set for the citizens of the respective state; the right to petition before the European Parliament and the right to address the European Mediator for examining cases of maladministration of community businesses by the institutions and authorities of the community (except the Court of Justice of the European Communities); the right to benefit, on the territory of a third party state, of diplomatic and consular protection from the diplomatic and consular authorities of another member state in the case in which the resident state has no diplomatic or consular representation in the respective state.

As a principle, the European and the national citizenship should not be confused. The European citizenship is regulated by the laws of the European Union (the communitarian European law), in which it has its basis; and the national citizenship belongs exclusively to national law.

European citizenship does not suppress any of the inherent rights of national citizenship. It just offers complementary rights which are exercised either at the level of the Union, either at the level of member states.

Certain elements of European citizenship can sometimes be of the nature to weaken national citizenship if to a person from another member state is acknowledged rights that were reserved in the past only to citizens.

The European citizenship can then be perceived as threatening or competing with national citizenship. This is obvious especially in regards to the right to stay or the right to choose or to be chosen, not only in the European Parliament, but also in municipal elections. Hence, the restraint of certain states regarding the development of European citizenship. As such, Denmark held to declare that the Union's citizenship does not in any case give the right to obtain Danish citizenship.

European citizenship is deducted from the nationality of a member state. According to Art.8.1.CE (the new 17 article), "a citizen of the European Union is any person who has the citizenship of a member state".

So, the quality of European citizen is a subordinate of having or gaining the membership of a member state. Hence forth, it comes to the national law of each state to determine if a person has or has not its citizenship. This solution has been quickly confirmed through the Declaration regarding the citizenship of a member state. The Maastricht Treaty according to which "each time when the Treaty establishing the European Community refers to citizens of member states, the problem of knowing if a person has the citizenship of one of these states is solved only by using the national law of the particular state".

In order to be according to international law, this principle raises difficulties in the hypothesis in which a person has more than one citizenships among which one would be of a member state. In the international juridical order the opposability of citizenship towards third party states is subordinate to the existence of "an effective link between the

person and the state"[4]. But the CJCE has objected to the requirement for effectiveness in the case of Micheletti, from July 7th 1992, as regards to the freedom of establishment. Mister Micheletti, Argentinean at origin, but also having Italian citizenship as descendent from Italian parents, is the holder of a degree in dentistry obtained in Argentina but registered in Spain from the enforcement of a convention between the two countries. So, the right to move to Spain in order to exercise his profession on the grounds that his normal residence was in Argentina cannot be denied to him. The Court forbids a member state "the right to pass effects of giving citizenship to another member state by requesting a supplementary condition for the acknowledgment of this citizenship as regards to exercising fundamental freedoms provided by the treaty".

But what is true as regards to the access in territory and the exercise of a professional activity can be enforced also in regards to the exercise of civil rights, as for example the admittance in public functions. Great difficulties can appear if the states of the Union have different legislations and practices in matter of giving and denying the citizenship, (a conflict between *jus soli* and *jus sanguinus*, different practices when concerning the naturalization of foreign workers). The states who narrow down the gaining of citizenship risk to reluctantly accept the opening of their territory, of the labor market or of the political rights to citizens coming from more liberal member states. European citizenship logically invites to a certain understanding between legislations as regards to the attribution of citizenship, understanding very little accomplished in present because of the great political sensibility of the problem.

Conclusions

European citizenship is added to national citizenships, without erasing the latter. The citizens of member states of the European Union benefit as such of a double citizenship. So, a Romanian citizen is at the same time a Romanian citizen and a European citizen.

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[4] The International Court of Justice, April 6th 1955, Nottebohm, Collection of the CU decision, p. 4.

Legea nr. 21/1991 a cetăţeniei române, modificată

CERTAIN ASPECTS OF THE RIGHT TO LIFE IN THE CEDO JURISPRUDENCE

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Abstract

The right to life, the most natural of man's rights, even though it is a classic subject and analyzed for a long time by reputed authors, always stays current and gains new meanings. The CEDO decisions regarding several aspects of European regulations on the right to life are interesting to analyze.

Key words: *right to life, CEDO, jurisprudence, right to di.e*

Introduction

The right to life is one of the fundamental rights regulated by the European Human Rights Convention. It is guaranteed to each person through the depositions of Art.2 of the Convention. At the same time, these depositions provide certain exceptional cases, when death is not a violation of this right. The provisions of Art.2 are made whole with those stated in Protocol 6 of the Convention regarding the cancelation of the death penalty, and in Protocol 13 regarding the cancelation of the death penalty in any circumstances.

The right to life seems as essential in the system of laws and fundamental freedoms defended through the European Convention in matter, because, without the consecration and the effective protection of this right, the protection of the other rights would be pointless. It is obvious that the right to life represents the essential condition of the possibility to exercise all rights and fundamental freedoms. As often as the European Court has stated, among the depositions of the Convention, which it considers as primary or pre-eminent, it also exists the right to life, because, without the protection of this right, the exercise of any other rights and guaranteed freedoms by the Convention would be false. Art.2 defines the limited circumstances in which death can be caused intentionally and the European courts have always enforced a strict control each time such exceptions have been brought forth by governments of contracted states.

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The object and goal of the Convention, the protection instruments of human beings, impose for Art.2 to be interpreted and explained in such a way that its demands are to be concrete and effective.[71] Also, even from the first case examined through Art.2 of the Convention, the Court has stated that this text "guarantees not only the right to life, but also provides the circumstances in which the cause of death can be justified; from this point of view, it is placed among the fundamental texts of the Convention (…). Along with the banning of degrading and inhuman treatments (Art.3), Art.2 establishes one of the fundamental values of democratic society which forms the European Council". [2]

In another case – *Streletz, Kessler and Kreuzc vs. Germany*, the European Courts has pointed out the evolution of the right to life in Conventions and other international instruments in matter, which have always stated their pre-eminence. In this sense the Court has retained that the Human Rights Universal Declaration from 1948 states in Art.3 that "each person has the right to life". This right has been confirmed through the International Pact regarding the civil and political rights from 1966 and the European Convention. "The understanding between the stated instruments is meaningful, says the Court, indicating the fact that the right to life is an undeniable attribute of the human person and it forms a supreme value among human rights".

It is noticeable that the formulation of Art.2 of the European Convention is different to that used in mentioned international acts in matter, adopted under the U.N., Art.3 of the Declaration simply states that each person has the right to life, and Art.6 paragraph 1 of the Pact states that the right to life is innate to the human person; this right must be protected by law; nobody can freely be deprived of life.

Apparently, the protection of the right to life is better shaped in the United Nations' system, because the above mentioned texts mainly state the right to life and then enforce the obligation of countries to defend this right by law, as Art.6 paragraph1 of the Pact does. On the contrary, the European Convention lays emphasis on the obligation of mandatory states to protect the right to life. In practice, the protection of the right to life in the system of the European Convention is much more efficient than that offered by the U.N. acts. Actually, controlling the way in which mandatory states accomplish their obligations through respective international treaties is completely different in the two systems of the present Universal Declaration and, as its name shows, it has no force of constraint because it has not provided any juridical mechanism to supervise its enforcement, and the

[1] So, in Ilhan vs. Turkey, the Court stated in the sense that only in exceptional cases the acts of bodily violence committed by an agent of the state can be analyzed as a violation of dispositions from Art.2 of the Convention, when the death of the victim was not produced.

[2] Corneliu Barsan – *Convenţia Europeană privind drepturile omului.Comentariu pe articole*, Pub. All Beck, Bucharest, 2005.

efficiency of the United Nations Committee on Human Rights as a control mechanism in enforcing the depositions of the United Nations Pact does not even exceed the limits of the declarative. On the contrary the European Convention has an adequate juridical mechanism, which, on the basis of a contradictory procedure, controls the way in which the right to life is defended in mandatory states of the Convention[3].

"In essence, countries, through their agents, must not only refrain from provoking the death of a person, but have the positive obligation to take all necessary measures to the efficient protection of this right, which includes the obligation to insure the progress of an efficient investigation regarding the causes of a death when it has been made, with the consequence of appropriate punishment of the guilty". [4]

To better understand the regulation of the right to life it is called for to know the holders of this right and the object of its protection. Since Art.2 states that each person's right to life is protected by law, this means that we have to see what is meant by the notion of "person", in order to see how it can benefit from this right, and, as regards to the notion of "life", where it begins and where it ends.

So it is required first to mention the notion of "person". From this point of view it is to be remembered that, since Art.2 paragraph1 tells about the right to life which is acknowledged to each person, it is clear that it had in mind the physical person, the human person. Secondly, the notion of "life" itself must be determined, in the sense of the same text, and the more so the civil right is known that, in certain situations, operates the principle according to which a child can gain rights from the moment it is conceived – *infans conceptus pro nato habetur de commodis ejus agitur*. The problem of knowing where the protection of the right to life begins is more than delicate[5]. In other words, the conceived child but not yet born, goes under the protection of Art.2 of the Convention. From this point of view we have to keep in mind that, unlike Art.4 of the American Human Rights Convention, which states that the right to life is protected "generally beginning with conception" (of the child), Art.2 of the European Convention does not stipulate anything similar to the temporal limits of the right to life and neither defines the person whose right to life is being protected[6].

Regarding the legitimacy of voluntary pregnancy interruption, the Court has been noticed in a petition from a person who could not claim that had the quality of "direct victim" of the national legislation questioned.

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[3] Corneliu Bârsan , *Convenţia europeană a drepturilor omului. Comentariu pe articole*, Ed. All Beck, Bucureşti 2005.

[4] Cornelia Liviu Popescu *"Protecţia internaţională a drepturilor omului" - surse, instituţii, proceduri-*, Ed. ALL Beck, Bucureşti, 2000.

[5] Corneliu Barsan , *Convenţia europeană a drepturilor omului. Comentariu pe articole*, Ed. All Beck, Bucureşti 2005.

[6] Doina Micu ,*Garantarea drepturilor omului*, Pub.All Beck, Bucharest, 1998.

Through its action, the claimant, married and father of 3 children, complained in the year 1975 that the adoption of the Austrian legislature, at the date of January 29th 1974, of a law which permitted, in certain conditions, the interruption of voluntary pregnancy, has the nature to contravene, among other dispositions, with Art.2 of the Convention, which protects the right to life. In the decision regarding the validity of the request, the Commission has stated that it is not in its competence to examine the compatibility of a national law with the dispositions of the Convention unless as regards to a concrete situation and not *in abstracto*. Furthermore, it has retained that the claimant's arguments in the sense that each Austrian citizen is concerned by the dispositions of the discussed law, thanks to its consequences regarding the future of the country, and that he is ready to become the trustee of every child who would be born if the law's dispositions were not enforced, meaning the fact that he intended an "*actio popularis*" and not an individual action, through which he could complain the violation of a personal right, so his request was declared inadmissible[7]. The right to life in the sense of Art.2 of the European Human Rights Convention signifies the right to live, in the usual sense of the way, and not the right to a decent life. In other words an economic and social right must not be confused with the right to life, in the sense of Art.2 of the European Human Rights Convention. This text protects life itself and not the right to certain conditions in life.

In the doctrine and in the jurisprudence has been questioned the fact that the text defends only the life itself of a person or also the person's right not to be harmed physically, or at the nature of its existence.

Also the surrounding in which the text speaks about the interdiction of causing death intentionally, through the action of agents of the state's public force, does not mean that these could cause the death of a person unintentionally.

That is why the Committee's solution in a case against Belgium, where the plaintiff complained about the death of her husband, caused by the shooting without notice by a constable, threatened by another person in a desperate action in a demonstration, in the sense that the death was not caused intentionally, has received some of the harshest criticisms from the doctrine, which lead the former European Human Rights Protection organism to state its jurisprudence in the matter. That is why later on, in similar circumstances, it was decided, in 1978, that the idea that "the right to life of a person is protected by law" implies for the state not only the obligation not to cause, through its agents, the death of a person "intentionally", but also to take every necessary measures for the protection of life. And in the year 1984 it stated that the analysis of dispositions of Art.2 of the European Human Rights Convention leads to the conclusion

[7] Comis, EDH, decision from December 10th 1976, no.7075/1975, X vs. Austria, DR no.7.

that its dispositions do not concern only the cause of death, by the state's agents, intentionally. Any other interpretation seems incompatible to the object and purpose of the text, which has in mind the protection of the right to life in general.[8]

Interesting to discuss is if the provisions of Art.2 of the Convention provide also the right to die. Regarding this right the CEDO has been noticed repeatedly by persons who by any reasons did not want to live any more.

One of the situations with which the Court has been noticed with was the following: the plaintiff married by over 25 years, mother and grandmother, paralyzed and suffering from a degenerative progressive and incurable disease, with health rapidly deteriorated in the last period, in such a way that she was completely paralyzed, could not express herself coherently and was fed through a tube, but kept intact her mental capabilities. Considering the completely degrading state of her health she wanted to commit suicide but was unable to act alone in this. Due to her condition, she had to be helped in the act of suicide by her husband. Only that, regarding to Art.2 paragraph1 of the English law of 1961 concerning suicide, anyone who helps a person to commit such an act commits a crime. In July 27th 2001, the plaintiff addressed, through her lawyer, the district attorney with the request to not prosecute her husband, if he would help her commit suicide. In a letter from August 8th 2001, the district attorney refused her to make such an arrangement, under the motivation that "no matter how unusual the circumstances are, it cannot authorize the commission of a penal crime". [9]

Another important matter to the doctrine, but also for the competent authorities, was determining the boundaries of the right to life.

Regarding the first boundary of the right to life, we confront the problem of the inexistence of an uncontested definition from the scientific point of view of the beginning of life, although several theories have been formulated. The question that remains is: the life of a human being begins from birth or from conception? In the context of spectacular progress in medical science, it is beginning to become a necessity the provision of a juridical status of the human embryo, status which permits its efficient protection. The European Council has already engaged on this path: a recommendation regarding genetic engineering states that the right to life and to human dignity involves the right to inherit the genetic characteristics without suffering a genetic manipulation. So it has been asked from the Committee of Ministers to quickly provide the acknowledgement through

[8] Corneliu Barsan , *Convenţia europeană a drepturilor omului. Comentariu pe articole*, Ed. All Beck, Bucureşti 2005.

[9] CEDH, April 29th 2002, Pretty vs. the United Kingdom, in Corneliu Barsan Convenţia europeană a drepturilor omului. Comentariu pe articole, Ed. All Beck, Bucureşti 2005.

the European Convention of a right to genetic heritage which has not suffered any modification. Also, it is starting to shape up a right of bioethics which will become one of the most important divisions of International and European law in human rights.

Regarding the right to life of the unborn child, in a first jurisprudential stage, CEDO has seemed to give also the fetus a "certain personality", independent to that of the mother, estimating that the limitations of voluntary pregnancy interruption cannot be considered a violation of Art.8 which guarantees the respect of private and family life. However, the Committee has established that abortion in the tenth week of the pregnancy in the purpose of protecting the physical and mental health of the mother does not represent a violation of Art.2. Later, the Committee has refused to recognize the fetus a right to life with absolute character, showing that the term of "person" used in Art.2 does not also refer to the conceived child. The fundament of the Committee's argument in these cases was the considerable diversity of national legislations regarding abortion.

So, in the case of *Brugemann and Scheuten vs Germany* (1977), the Committee appreciated that through the Convention, therapeutic abortion during the first months of the pregnancy is not forbidden. What happens in the case of non therapeutic abortion in the first 3 months of the pregnancy? The problem has not yet been solved at a European level, in this domain the states having an extensive margin of appreciation. The European Commission has shown that the right to life does not "seam" to apply except at birth. The European Court has appreciated, in its turn that it is not necessary to determine if the Convention guarantees a right to abortion or a right to life to the fetus. Still, any constraint of the freedom to communicate the information on abortion practiced outside the national territory has been qualified as being contrary to Art.10 of the Convention which guarantees the freedom of speech. In a regrettable way, European judges have not pronounced on the right to life of the conceived child, which created uncertainties on this problem, even more because certain national courts have adopted a firm position in this matter.

As regards to "the last frontier" of the right or "the right to die", the problem remains controversial. European legislations approach the problem of euthanasia in a different manner, even though they are all part of the European Convention regarding human rights. In France for example, the legislation ignores euthanasia and believes that the expression of the victim's consent does not justify the act. In Switzerland, active euthanasia (through which death is accelerated in a positive act) is forbidden by the Constitution and by penal law. Certain Swiss cantons permit passive euthanasia, which is the right to refuse in advance the care or the artificial prolonging of life. Only the Dutch legislation permits euthanasia from 2001.

The European Court's position has been firm in this respect. In the recent decision from *Pretty vs. the United Kingdom*, the court showed that

Art.2 cannot be interpreted, without distorting the language, as giving a diametrically opposite right, which is the right to die by the hand of a third party or with the assistance of public authority. The Court refused any evolutionary interpretation of the Convention concerning Art.2, stating that "in such a delicate matter, the solution must be political and not judicial". [10]

The positive obligations that belong to the states for the effective protection of the right to life and its limitations are being debated in the Court's recent jurisprudence. So, in January 22nd 1997, the European Court has been noticed with a request in which the plaintiff claimed, among others, that British authorities did not warn her regarding the radiation effects her father had suffered, so his health could not be supervised even from her birth, which would be a violation of her right to life defended by Art.2 of the Convention. In fact, the plaintiff showed that her father participated, as military, in nuclear experiments conducted by the British army in the Christmas Island between 1958-1959 in the Pacific Ocean, and thus he was subject to nuclear radiations; at four years from her birth, in 1970, she was diagnosed with blood cancer (leukemia), in her medical chart being retained as a possible cause of illness "irradiated father"; that she was subject to chemotherapy from the age of ten; that each year she had to do her medical exams and that she was afraid to have children because of the risk of genetic predisposition to leukemia. Also, the plaintiff has indicated that in the year 1992 she became aware of the content of a report of the Veteran's Association concerning British nuclear experiments, which stated the existence of a significant incidence in the different kinds of cancer on children of veterans who worked in the period of those experiments on Christmas Island.

In its rationing, the Court began its analysis from the fact that, in this case, the existence of an activity by the English authorities regarding the deliberate harming of the plaintiff's life was not sustained; so, as a consequence, she had to determine, beside the special circumstances of the case, if the state took all necessary precautions to prevent her father's life from being endangered.

The European Courts claimed that, if it is true that the father of the plaintiff worked in the area of the suspected nuclear experiments, there are no individual measurements of the received nuclear radiations, so it is impossible to know for certain that this risk was dangerous during its service. Furthermore, it was not approved in any way that the plaintiff's father had presented any symptoms from radiation exposure superior to the accepted average of exposure.

The Court considered that it could ask the state to supervise the plaintiff's medical condition, only in the case that the radiations to which

[10] Stelian Scaunas – "*Dreptul internaţional şi drepturilor omului"*, Pub.All Beck, Bucharest, 2003.

her father had been exposed could be proven to be of such nature that represents real risks for her health. Or, the analysis of expert's reports that were filed did not convince the Court to sustain the existence of a causality report between the irradiations suffered by the plaintiff's father and the ulterior appearance of the plaintiff's leukemia. That is why the European Court came to the conclusion that, reasonably, it could not be asked from the state's authorities to take certain actions on the basis of a causality report that could not be established, and as such, it could not be claimed from the state to have broken the dispositions from Art.2 of the Convention. [11]

Conclusions

The regulations of the European Human Rights Convention have been extensively debated before the Court. For the defense of interests the citizens of mandatory states considered that the authority which better guarantees the compliance of rights is the European Human Rights Court.

Starting from the multitude of requests with which the Court has been brought to notice we laid emphasis only on several which concern some of the most important controversial aspects of the right to life.

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[11] CEDH from February 28th 1983, no.9360/1981, Mme.W vs. The United Kingdom and Ireland, DR. no.32, in Corneliu Barsan, The European Human Rights Convention. Commentary on articles. Pub All Beck, Bucharest , 2005.

A SHORT REFLECTION ON THE EUROPEAN CONSTRAINT OF DOMESTIC LAW

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Abstract

The present article wishes to point out what influence the European Union has over domestic law. Without losing sight of or contesting the positive effects of integration and the constitutional basis between the two legal orders, we nonetheless appreciate that there are elements of constraint of our domestic law.

Key-words: *law crisis, domestic law, the primacy of the European law, constraint*

Introduction

Within the framework of the domestic legal order, the law appears to lose its central role, as it has become less accessible to citizens and therefore harder to be enforced. It has evolved and it is posing certain problems.

Thus, in contemporary society, characterized by an accelerated social evolution and radical economic changes we are witnessing a decline in or a "crisis" of the authority of the law. Besides the legislative inflation, the incomprehensibility of the laws and the negative influence of the government's emergency orders, we consider the pressure or the constraint exercised by the European Union as one of the main causes for the decline of the law.

1. The amount of statutes adopted by EU institutions – An element of constraint of domestic law?

The EU is more than just an ordinary union of common interests of several states; it has its own autonomous order of law whose subjects are not just the member states, but also physical and legal persons as individual entities.

European law regulate the legal relations that arise between states and their nationals or better put between the governing bodies and the European citizen and in certain cases it regulates even the relations between European citizens[1].

A study done by a French doctrinaire has shown that at the beginning of 2005, European law consisted of almost 17 000 laws, mostly directives,

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[1] F. Gyula, *Curtea de Justiţie Europeană,* Ed. Rosetti, Bucureşti, 2002, p. 26.

regulations and decisions. Added to these there are about 3000 international agreements between the Community or the European Union, certain member states, on one side, and third party states on the other[2].

Statistics show that there is an increase in the number of Union legal norms, which is explained by the new competences granted to European institutions by the Treaty of Maastricht in 1992, the Treaty of Amsterdam in 1997, the Treaty of Nice in 1992 and last but not least the Treaty of Lisbon.

Obviously, it is extremely difficult to appreciate with mathematical precision what influence the European regulations have had on the domestic legal dynamics, although it is clear that an inflation of Union laws makes it more difficult for national legislations to adapt and to apply the law, especially in new member states, such as Romania.

2. The primacy of European Union law and its direct effect

Following Romania's adherence to and final integration into the European Union, there has been a collision between the two legal systems: the national legal system and that of the European Union. This has been posing problems at a practical level, although from a theoretical point of view things appear to have been settled thanks to the provisions of art. 148 of the Romanian Constitution and the stipulations of the Treaty of Accession, which consisted of transforming the European legal texts into national legal statutes.

According to art. 148, second paragraph of the Romanian Constitution "as a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act".

The act stipulating the accession conditions for Bulgaria and Romania and the adaptations of the treaties that establish the European Union, contained in the Treaty of Accession, states in art. 2 that "from the date of the accession, the provisions of the Constitution, the EAER Treaty and the acts adopted by the institutions before accession shall be binding on Bulgaria and Romania and shall apply in those States under the conditions laid down in the Constitution, in the EAER Treaty and in this Protocol".

According to art. 249 (2) of the Treaty on the Functioning of the European Union (TFEU) "The regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States".

Referring to the general characteristics of community regulations the European Court of Justice (nowadays the Court of Justice of the European Union) stated by its ruling on the 7th February 1973, in case 39/72, Commission of the European Communities vs. Italian Republic, that: "According to the terms of article 189 and 191 of the Treaty, regulations are,

[2] Jean Maïa, *La contrainte européenne sur la loi*, Pouvoirs - Revue française d'études constitutionnelles et politiques nr. 77, Seuil, avril 1996, p. 54.

as such, directly applicable in all Member States and come into force solely by virtue of their publication in the Official Journal of the Communities, as from the date specified in them, or in the absence thereof, as from the date provided in the Treaty.

Consequently, all methods of implementation are contrary to the Treaty which would have the result of creating an obstacle to the direct effect of community regulations and of jeopardizing their simultaneous and uniform application in the whole of the Community".

The direct applicability of Union regulations implies that they apply within the framework of national legal order as they were adopted, without the need to accept or transform them into national laws[3].

Thus, the relation that has been formed between European and national law is very complex. It has evolved and has faced great difficulty in assimilating and applying the EU regulation at a national level.

The main feature of these relations between European and national law is cooperation, starting with the necessity that the two components of the European Union's legal system complete one another in the pursuit of a common goal of promoting general objectives. Between the EU law and the national law there is an interdependency reflected by the fact that certain provisions of the national law are valued[4].

However, between these two components of legal order there is also some conflict. It has been noticed that there are disagreements between the two systems of law in those cases where the EU law states the direct rights and obligations of EU citizens, whose content is different to that stipulated by national law. Two principles have been instituted in order to solve these disagreements: the supremacy of EU law and the principle of its direct applicability.

At present, the principle of supremacy is sanctioned by Declaration nr. 17 – annexed to the Treaty of Lisbon suggestively entitled "Declaration on primacy" where it is expressly stated that: "…the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States…".

Thus, according to this principle European statutes will render ineffective any current or subsequent regulations belonging to national law, in case they oppose each other, of course and in case there are reasons that place the situation under the authority of the European law.

In order to ensure the complete effectiveness of EU law primacy it is also necessary to ensure its interpretation in each Member State. Given that the primacy of Union law over national law is a thing of principle, the

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[3] Lucreţia Dogaru, *Aplicarea normei juridice ca finalitate a interferenţei sistemului de drept românesc cu dreptul comunitar*, Revista Română de Drept Comunitar, nr. 4/2008, p. 62.

[4] D. Mazilu, *Integrarea europeană: drept comunitar şi instituţii europene*, Ed. Lumina Lex, Bucureşti, 2007, p. 88-89.

Member States are obliged to guarantee that the national legislation present no obstacle to its full effectiveness, and if otherwise legal proceedings[5] can be brought up before justice.

Besides the principle of supremacy of European law, the principle of direct effect represents part of the basis for European Union's legal order.

The concept of "direct effect" is tightly linked to the principle of "direct applicability", without being mistaken for it. Even though some authors[6] do not make the distinction between the two, using them to express the same idea, at present it is accepted that direct applicability is that ability of the European law to be incorporated within the national law, without needing a complementary national statute, while direct effect refers to that situation, in which a European law creates rights for private individuals, which they can invoke before the national courts[7].

As jurisprudence has shown, the European Union has a new legal order, in favour of which the Member States have limited their sovereign rights and both their inhabitants and these states have become subject to this new order. Thus, independently of the legislation of member states, the Union law not only imposes new obligations upon people, but it is also destined to offer them rights that will become part of their legal legacy. These rights appear not only when decreed by treaties but also in virtue of the obligations clearly imposed upon Member States and European institutions[8]. This way, people may always invoke the provisions of European law before a national court of law against the authorities of the state in virtue of a vertical effect, in accordance to whether the state in question has not applied these provisions while these they are precise and unconditioned enough and it is not necessary to make a national notification that they have been taken into consideration[9].

Concerning the relations between people, in general, directives do not have any effect. However, in practice an indirect horizontal effect of directives has been acknowledged, although not constantly, in virtue of which they may be invoked if necessary in order to clarify provisions of national law or to remodel the solutions offered by it. The indirect horizontal effect may come from the national judge's obligation to interpret national law in such a way as to match with the directive, however, if it does not, then the obligation to interpret accordingly and therefore the indirect horizontal effect exist no longer, and priority is given to the trust placed by people in the validity of

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[5] Elise Vâlcu, M. Delcea, *Elemente de drept comunitar*, ediţia a-II-a, Ed. Sitech, Craiova, 2006, p. 201-202.

[6] G. Isaac*, Droit communautaire général,* Ed. Armand Colin, Paris, 1998, p. 171.

[7] J.C. Cautron, *Droit européen*, 6' édition, Ed. Dalloz, Paris, 1994, p. 141.

[8] O. Manolache, *Drept comunitar*, Ed. All Beck, Bucureşti, 2003, p. 57.

[9] *Ibidem.*

their national law, due to the principle of legal security that will limit the horizontal effect[10].

That is how, through the existence of these two principles, beyond the uncontestable benefits that they bring, they still constrain the national law, which is subordinated to the European law.

3. Solutions to reduce the constraining effect of EU law on national law

Conscious of the corrosive effect its law has of national law, the European Union has tried to limit this danger by sanctioning the principles of subsidiarity and proportionality, consolidated at present through the Treaty of Lisbon and by trying to increase the importance of the roles of national parliaments.

The purpose of subsidiarity is to firmly limit the abilities of the European Union in order to protect the sovereignty of states.

The principle of subsidiarity represents a means of close political organizing, which combines the need for sovereignty with the respect of autonomy, as the only one able to shoulder the diversity of the European Union and the simultaneous objectives of expansion and permeation of the integration process and the conservation of the sovereignty of Member States, because the idea of subsidiarity is based on the acceptance of a pluralist society[11].

Subsidiarity is also viewed as a solution capable of disarming tension, contributing to the efficiency of all activities, especially at the level of European institutions, but also as a balancing factor.

The principle of proportionality is tightly linked to the principle of subsidiarity. It is applied in different situations to limit the abilities of the European Union and the means whereby they are used, while also having the role to identify the substance and the meaning of fundamental liberties decreed by constituent treaties, as it is complementary to principles of justice and equity.

The principle of proportionality carries considerable importance in protecting the individual, considering its role of "endorser of substance" with respect to protected fundamental rights[12].

Last but not least, it is worth relating these principles to the provisions in the Treaty of Lisbon.

Lastly, it was sought to clarify the limits of the Union's competences, which are categorized in three types: exclusive competence, shared

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[10] Elise Vâlcu, M. Delcea, *Elemente de drept comunitar*, ediţia a-II-a, Ed. Sitech, Craiova, 2006, p. 204-205.

[11] R.Velişcu, *Principiul subsidiarităţii în dreptul comunitar,* în Revista Transilvană de Ştiinţe Administrative, nr. 2(11), 2004, p. 174.

[12] I. Alexandru şi colab., *Drept administrativ european,* Ed. Lumina Lex, Bucureşti, 2005, p. 221.

competence and supporting, coordinating or complementary competence. The principle of subsidiarity applies to further non-exclusive competences; the treaty institutes the obligation of every institution to ensure that the two principles defined in art. 5 CE are observed. Article 5 from the Protocol regarding the applying of the principles of subsidiarity and proportionality reaffirms the obligation to motivate all legislative projects accordingly; each such document must contain a detailed sheet, which permits the evaluation of whether the principles are upheld, as well as financial impact and the implications on national and regional legislations, accordingly. The deadline allowed to national parliaments in order to examine legislative projects and to issue a notice referring to the principle of subsidiarity is extended from 6 to 8 weeks[13].

A means of controlling subsidiarity is also put into place, according to which, in case a legislative project is contested through vote by a third of all national members of parliament (and a quarter in case of a legislative project concerning freedom, security and justice), the Commission will reexamine the legislative project and may decide to maintain it as it is, modify it or simply withdraw it. Thus, legislative projects will be revised, no matter what legal procedure is applied, when the required vote quota is met, yet this does not mean that the one who issued it (normally the Commission) is obliged to withdraw or modify it as well[14].

Therefore, as doctrine has shown[15] "the role of national parliaments is still a symbolic one, while the Commission is not obliged to withdraw its legislative proposals. The Treaty stipulates the possibility that, before finishing reading the proposal for the first time, the European legislative body may decide (the Council with the vote of 55% of members and the European Parliament with a majority vote) to reject the legislative proposal, based on the notices of the national parliaments. However not even in this case is the result due to direct action from the national legislative branch, but also based on decisions made at a European institutional level".

Conclusions

The relatively large amount of statutes created by the European institutions, the affirmed primacy of these statutes over domestic laws and the consequences on the national legal systems that spring therefrom, all these encourage us to discuss the European constrain of domestic law.

Obviously, we offer a single point of view and we are not trying to denigrate the European structure nor deny its benefits, especially since the integration of Union law into our national law is based on our own

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[13] See: M. Banu, *Aplicarea principiului constituţional al subsidiarităţii în exercitarea competenţelor comunitare. Observaţii teoretice şi aplicaţii practice*, Revista Română de Drept Comunitar, nr. 2/2009, p. 66.

[14] *Ibidem*, p. 67.

[15] P. Kiiver, *The Treaty of Lisbon, the National Parliaments and the Principie of Subsidiarity*, 15 Maastricht Journal of European and Comparative Law, 2008, p. 77-83.

Constitution, and the harmonization of our national law with the European one is our main goal in order to uphold democratic exigencies.

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A FEW CONSIDERATIONS ON THE STRUCTURE OF THE ROMANIAN PARLIAMENT WITHIN THE EUROPEAN CONTEXT

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Abstract

Starting with the current doctrinal controversies of bicameralism and unicameralism, the present article seeks to propose a coherent solution for the structure of the Romanian parliament in relation with internal particularities and the European context.

Key-words: *Parliament, bicameralism, unicameralism, the European context.*

Introduction

Traditionally, in every democratic society the legislative power is held by parliament, considered in literature as being "…the common point of intersection of political interests, of conflicting debates on the topic of how to solve the social problems and the major conflicts that arise in society."[1]

With regard to the number of chambers there are two broad categories of parliaments: unicameral and bicameral; in rare situations there can be more than two, in which case we have multicameralism.

1. The Specific Nature of the Romanian Parliament's Current Structure

The structure of the parliament is closely linked to the structure of the state. Generally, the unitary state imposes a unicameral parliamentary structure, while a federal state has a bicameral parliament. However, this formula does not apply everywhere, and thus there are many unitary states that have bicameral parliaments, Romania being amongst them.

If in the case of unicameralism, seeing as there is only one chamber whose responsibilities and rights are established by the Constitution and other laws, there are no problems of qualification, the same cannot be said of the

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[1] Ioan Vida, *Comentariu articolul 61 din Constituţia României*, în I. Muraru, Elena Simina Tănăsescu (coordonatori), *Constituţia României. Comentariu pe articole,* Ed. C.H. Beck, Bucureşti, 2008, p. 595.

bicameral structure, which has been widely analysed in the literature and starting from the constitutional and legal provisions many types of bicameralism have been identified. In order to ascertain what type of bicameralism exists in our country today, we will present two of the best-known doctrinal classifications.

One of them is developed by G. Sartori[2] who uses two variables to identify the types of bicameralism that exist in the world. The first variable is the equal – unequal power of the two chambers, and the second variable consists in the similarities or differences between the two chambers, more precisely whether they are similar or different in their nature or their structure.

In the case of the first variable, when the power of the two chambers is unequal we have a weak or asymmetric bicameral system (e.g. Great Britain), and when the power of the two chambers is almost equal we have a strong or symmetric bicameral system (e.g. Germany). Last but not least, when the power of the two chambers is equal, we have a perfect bicameral system (e.g. Italy).

As to the second variable, we can distinguish between types by whether the two chambers are: identical in their nature, if they are both elected or represent populations, and not territories (e.g. the Czech parliament, the Romanian parliament) or are similar in composition, if both are elected through harmonised electoral systems (either both are proportional, or both are majoritarian – e.g., the Romanian parliament). If these conditions of similarity are not met, then we have differentiated bicameral systems (e.g., the parliaments in Great Britain, Ireland or Austria)[3].

Arend Lijphart[4]offers us a more complex classification of bicameralism. He distinguishes between: symmetric or asymmetric bicameral parliaments and between congruent and incongruent bicameral parliaments. "Symmetric chambers are those with equal or moderately unequal constitutional powers and democratic legitimacy. The asymmetric chambers are very unequal from this point of view"[5]. The author quoted here appreciates that there are states with incongruent bicameralism, e.g. Germany, Spain, France and states with congruent bicameralism – Austria, Italy, the Czech Republic and others.

After the constitutional revision in 2003, Romania is, according to Sartori's classification, a bicameral system that is leaning towards becoming a

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[2] Giovanni Sartori, *Comparative Constitutional Engineering*, Palgrave Macmillan, London, 1997, translated into Romanian by G. Tănăsescu, J. M. Stoica, *Ingineria constituţională comparată*, Ed. Institutul European, Iaşi, p. 249-256.

[3] Bogdan Dima, *Parlament bicameral versus Parlament unicameral*, Sfera politicii, nr. 140/2009, p. 23.

[4] Arend Lijphart, *Patterns of Democracy*: *Government forms and Performance in Thirty-Six Countries*, Yale University Press, 1999, New Haven, translated into Romanian by C. Constantinescu, *Modele ale democraţiei. Forme de guvernare şi funcţionare în 36 de ţări*, Ed. Polirom, Iaşi, 2000, p. 188-200.

[5] *Ibidem*, p. 193.

perfect one, which means that the Chamber of Deputies and the Senate have equal power. These two chambers are similar in their nature and composition. According to Lijphart, the current Romanian bicameral system is strong, symmetric and congruent.

Romanian doctrinaires consider that our country has an integral and perfect bicameral system, generated in fact by the two chambers "having a position of equality, resulting from the fact that both are elected by universal, equal, direct, secret and freely expressed vote, which therefore makes them legitimate. Consequently, both chambers of parliament have the same authority"[6].

In case that the first chamber notified is the Chamber of Deputies, then it votes on a law project that it will subsequently send to the Senate. The Senate has three options at its disposal: adopt the law in the same form as the Chamber of Deputies voted for, amend it or they can disagree with it.

Therefore, in the first case the Senate confirms the vote of the first Chamber, in the second they modify the expressed will of the first Chamber and in the second it invalidates the Deputies' vote. Thus, the final decision belongs to the Senate, if it has the authority to legislate in that specific field in accordance with the Constitution.

If the first Chamber notified is the senate, the procedure is the same, only the roles of the Chambers are different.

In conclusion, the Chamber that actually decides is the one that makes the final decision. Taking these things into consideration, Romanian bicameralism is a strong one, in which both Chambers control each other mutually, but in a way defined and coordinated beforehand, in the sense that the legislator has outlined in the Constitution in which fields the two Chambers have authority[7].

Since 2003 Romanian bicameralism has received many counterarguments. Thus, it has been criticised for:

- maintaining equal power between the two Chambers;
- maintaining inefficient and redundant parallelisms (the same voting system, the same mandate length, the same population being represented by both deputies and senators).
- the Romanian solution adopted by the revised Constitution is contrary to bicameralism, because the bicameral parliament has actually been transformed into three unicameral parliaments[8].
- sanctioning the presumption that a legislative initiative, even if it has not been voted by either Chamber, is considered adopted by simple passage of time. After the 45 day period has expired, or 60 day period in the case of

[6] I. Muraru, M. Constantinescu, *Drept parlamentar românesc*, Ed. All Beck, Bucureşti, 2005, p. 72.

[7] Bogdan Dima, *Structură bicamerală sau unicameralăpentru Parlamentul României?,* The Public Law Review, nr. 3/2009, p. 41.

[8] I. Vida în I. Muraru, Elena Simina Tănăsescu (coord.), *op. cit.*, p. 601.

codes or other especially complex laws, the legislative initiative is considered approved. Therefore we have a case of "adopting the law by not adopting", which presents a paradox: "formally, mathematically it is a «perfect» bicameral system, as there are only two Chambers, thank God; functionally it is a radically «imperfect» bicameral system, as only one of the two has the last word in the «legislative verdict»"[9].

- Romanian bicameralism generates large and useless costs.

In our turn, we appreciate that no matter how optimal the constitutional solutions are, any parliamentary system, whether bicameral or unicameral, can be dysfunctional if in practice there is demagogy and a lack of responsibility, as the absence of a constitutional norm can be alleviated through rigorous and civically responsible parliamentary activity.

2. Romanian Bicameralism in the European Context

By European Union levels, the Romanian bicameral Parliament, as stipulated by the Constitution of 1991, revised in 2003 is unique in comparison to other bicameral systems, because it is the only one where both senators and deputies are elected by the same voting system, directly by the citizens, they represent the same population and have a common mandate of four years.

For example, if we look at some European states such as Italy, the Czech Republic, Poland, which have parliamentary systems similar to the Romanian one, we will observe that in Italy, senators are elected depending on the region, in the Czech Republic deputies and senators are elected by the same voting systems, directly by the citizens, however the senators' mandate is longer than that of the deputies, and in Poland the mandates of deputies and senators alike are equally long, they are elected directly by the citizens, but by distinct voting systems.

In Spain, the legislative initiatives belong to the Government, Congress and the Senate, but there are also public initiatives. According to art. 66 of the Constitution, both the Congress of Deputies as well as the Senate represent the Spanish people, although the Congress of Deputies is elected by universal, equal, direct, secret and freely expressed suffrage, within the terms stipulated by law, while the senate is considered as the Chamber of territorial representation, the rule being that every region elect 4 senators by universal, equal, direct, secret and freely-expressed suffrage.

Article 36 of the Belgian Constitution stipulates that the federal legislative power is exercised collectively by the King, the House of Representatives and the Senate, and article 42 specifies that members of the two chambers represent the nation and that they are elected.

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[9] I. Deleanu, *Instituţii şi proceduri constituţionale - în dreptul român şi în dreptul comparat*, Ed. C.H. Beck, Bucureşti, 2006, p. 188.

Also, we consider useful comparing the situation of the Romanian Parliament by relating the dimension of the population with the parliamentary structures and the number of members of parliament from all the other 26 European member states.

Besides Romania, 13 other European states in the EU have bicameral parliaments: Austria, Belgium, the Czech Republic, France, Germany, Ireland, Italy, Poland, The United Kingdom, Slovenia and Spain, while the remaining 14 have unicameral parliaments: Bulgaria, Cypress, Denmark, Estonia, Finland, Greece, Latvia, Lithuania, Luxemburg, Malta, Portugal, Slovakia, Sweden and Hungary.

By the number of members of parliament, Romania is ranked seventh, behind: the United Kingdom, Italy, France, Germany, Spain and Poland[10].

On a world scale, as concluded by a report of the Inter-Parliamentary Union (IUP) from 2009, there are more unicameral parliaments than bicameral ones. However, the bicameral parliamentary structure is adopted by some of the wealthiest states in the world[11].

3. Unicameralism or bicameralism in contemporary Romania?

Throughout the years, but especially in the last year, politicians and specialists have been debating by bringing forward reasons for and against unicameralism and bicameralism.

Unicameralism poses no problems to define, as it is a unitary parliament, undivided, containing a single chamber. Instituting this structure is firstly based on the fact that any subsequent division of the parliament could weaken its authority before the executive branch and this would complicate the legislative process.

The arguments in favour of unicameralism are divided in three categories: arguments of political philosophy, arguments that refer to the functioning of institutions and arguments that take into consideration the relationship between democracy and bicameralism[12].

Thus, one argument of political philosophy results from the fact that unicameralism is inspired by J.J. Rousseau's theory of sovereignty. According to this theory, sovereignty is indivisible, in principle it is impossible to divide the representation of the nation, the expression of this sovereignty.

Another argument, included in the second category, consists in the fact that if the two chambers are elected at the same time, for the same mandate and in the same manner and it has the same suffrage, the same method of scrutiny and the same electoral body, then they express the same interest, have the same composition and consequently in principle the division of these two

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[10] A se vedea situl: http://europa.eu/abc/european_countries/index_en.htm .

[11] A se vedea situl: http://www.senat.fr/senatsdumonde/index.html .

[12] D. C. Dănişor, *Drept constituţional şi instituţii politice, Teoria generală*, vol. 1, Ed. C. H. Beck, Bucureşti, 2007, p. 413.

chambers is useless. On the other hand, the existence of a second chamber weakens the legislative branch in favour of the executive one[13].

The arguments against a bicameral democracy show that if the two chambers are not elected at the same time, their majorities differ and may also be contradictory, which would impede the process of expressing the democratic will. If indirect suffrage is used to elect the second chamber, it would more likely represent a gathering of notables than the people, which is obviously undemocratic. If a different electoral system were to be used, democracy is harmed because forming the majority is contradictory. In case one of the chambers is elected for a longer duration, it distances itself from the electorate and thus it somewhat escapes its control[914].

These are but a few of the advantages of unicameralism, which justify the tendency towards this type or parliamentary structure in countries such as Sweden, Norway, Finland, Iceland, Denmark, Croatia, Hungary, Bulgaria, Greece, etc.

Among the arguments for bicameralism given by doctrine[15], we keep in mind that:

- by avoiding to concentrate all the power on parliament, the chambers, mutually prevent themselves from becoming a prop for an authoritarian regime;
- the quality of the legislative act can be elevated by successive analysis of the laws by the two legislative bodies;
- controlling the executive branch is more efficient by means of the two chambers;
- bicameralism combines the principle of representation on a national level with the principle of representation on a regional level;
- bicameralism is a modern means of ensuring the principle of separate powers within a democratic state;
- bicameralism is the most suited to give cohesiveness and to act as a guarantee of stability in times of transition.

All these controversies culminated with the referendum on the 22nd November 2009, organized simultaneously with the first round in the presidential election, which consulted the Romanian electorate on two subjects representing fundamental problems in the existence of a general state of law, and especially for the legislative body to be run well: the transition of the Romanian Parliament from a bicameral to unicameral and reducing the number of members of parliament.

The results of the referendum has shown that 72,3% of citizens that have voted have agreed to this transition to a unicameral parliament, while

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[13] D. C. Dănişor, *op. cit.*, p. 414.

[14] *Ibidem*

[15] Bogdan Dima, *Structură bicameralã sau unicameralã pentru Parlamentul României?,* Revista de Drept Public, nr. 3/2009, p. 45.

83,31% have voted in favour of reducing the number of members of parliament, from 471, the current number, to 300.

Although we appreciate that the Romanian citizens have approved this change, choosing the structure of parliament constitutes a far more extensive process, considering the fact that it represents one of the bases of a functioning and consolidated state of law and democracy.

First if all, choosing between one or two chambers does not constitute just a technical aspect related to the forming of a structure. The decision to have either a unicameral or a bicameral parliament is tightly bound to the model of democracy that functions in a state[16].

In order to find the most suitable structure for a parliament we must take into consideration the institutional and political relationships within the state.

Last but not least, it is vital that we identify and analyse in detail all the factors that influence the structure and the way in which parliament functions. In reality, the problem of modifying the structure of parliament is part of the wider problem of ensuring an efficient system of *checks and balances* between the three powers in the state[17].

Conclusions

The analysis of arguments for and against bicameralism/ unicameralism as well as of the structure of the parliaments of European Union member states has afforded us the possibility of concluding that at present, in Romania, the alternative of a unicameral parliament can be a viable option. However, in our case, we consider the current structural transformation from a redundant bicameral form, symmetric and congruent to an efficient bicameral system, asymmetric and incongruent, in which the two chambers have the role to maintain the balance and to reflect, so that the parliament is truly, as stipulated by the Constitution, the ultimate representative body of the Romanian people and the sole legislative authority of the country, timely and beneficial.

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SUPRASOCIETARE STRUCTURES IN ECONOMIC ACTIVITY
EUROPEAN PERSPECTIVE AND VISION

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Abstract

Upgrading corporate legal institutions is a process pursued with determination. Determining the stability and strength limits the European regulatory system is not a prospect too close. As with all European construction as a whole, it's a corporate law system that seeks the natural course through the difficult terrain of different national approaches, is still far from smooth over the flattened areas of consensus.

Key words: *European Union, groups of companies, commercial companies, Corporate law.*

Introduction

Groups of companies are realities suprasocietare structures that can not be legally discarded, but they do not have a coherent regulatory or legislative recognition distinct. The situation derives from state law the Directive Designed euroepan where groups of companies has never been adopted. Among groups of companies, holding companies, however, have special regulations and conceptual limitations, if not themselves, at least for use in sensitive areas lo existence can not be ignored.

Feature specific groups of companies is an economic, legal and study remains to define how to carry out control relations. Suprasocietar Group has no legal personality, subsequently, either their own assets. Suprasocietare control structure is unique however, in areas strictly limited legal effects to be obvious and necessary to be covered.

With no single regulator, each particular area of interest and has defined its own group of companies to solve their legal effects covered. For this reason, the module defining the concepts of interest is limited to specific and general treatment, a translation of concepts in particular in the overall plan of the group of companies. Lack of a single regulatory npoate not be supplied by extrapolation of the areas covered concepts unique to the concept drawing, in the absence of express reference.

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The issue of corporate superstructure has been a separate proposal for a directive of the European Commission since 1984 (Directive of the Ninth Company), who has not reached consensus Directive European rămânân in draft form. The failure of the proposed directive comes from the status quo of the majority of Member States legal system, which contains no explicit rules in the field.

If a comprehensive settlement appears to be outdated, even the commission[1] has proposed rules establish the framework for companies in a group that would allow the rights of creditors of the company and the existence of a fair balance between the obligations and benefits to shareholders. Common policy group shall not affect the individual interests of each group member, to ensure respect for the rights of creditors and other shareholders, the minority of private companies.

For shaping the concept of group of companies, the directive is based on the notions of parent and subsidiary, directly or indirectly control their influence. Amounting to a general level, the sense of group directiovei extends through assimilation to the dominant influence of the condition as a way of defining the group, but also by supplementing traditional control over the subsidiary's parent company as a whole with the leadership of the company and the subsidiary's Mommy .

Systematizing European norms on groups of companies, the lack of regulation unit can be raised mainly in the Directives on companies and regulated markets and in particular competition law[2].

From the perspective of Romanian law, the issue of groups of companies is a new concept. Compared to the previous lack of regulation, the Romanian legislature has only, in this case more than alre seats directly importing European references to groups of companies. For this reason, lending and gaps in the Community, the Romanian law knows no concept of a legislative consecration, no single source of regulation. Furthermore, the rules of the incidents stop several times to direct transposition of the European text, the Romanian legislature abdicates regulatory expectations, coherent and comprehensive law of the recipients.

Implementation efforts is taken in some cases directly by ministries or autonomous authorities (Competition Council, Ministry of Finance National Bank of Romania, etc), in the absence of a regulatory framework, regulatory updated situaează is often limited or beyond it, their regulatory powers. We appreciate that the legislature, in its logic, you should view and apply rules, shaping of legal practice, to achieve regulatory requirements inclined reality,

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[1] European Commission Communication to the Council and European Parliament, "Modernisin company law and corporate governance rules increased the European Union - A Plan for Development" (COM/2003/0284).

[2] Directives companies address issues in the context of groups of companies acquired by the company's own shares (II Directive, 77/91/EEC) and especially in the context of rules on financial reporting and consolidation of accounts 8Directiva VIIa, 83/349 / EEC).

not just for regulatory compliance and harmonization with European secondary law.

SUPRASOCIETARE STRUCTURES IN ADDRESSING STANDARDS FOR COMPANIES

Classically Company Law does not cover groups of companies, identity and structure without legal personality - even if they are not treated specifically, there are special rules îngtre reglemenetează certain legal relationships between the companies that control connections exist. One such area of interest for the legislator is armed with severe restrictions on holdings of mutual (cross-holding) the equity of the corporation will be treated in accordance with European standards as their indirect holdings. Commercial Law, in its older, established a rule that the ban on joint stock companies to acquire its own shares, both directly and indirectly.

Astăzi, urmărind acelaşi text european (în acest punct nefiind schimbat), legea societăţilor comerciale interzice societăţilor să subscrie propriile acţiuni .

Today, following the same European text (at this point is not changed), company law forbids companies to underwrite its own shares[3].

The difference, which can be considered as a substance, draws the distinction between primary issue of shares on acquisition ff secondary market, the actual purchase of shares already in circulation. Thus holding their shares through secondary market acquisition, becomes a situation allowed by law. Exceptions to the rule laid cunaoşte allow limited[4] or unlimited detention of its shares.

Conditions of acquisition of own shares shall be applicable to both the company itself and for companies who are against this type of relationship between a subsidiary and a parent, in the end application that requires a separation of a group companies. de o delimitare a unui grup de societăţi.

Conditions of acquisition of own shares shall be applicable to both the company itself and for companies who are against this type of relationship between a subsidiary and a parent, in the end application that requires a separation of a group companies.

Compared to this, the legislature has drawn a very general area companies who are in relationships of dependency with a company: other dominant companies in which the company holds, directly or indirectly, the majority of the voting rights or whose decisions can be influenced significantly Company shares (dominant).

This notion of significant influence is not explicit, it actually removes European legislation (Directive II of the corporate law), which governs the

[3] Legea nr.31/1990, art.102 alin.(1).

[4] The acquisition is only permitted: following the extraordinary general assembly decision setting the number of shares, mode, minimum and maximum value of the acquisition, payment can be made only from sources provided by law, must be fully paid shares and in a number not exceed 10% of the equity-art.1031alin.1 of Law 31/1990.

area "dominant influence" concept Carew appear in Romanian law until 2006[8].

Legal text refers to an abstract influence for qualification purposes, not for acquiring private decision dominant shares. The approach is correct, simply because the purpose of acquiring shares influence the interest and purpose transcends the norm. Only a stable relationship of dependence extending the system to acquire the shares and warrants finally enables companies dominated the assimilation of the shares acquired by the acquisition of own shares. A simple conjecture in terms of reaching particular decisions between companies is not so clear-cut apology and consequences extending the system to acquire its own shares.

What the legislature intended - without worrying about the groups of companies is preventing fraud. Acquisition of own shares through a controlled company is merely an attempt to avoid a restrictive legal regime. Evasion of regulation leaves unresolved situation of groups of companies in the same group of companies that depend on the same parent company.

Demarcation of the group of companies, even for purposes of regulation, it is important for proper application of rules relating to the purchase of own shares, the lack of such a delimitation of the group of companies, which apply to legal refgimul leaves unresolved practical situations. Legal rule is solely concerned with a relationship of "radial", the dominant society and a society dominated. Relations between dominant companies themselves, between the horizontal members of a group, however, are not covered..

Conditions of acquisition of own shares, and remedies for breach thereof, are rules of European law. Starting from the basic treaty of the Union's[9] aim is to ensure adequate protection for creditors and third parties in the company.

From this point of view and to achieve this goal, secondary European law was concerned realitqatea, maintenance and capital on the compulsory disclosure of such joint-stock companies.

European arrangements, followed very closely by the rules of law intermn, establishes a firm prohibition on underwriting own actions and restrictive legal regime in the acquisition and holding of own shares by companies.

If we follow closely the existing legislative gaps in the regulation of groups of companies, the European Directive raised the matter, recommends precisely the lack of regulation of groups of companies legislation in the Member States to define this dominant influence. In this case, if the Member

[8] These changes in company law (in which the dominant influence has been replaced with "significantly influenced decisions) are made by Law 441/2006.

[9] Treaty of Rome,art. 58, became after the Reform Treaty, the Treaty on European Union.

shall make this determination, must be classified as "dominant influence" at least two situations: the dominant company has the right to appoint or remove a majority of management or supervisory bodies and the company has full control over most of the votes attached to shares Understanding entered into with other shareholders.

When referring to the American vision, we see that American law has treated differently registration, issuance and holding of own shares. The best example is the actions "left on the shelf" and the shares issued, but not giving to subscruere available to the company for reasons of rapid further financing. In this way the company to register securities may be offered to investors in a continuous or delayed in the future. Operation is subject to compliance, placing limitations / considerations related to their use of transparency and investor protection.

GROUPS OF COMPANIES IN FUTURE FISCAL AND BANKING

Relevant is the fact that one of the main regulatory areas for groups of companies the consolidation of accounts in order to achieve the company's financial statements. Financial statements that satisfy the information requirements of both shareholders and investors and tax requirements.

In the interest of the tax legislation defines doctrine affiliate relationship. Relevant group structure for tax purposes is based on a threshold of relevance: a person owns, directly or indirectly, at least 25% of the units, shares and voting rights of another legal entity, or controls fact that legal person.

Affiliation relationship is commutative, that society is dominated society afiliastă dominant society, but also the dominant relationship is dominated society affiliation, the same type of relationship that are affiliate companies that are simultaneously in the same relationship with third party affiliation (transitivity).

Owning a quarter of the shares controlled group is defined as a basic rule for use tax, the legislature prefers to remove the subjective criterion of effective control. Defining the concept Previous reglmentarea was omitted anyway. The purpose of regulation is effective control cover any relationship, so that customization could undermine the rule coverage. The aim of regulation is to prevent "income transfer" and its translation by legal acts of simulated between different entities within a group of companies**.**

Tax approach in group companies

The principle of contractual freedom can not defend this case in private legal relations of the same group of companies a more careful observation. If legal relations arising between independent wills are presumed equivalence, determined by the parties of proportional counter provisions onerous-specific legal documents may be presumed that each party meet their interests, companies resulting socila if there is a legal act that causes.

Presumption can not work for companies in the same social group where wills are not by definition independent. Relationships involving control hierarchy, subordination to a dominant entity, or submission to a common control.

In its latest form, the tax law states that transactions between related parties are carried out according to the principle of free market price, the same condfiţii as between independent enterprises. Without necessarily remove the legal effects of acts between affiliates, the tax authorities are entitled to recommit as a transaction to reflect the economic substance of the transaction.

They can "adjust" the income or expenses related companies to respect the principle of equivalence of benefits in costly legal documents, such equivalence is achieved by some legal method: compare prices, cost-plus method, resale price method (which is market price determined by the resale price of goods or services by an independent person, less selling expenses and profit margin), any other method recognized in transfer pricing guidelines issued by the Organization for Economic Cooperation and Development Economnică (OEDC- English acronym.

Banking approaches in group companies

After the tax, capital markets, competition, and, of course, that common-law corporate banking and insurance and contain rules applicable to companies in the same group.

Previous banking legislation[10] defined group as represented by two or more individuals or legal entities that make a common policy towards a target company. Present regulation of the banking system has excluded direct reference to the group, focusing on the types of relationships that help shape suprasocietare architectures. Banking legislation uses the terms "subsidiary[11]", parent, control, strong ties. Concrete goal-oriented regulation is that the principal terms of the subsidiary and the parent to find different rules even in the same body of law. Thus, the purpose of supervision on a consolidated basis, these terms have defined a special sphere of incidence.

Conclusions

European optics present in the European corporate law, is in the process of relocation. Previous considerations, to modernize the legal framework of company, have evolved to the extreme views which aims to replace the total corpus of European legislation concerning corporate law. Rightly observed that it is a corporate harmonization of the oldest concerns of European secondary legislature. Basically, the concern to achieve a similar

[10] Nr. 58 din Act 1998, repealed. Spring is the current regulatory OUG nr.99 2006 on capital adequacy credits institutions (M.Of.nr.1027din December 2006), amended by Law no.227 D fine 2007 (M.Of.480din July 18, 2007), OUG nr 2008 .215 (M.Of.nr.847 of 16 December 2008, EGO 25 of 2009 (Official Gazette No, 179 of 23 March 2009).

[11] Emergency Ordinance no.99 of 2006 on credit institutions and capital adequacy, Article 7 paragraph 1 point 5.

corporate framework overlaps with the beginnings of European regulation of the European Union's main. Considerable effort is required to refresh the image conditions at the European started to realize that the harmonization of corporate unreported engine was afraid to escape from danger areas and the national societies of their concentration in one or two jurisdictions considered more friendly in terms of administratively, and perhaps tax. In the absence of initial fears of national differences in the field, but after nearly half a century of approximation for the purposes of regulations have been largely achieved, it is not surprising that it arrives, and get an idea rooted slowly rewording the domain total European corporate. Trends and ways forward are included again in a Commission Communication to the EU legislators. [12].

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[12] Commission Communication COM (2007) 394 final, Brussels, 10.07.2007, on a simplified business environment for companies in the areas of company law, accounting and auditing.

CONTEMPT OF THE JUDICIARY

Duvac Constantin*

Abstract

The author provides an insight into the offence of contempt of the judiciary, provided for under art. 272[1] of the Criminal Code, with a view to assisting the agencies enforcing criminal law with promptness and firmness. The author also refers to the way in which this offence is criminalised in the new Criminal Code, adopted by Law no. 286/2009, legislation that shall come in force probably as of 1 January 2012.

Key words*: judiciary, contempt, insult, threat.*

Introduction

The offence of contempt of the judiciary has been introduced in the positive criminal law as a result of the legislator's intention to provide a useful instrument to the judiciary in the fight against those attempting to diminish its authority and therefore to adversely impact on rendering a proper criminal justice in Romania.

For the purpose of criminal law, contempt of the judiciary means the uttering insulting words or using obscene or threatening gestures towards the bodily integrity of a judge, a prosecutor or a criminal investigation body, by a person who participates in or assists to a procedure that is conducted in front of a court or a prosecution body, or uttering insulting words or using obscene or threatening gestures addressed in a direct way towards the bodily integrity of a judge, a prosecutor or a criminal investigation body, police or gendarme, in connection to the acts performed in the exercise of their office.

Contempt of the judiciary is a new criminalisation, recently introduced in the Romanian criminal law by means of the Government Emergency Ordinance no. 198/2008 on the amendment and supplement of the Criminal Code[1] and it is provided for under art. 272[1] of the Criminal Code.

This text has been introduced as a consequence of the fact that in recent period an ever-growing number of offences have been committed, thereby prejudicing both the authority and the achievement of justice[2], being

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[1] Published in the Official Gazette no. 824/08.12.2008.

[2] In 2009, the Romanian Police: was reported with almost 3,500 offences to 100,000 inhabitants as compared to almost 3,000 offences in 2008; detected about 1,650 offences to 100,000 inhabitants, as compared to almost 1,550 in 2008 and solved about 1,300 offences as

likely to negatively impact on the public image of the judiciary and representatives of the public authorities having responsibilities in the area of public order and security, as well as to undermine the public confidence in the act of justice, by means of actions that are likely to defy the judiciary or representatives of the public authorities.

Under such circumstances, the purpose of this *ex novo* criminalisation has been to ensure adequate means to protect the impartiality and independence of judges, prosecutors and criminal investigations bodies, with a

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compared to almost 1,250 in 2008 to 100,000 inhabitants. Against this criminal background, we underline that in 2009, at the level of the Romanian Police, Romanian Border Police and Romanian Gendarmerie, *401 offences of outrage* were detected, where 532 police/gendarmes, as the case may be, were outraged. Out of these, in 368 cases offenders were investigated without being deprived of freedom, in 19 cases confinement measures were taken for 24 hours and only in 12 cases the measure of preventive arrest was taken. Mention must be made that in more than 90% of the cases refer to Romanian Police staff, and the number of outraged police has increased from a year to another (for instance, in 2006 their number was only 197, in 2007 their number was 276, whilst in 2009 their number exceeded 350 staff). Clearly, we assist to a continuous erosion of police authority in its relation with the wrongdoers.

Apart from the lack of firmness displayed by the prosecutors in such cases, the main cause that makes the offenders be investigated without being deprived of their freedom and implicitly the outraged police lack the authority which is conferred to them by means of legislation, in their relation with the community they serve, is represented by the *lack of a criminal legal and criminal procedure framework allowing for the investigation under arrest of these persons*.

Therefore, at present, the police, when exercising their office, are protected by means of the provisions or article 239 of the Criminal Code, yet this protection is insufficient considering that the punishment provided for by law for outrage, in its simple form (outrage by threat) is imprisonment of 6 months to two years or fine, whilst for the outrage committed by hitting or other forms of violence, the punishment provided for by law is imprisonment from 6 months to 3 years or a fine.

In accordance with the provisions of article 136 para. (5) of the Criminal Procedure Code, *the measure of preventive arrest may not be taken in the case of offences for which the law provides alternatively the fine punishment, whilst according to article 148 of the Criminal Procedure Code, the measure of preventive arrest may not be taken against the offender as the maximum punishment by imprisonment for the two cases is less than 4 years*.

These legislative obstacles and inequities are also retained in the new Criminal Code adopted by Law no. 286/2009. For instance, the punishment limits established for outrage (article 257 of the new Criminal Code) are less than those provided for by the Criminal Code that is currently in force (article 239). Moreover, *in an inexplicable fashion, by means of article 279 of the new Criminal Code referring to the judiciary outrage, judiciary police are excluded from criminal protection, although paradoxically these provisions apply, by assimilation, to the lawyer*.

Additionally, on one hand, the provisions relating to the use of firearms from Law on the regime of the firearms and ammunitions are highly restrictive, and on the other hand, police are very intimidated (either as a consequence of the insufficient knowledge of these provisions, or of the highly demanding attitude of the prosecutor who is informed about such cases) in applying article 47 *et seq.* from Law no. 17/1996 that are maintained in force by Law no. 295/2004.

view to creating the best framework for them to perform their incumbent duties, as well as to introducing the adequate legal framework, which is likely to provide the safeguards for ensuring the solemnity of the sittings and, generally, the entire activity conducted by the judiciary and representatives of the public authorities.

The special legal object of the contempt of the judiciary is represented by the social relations whose existence and conduct are protected by defending the achievement of justice against the acts criminalised in art. 272^1 of the Criminal Code.

The assimilated variant provides the safeguards for the social relations meant to ensure a proper operation of the public units, whereby certain public servants, explicitly mentioned in the text of article 272^1 of the Criminal Code are part of. [3]

In a subjacent fashion, social relations pertaining to the dignity and psychical integrity of the injured person are safeguarded as well.

The *material object* misses from this criminalisation, in both criminalisation variants, considering that the criminalised action goes towards an immaterial value. [4]

The *direct active subject* (the author) of the typical act is circumscribed and s(he) may only be a person who participates in or assists to a procedure that is conducted before a court[5] or before a criminal investigation body. As such, in respect of this particular offence, co-authorship is only possible when both perpetrators assist to such a criminal judiciary procedure.

However, this delineation is not required to be made for instigators and accomplices.[6]

In the assimilated variant, any person can be an author, when s(he) meets the general conditions for criminal liability. Criminal participation is possible in all its forms.

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[3] Article 272^1 of the Criminal Code - "The act of a person who participates or assists to a court procedure or a procedure conducted in front of a criminal investigation body utters insulting words or commits obscene or threatening gestures towards the bodily integrity of a judge, a prosecutor or a criminal investigation body shall be punished by imprisonment from 3 months to 1 year or by fine. The same penalty shall sanction the utterance of insulting words or use of obscene or threatening gestures addressed directly towards the bodily integrity of a judge, a prosecutor or a criminal investigation body, police or gendarme, for for acts performed during the exercise of office".

[4] *C. Duvac*, in *Gh. Diaconescu*, *C. Duvac*, Tratat de drept penal. Partea specială (Tratat), C.H.Beck Publishing House, Bucharest, 2009, p. 618. For the same purpose: *I. Pascu, Mirela Gorunescu*, Drept penal. Partea specială, 2nd edition, Hamangiu Printing House, Bucharest, 2009, p. 475.

[5] In accordance with article 299 para. (1) of the Criminal Procedure Code, if during the works of the sitting an offence provided for by criminal law is committed, the chairman detects that particular offence and identify the offender. The minutes drawn up whereby shall be referred to the prosecutor.

[6] *C. Duvac*, Tratat, p. 618.

An active subject of this offence may be a legal person as well, under the conditions and with the limitations provided for in art. 19^1 of the Criminal Code.

The *passive subject* of this offence, in its both variants, must have a special statute. In the typical variant, s(he) is a judge, a prosecutor or a criminal investigation body, whilst in the assimilated form, s(he) must be a judge, a prosecutor, a criminal investigation body police or gendarme.

The statute of *magistrate* was provided for by Law no. 303/2004 on the Statute of the judges and prosecutors, [7] according to which the judges from all courts, the prosecutors from the prosecutor's offices attached to these courts, as well as the magistrate-assistants of the High Court of Cassation and Justice have this statute and are part of the corps of magistrates. Additionally, the Minister of Justice, his/her deputies and the legal staff from the Minister of Justice are assimilated to magistrates, for their tenure. As such, in accordance with relevant legal provisions, the military judges and military prosecutors are magistrates and they are part of the corps of magistrates.

Furthermore, the magistrates of the Constitutional Court also come under the safeguards of the text under analysis, as well as the magistrate-assistants who, according to the provisions of article 48 para. (3) of the Law on the organisation and functioning of the Constitutional Court,[8] are assimilated to those from the High Court of Cassation and Justice.

Criminal investigation bodies are the criminal investigation bodies of the judiciary police [article 201 para. (3) of the Criminal Procedure Code], as well as the special investigation bodies (article 208 of the Criminal Procedure Code[9]).

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[7] Published in the Official Gazette no. 576/29.06.2004, recast in the Official Gazette no. 826/13.09.2005, further amended and supplemented.

[8] Law no. 47/1992 published in the Official Gazette no. 101/22.05.1992, recast in the Official Gazette no. 643/16.07.2004.

[9] "The criminal investigation is also performed by the following special bodies:

a) officers especially appointed by commanders of military units special corps and similar, for the subordinated militaries. The investigation may also be performed personally by the commander.

b) officers especially appointed by the garrison commanders, for offences committed by militaries outside the military units. The investigation may also be performed personally by the garrison commanders;

c) officers especially appointed by the commanders of military centres, for offences falling under the competence of military courts, committed by civil persons in relation with their military duties. The investigation may also be performed personally by the commanders of the military centres. At the request of the commander of the military centre, the police body performs certain investigation acts, after which it leaves the activity to the commander of the military centre;

d) border police officers, especially appointed for border offences;

e) port captains, for offences against security of water navigation and against order and discipline on board, as well as for work or work-related offences stipulated in the Criminal code, committed by the navigating staff of the civil marine, if the offence did endanger or could have endangered the security of the ship or of navigation. In the cases provided for

Specialised staff from the Ministry of Administration and Interior, appointed on a nominal basis by the Minister of Administration and Interior, with the assent of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, perform their duties as investigation bodies of the judiciary police, under the authority of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice. Withdrawal of the assent of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice leads to the cessation of the statute of judiciary police staff. When the special legislation provides for a different procedure for appointing and functioning of the judiciary police bodies, the provisions of the special legislation shall apply.

Mention must be made that, in the assimilated variant, the scope of passive subjects is wider than those of the typical variant, as the police and the gendarmes are mentioned as well, whilst in order to benefit from the protection of the text, they must be contempted (for the purpose of the text) for acts fulfilled in the exercise of their office.

The *police*, in accordance with article 1 of Law no. 360/2002 on the Statute of the police, [10] is a civil public servant, having a special statute, armed, as a rule wearing a uniform, and exercising the functional duties that are established for the Romanian Police by law, as a specialised state institution.

The statute of a *gendarme* stems from the provisions of Law no. 550/2004 on the organisation and functioning of the Romanian Gendarmerie. [11]

In order to benefit from this special protection, in both normative situations, the passive subject has to exert his/her functional duties within the limits provided for by the legal instruments regulating his/her activity. On the contrary (abusive conduct) the provision of article 205 or article 193 of the Criminal Code, as the case may be, are to be applied, provided the other conditions, mentioned thereby are met. [12]

In any of the normative modalities of the contempt of the judiciary, plurality of passive subjects engenders a real offence plurality in the form of a real concurrence of offences, and the perpetrator is to be liable for as many criminal offences as the number of the injured persons. [13]

The *material element* of the offence represents an action of uttering insulting words or using obscene or threatening gestures towards the passive

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under points a), b) and c), the criminal investigation is mandatorily performed by the special bodies mentioned thereby".

[10] Published in the Official Gazette no. 440/24.06.2002, further amended and supplemented.

[11] Published in the Official Gazette no. 1175/13.12.2004.

[12] *C. Duvac*, Tratat, p. 618.

[13] Ibidem, p. 619.

subject. In this context, contempt of the judiciary is purely a commissive offence that may only be perpetrated by way of an action. [14]

It is sufficient for an offence to exist to use either insulting words, for the purpose of article 205 of the Criminal Code, or obscene or threatening gestures. The completion of this multiple normative modalities by the same person does not affect criminal unity. [15] The offence under analysis exists even if insulting words or gestures do not have the intensity or do not meet the constitutive elements of the offence provided for under article 193 of the Criminal Code.

According to article 2 para. (2) of Law no. 196/2003 on the prevention and fight against pornography, further amended and supplemented,[16] recast[17], obscene materials are represented by "objects, engravings, photos, holograms, drawings, writings, printed documents, emblems, publications, films, video and audio recordings, commercials, IT software and applications, musical works, as well as any other forms of expression presenting in an explicit or implied manner a sexual activity".

To put it differently, obscene means the indecent, pornographic feature of the object or of the act, drawing, writing, that is the vulgar, coarse manner of envisaging attitudes, aspects or practices related to sexual life. [18]

Essential requirements. In the typical variant, at the moment of committing the concrete act, a judiciary proceeding must be in progress (for instance, a hearing, a confrontation, a home search etc.). Neither the statute of the active subject in that particular procedure, nor its status (pre-trial or trial, in the substance or appeal procedures) make any difference. S(he) may be a party in the criminal proceedings or a person who contributes to rendering criminal justice.

In the said judiciary proceeding, prosecution must not necessarily have been initiated; therefore the offence under analysis exists even in the case when that particular proceeding is in the preliminary stage. [19]

In the assimilated variant the contempt of the judiciary, of the police or of the gendarme has to be made for the acts fulfilled by them in the exercise of their office. When the criminalised act is completed towards one of the afore-mentioned persons being in the exercise of their office, the provisions of article 205 of the Criminal Code (insult), article 239 of the Criminal Code (outrage) or article 321 of the Criminal Code (Outrage against good usage

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[14] Ibidem.

[15] Ibidem. For the same purpose, please see also: *I. Pascu, Mirela Gorunescu*, op. cit., p. 479

[16] Published in the Official Gazette no. 342/20.05.2003, reviewed in the Official Gazette no. 531/24.07.2003, modified by: Law no. 496/2004 (Official Gazette no. 1070/18.11.2004) and Law no. 301/2007 (Official Gazette no. 784/19.11.2007).

[17] Official Gazette no. 87/4.02.2008.

[18] *O. Loghin, T. Toader*, Drept penal român. Partea specială, 4th reviewed edition, "Sansa SRL" Printing and Editing House, Bucharest, 2001, p. 662.

[19] *C. Duvac*, Tratat, p. 619.

and disturbing public order and calm) shall apply, if the other criminalisation conditions provided for under these texts are met. [20]

In cases when acts coming under the content of the offences under analysis are committed, and also acts representing an outrage (for instance, threatening gestures towards bodily integrity and hitting) and when the social value criterion that is damaged by the perpetration of the offence is taken into account, one has to hold a concurrence of offences between contempt of the judiciary and outrage, because by the perpetration of these respective offences, both authority and the achievement of justice are affected. [21]

The *immediate consequence* resides in a state of danger for the social value protected by criminal law.

The *causality* between criminalised action and the immediate consequence has to exist and it stems from the materiality of the act itself (*ex re*).

The *type of guilt* that is particular to this offence is *direct or indirect intent*. [22]

There are no essential requirements as to the *purpose* or *motive*, so that acknowledging them is not needed as to the existence of subjective side of the offence, yet it is needed only for rendering a judicious criminal repression individualization.

Contempt of the judiciary is criminalised only in its completed form. *Preparatory acts* and the *attempt* to this commissive and intentional offence are possible, yet they are not criminalised and consequently they are not punished as well.

The *completion* of this criminal offence occurs when the criminalised act is achieved and when the immediate consequence has been produced.

When the act is directed towards the same passive subject, it may take the continued completion form, and in this case the *completion* moment occurs at the moment of committing the latest criminalised action. [23]

The contempt of the judiciary presents more *normative modalities*, depending on the way in which the criminalised action is described or subject to the statute of the passive subject. Numerous *factual modalities* may correspond to them, subject to specific conditions under which the contempt of the judiciary was committed, and which will be taken into account when individualizing criminal liability.

Mention must be made that this criminalisation norm is implicitly resumed and with multiple improvements (that is the enlargement of the incrimination), yet with some drawbacks in the new Criminal Code (adopted

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[20] Ibidem.

[21] *I. Pascu, Mirela Gorunescu*, op. cit., p.479.

[22] *C. Duvac*, Tratat, p. 619. For the same purpose: *I. Pascu, Mirela. Gorunescu*, op. cit. p. 478.

[23] Ibidem.

by Law no. 286/2009), in article 279 – Judiciary outrage – that is to come into force probably on the 1st of January 2012. Unfortunately, in an inexplicable way, in the new legislation, criminal investigation bodies were excluded from the scope of the criminal protection, although they are part of the judiciary contributing to achieving criminal justice. As such, we propose, *de lege ferenda*, the replacement of the term „prosecutor" with the phrase „prosecution body" in the content of article 279 of the new Criminal Code. [24]

The offence under analysis shall be punished by imprisonment from three months to one year or by fine.

The contempt of the judiciary committed by a legal person, in any of the modalities provided for under article 272^1 of the Criminal Code, shall be punished by judicial fine between 5.000 lei and 600.000 lei, according to article 71^1 para. (2) of the Criminal Code.

For the offence provided for under article 272^1 of the Criminal Code, *criminal action* is initiated *ex officio*.

The proceedings, as well as the prosecution and trial competence are conducted following regular procedural rules.

Therefore, the criminal investigation body has the competence to conduct criminal prosecution, under the supervision of the prosecutor from the prosecutor's office attached to the court.

The case referring to the perpetration of the contempt of the court shall be tried at first instance by the court.

Conclusions

It comes out, undoubtedly, from the afore-mentioned, that under the current socio-economic circumstances, such a criminalisation is most welcome. However, a greater responsiveness is needed from the part of the criminal prosecution bodies that have competence to investigate these offences as no final decisions have been passed so far by courts in this respect.

Although it is a commendable that the new Criminal Code provides for and aggravates criminal liability incumbent on those breaching criminal law, in this respect, by article 279, it is regrettable, however that criminal investigation bodies were excluded from the scope of those benefiting from this enhanced protection. Considering that the legislative technique norms allow for making this happen, we are confident that, by the date of its entry into force, the text of article 279 of the new Criminal Code is amended in the sense of the aspects proposed by us.

[24] *C. Duvac, Unele observaţii critice cu privire la proiectul unui al doilea nou Cod penal*, in "Cross-border crime at the border between the present and the future" T.K.K. Debrecen, Hungary, 2009, bilingual edition (Romanian-Hungarian), pp. 91-106, 373-390.

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NATURAL COMPLEXITY. REFLECTIONS

Constantin Duvac*

Abstract

Every time we refer to unity of offences and plurality of offences, we make a certain judgement, we reach to a certain conclusion as to the existence of a sole penal law infringement or more such infringements.

Key words: *offences, penal science, jugdement, natural complexity, plurality, penal law.*

Introduction

By making such a judgement on surrounding reality, from the viewpoint of penal science, one has to differentiate, from the outset, between the natural, objective existence of the object that we characterise as a unity or a plurality and the legal conclusion on it, conclusion that may not always coincide with the object regarded as a natural entity likely to be perceived through senses.

Normally and most often there is undoubtedly such a coincidence, that is the judgement as to the unity of the analysed object corresponds to its natural unity and, in the same fashion, the judgement of a plurality of analysed data corresponds to the natural plurality of the objects subjected to such an evaluation.

1. There are certain cases when such a coincidence may be missing, meaning that what is considered to be a unity by nature may represent in the light of penal law a plurality and what is naturally a plurality to be treated as a unity from the penal law standpoint.

In such cases, the judgement regarding the unity and plurality of the analysed object does not alter its natural reality and does not ignore it, yet it only attributes, for penal policy reasons, a different significance, that is a specific meaning linked to the penal policy interests or other particularities of penal repression or legislative technique.[1]

2. As regards the unity and plurality of offences, one has to differentiate between real situations and apparent ones as well as between factual situations and legal ones.

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[1] Constantin Duvac, *Unity of offence and plurality of offences. Reflections*, Penal Law Review, issue no. 2, 2008, p.114.

Apparent plurality of offences exists when a single action (or omission) looks like infringing more penal rules or when the materiality of more actions (or omissions) appear as a plurality although, naturally or legally, they should have been deemed as a unity of offences[2].

Subject to the way in which apparent plurality is envisaged, one could conceive the possibility of an *apparent plurality per se* within which, although there is a single action or inaction, either naturally or by law, the legal provision is presented in such a manner that seems to confirm the idea of a plurality of offences[3]. Consequently, in all these cases, the manifestation of the apparent plurality of offences stems from the text formulation itself, whilst in the cases when the legislation does not provide for a definition of the respective institution, it originates from the way in which the doctrine explicitly characterises it.

We would incorporate in this form the following: concurrence of penal norms, ideal concurrence of offences, continued offence and complex offence.

In our opinion, apart from this category of apparent plurality, there would be an *improper apparent plurality* of offences in the cases where the manifestation of such a plurality is not suggested by the legal provision itself, yet it results either from the analysis of the acts of completion or from the unifying intervention of the legal interpreter, or from both of them[4]. To put it in different words, its foundation relies neither on the way in which the legal definition is formulated, nor the characterisation in the doctrine, yet it is inferred from the interpretation of the way in which the specific activity is developed, and this development appears to suggest the existence of more offences, although in reality there is a unity of offence.

Within this form we would incorporate the following: simple natural unity of offence with a plurality of contextual acts, succesive continuous offence, natural complexity and progressive offence, and *not* the deviated offence (as in our opinion, in this case, - in both of its forms - *error in personam* and *aberatio ictus - the solution of* concurrence of offences is to apply[5]) and habitual offence (since plural acts, perpetrated by the offender have no penal relevance by themselves).

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[2] *Ibidem*, p. 119.

[3] Constantin Duvac, *Apparent plurality of offences*, Bucharest: Universul Juridic, 2008, p.30.

[4] *Ibidem*, p. 31.

[5] The solution adopted by most of the Romanian doctrine advocating for the existence of natural unity of offence in the case of deviated offence (in both of its forms of manifestation: *error in personam* and *aberatio ictus*), and implicitly of an improper apparent plurality of offences is not beyond critiques. It is true that in both cases the active subject aimed at murdering a person and this result was achieved either by making a confusion as to the victim, or by deviating the action upon the victim, yet such a reasoning simplifies things to the most. The active subject did not intend to murder a person "in general", aspect that would have justified to ignore the person of the victim either in case of error, or in the case of action deviation. We don't exclude the existence of such cases, for instance in organised crime cases, or in cases of serial killers, when the active subject kills irrespective of the person of the

Whilst for the first category of apparent plurality (apparent plurality *per se*) external factors (the way in which the text is formulated) imprint natural unity with the feature of plurality, for the second one (improper apparent plurality), internal factors unify the plurality, they alter it, by changing its significance from natural plurality to apparent plurality, whilst the unity concealed behind this apparent plurality becomes a real unity[6].

B. According to Romanian doctrine, *natural* complexity exists when the objective elements of an offence, although dealt with separately, would constitute the traits of an autonomous offence, are by nature part of the content of another offence[7]. Although it has been argued that this form of

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victim (*i.e.* of the victim's identity or traits). Yet, as a rule, criminals being in error situations aim at suppressing the life of a specific person they have had a conflict with or in relation with whom they have had other reasons or interests to suppress their life. From this viewpoint, the argument stating that the subject, by intending to murder a person, the question of who is the victim doesn't matter, is far from being in accordance with the well determined feature of the victim in the murderer's representation and upon whom he/she directs his/her aggressive action. The active subject is not interested in murdering any person (it may appear that the murdered victim is the defendant's good friend or relative), yet a certain person, his/her intention to kill being stated in relation with the identity and features of a well determined person. Penal law should not ignore such realities. Reasoning in such a manner, it seems that one can get to an objective penal liability (exclusively for the result), by ignoring the evolution of the legal theory and practice that place the subject, and his/her subjective position, against the background of penal liability.

From this perspective, it would appear right to us that deviated offence, under its two modalities, to be dealt with as a plurality of offences (an attempted murder and a manslaughter), whether, subject to the circumstances of the case, the defendant could and should foresee the effectively produced result.

This solution is already enshrined by German, Austrian and other legislation, in terms of the deviation of action, and there are many authors adopting this position. We consider that such a development is to be achieved progressively in our country as well. Moreover, we consider that the solution of real plurality of offences should be extend also to the cases of *error in personam*, the arguments brought in favour of the action's deviation applying for this assumption, too.

For further details, please see also Constantin Duvac, *Deviated offence, unity or plurality of offences*?, in "Legal researches in honour of Professor LL.D. George Antoniu", collective work, Bucharest: Hamangiu, 2009, pp. 98-110.

[6] Constantin Duvac, Apparent plurality of offences, cit. supra, p. 31.

[7] Iosif Fodor, in Vintila Dongoroz, Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stanoiu, *Theoretical Explanations of the Romanian Penal Code. General Part,* vol. I, Bucharest: Academiei Print House, 1969, p. 292. *For the same purpose*: Constantin Bulai, *Penal Law. General Part,* vol. II, *The offence*, Bucharest, 1981, p. 156, Vasile Patulea, *Theoretical and practical aspects regarding the structure of complex offence*, Penal Law Review, issue no. 4, 1984, p. 30; Lidia Barac, *Penal Law. General Part,* vol. I, "Eftimie Murgu" University, Resita, 1994, pp. 141-142; Costica Bulai, *Penal Law Handbook. General Part*, Bucharest: All, 1997, p. 484; Ilie Pascu, in Vasile Dobrinoiu, Gheorghe Nistoreanu, Ilie Pascu, Alexandru Boroi, Ioan Molnar, Valerica Lazar, *Penal Law. General Part,* 4th edition, reviewed and supplemented with the provisions of Law no. 140/1996 regarding the amendment and supplement of the Penal Code, Bucharest: Europa Nova, 1997, p. 248; Lidia Barac, *The constants and variables of penal law, General Part. Special Part. Penal caselaw,* Bucharest: All Beck, 2001, p. 76; Costica Bulai, Bogdan N.

complexity would have neither a theoretical relevance, nor a practical one[8] (there are even some authors[9] who don't address at all this form of complexity), yet it has a certain significance. The acts of fulfillment of the consummated offence occur in such situations as serious acts of completion (because if dealt with separately they also represent autonomous offences) and also as stages of perpetration of a more serious simple offence. Consequently, it is possible to resurrect the absorbed offence, provided the more serious offence is not completed as a consequence of the interruption of perpetration by desisting or by preventing the result to be produced, after the perpetration has been ended[10].

The existence of certain perpetration acts having a double significance is therefore specific to natural complexity: on the one hand, they represent an autonomous offence, dealt with separately, and on the other hand, they are steps of accomplishing a consummated offence. For instance, the offence of completed homicide may be preceded by acts of perpetration consisting of simple or grievous bodily harms. Such acts of perpetration are also named serious as, even dealt with separately, they are provided for by penal legislation.

Undoubtedly, in the case of this complexity, there is an appearance of plurality caused by the fact that from the specific way of committing the offences stems the possibility of distinct provision in the penal norms of at least two offences: acts of perpetration and consummated offence. Yet, this plurality is apparent since in reality there is just an offence (the consummated offence) that naturally absorbs the acts of perpetration.

Natural absorption does not stem only from the way of committing the offences, since it is partially provided for by the legislation itself. In the legal content of the absorbent offences, the features of the absorbed offence are *implicitly* in-built. Natural absorption does not function only *in concreto*, on a case by case basis, yet it is to be applied also in relation to the legal content of penal norm. Certain offences, as they are outlined in the penal norm, cannot

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Bulai, *Penal Law Handbook. General Part*, Bucharest: Universul Juridic, 2007, p. 515; Gheorghe Alecu, *Penal Law. General Part*, university course, 2nd edition, reviewed and supplemented, Constanta: Europolis, 2007, p. 311-312.

No mention about natural complexity: Mihai Adrian Hotca, *Comments and explanations on the Penal Code*, Bucharest: C. H. Beck, 2007, p. 477-487; Mihai Adrian Hotca, *Penal Law. General Part*, Bucharest: C. H. Beck, 2007, p. 466.

[8] Matei Basarab, *Penal Law, general part*, vol. II, Bucharest: Lumina Lex, 1997, p. 105; Matei Basarab, *Penal Law, general part, Treaty*, vol. II, Bucharest: Lumina Lex, 2005, p. 67.

[9] Maria Zolyneak, *Penal Law. General Part*, vol. II, Iasi: Fundatia Chemarea, 1993, p. 441-452.

[10] Iosif Fodor, *op. cit.*, vol. I, 1969, p. 292. *For the same purpose*: Constantin Bulai, *op. cit.*, 1981, p. 156; Costica Bulai, *op. cit.*, 1997, p. 484, Costica Bulai, Bogdan N. Bulai, *op. cit.*, 2007, p. 515; Constantin Mitrache, Cristian Mitrache, *Romanian Penal Law. General Part*, 4th edition, Bucharest: Universul Juridic, 2007, p. 266.

be perpetrated without including the own activity of another offence, when the latter is provided for by penal law. It is necessary for this absorption to originate, it applies naturally, just as an effect of analysing the penal norms comprising the provisions of the two offences. For instance, the serious burglary naturally absorbs the activity of destroying or damaging the locks, so that this activity can not apply as a separate offence of destruction, yet it it is encapsulated, by natural absorption, in the offence, which thus becomes a complex one, called burglary[11].

Some authors[12] argue that natural complexity stems from the natural absorption into the consummated offence of the *attempted offence*, or, in the case of certain offences against persons, the absorption of less serious offences into other offences, more serious. In such cases of natural complexity, the unity of the simple offence is retained, and its material element also contains the material element of a less serious simple offence. There is an interest to get the knowledge about natural complexity since failure to achieve the content of the more serious offence will lead to the liability of the offender for the less serious offence.

Conclusions

In our opinion, natural complexity represents a form of apparent plurality of offences, as at first sight this is represented as a plurality of offences, the subject accomplishing both the absorbent offence and the absorbed one. Only through the analysis of the criminal conduct one gets to the conclusion that the less serious offence is absorbed by the more serious one and implicitly to the conclusion of unity of offence.

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[11] Doru Pavel, The complex offence. Structure. Critieria to differentiate from concurrence of offences, J.N., issue no. 11, 1964, p. 61. For the same purpose: George Antoniu, In relation with the unity and plurality of offences, Penal Law Review, issue no. 9, 1967, p. 122 et seq. Ion Dobrinescu, Provision of complex offence in the new Penal Code, Penal Law Review, issue no. 7, 1969, p. 24-25; Vasile Papadopol, Considerations on the legal classification of trespassing offences perpetrated in view of committing other offences, Penal Law Review, issue no. 9, 1975, p. 31; Doru Pavel, in Vasile Papadopol, Doru Pavel, Forms of unity of offence in Romanian penal law, Bucharest: Sansa S.R.L., 1992, p. 189-190.

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THE RECOGNITION OF PROFESSIONAL QUALIFICATION AT EUROPEAN LEVEL

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Abstract

The rights of citizens to practice economic activities in another Member State are a fundamental aspect of the European labour market. Within the limits of the Internal Market rules, each Member State is free to make access to a particular profession. But this is an obstacle to the free movement of professionals in the European Union. So, the aim of Directive 2005/36/EC is to facilitate recognition of professional qualifications within the European Union.

Key words: *European labour market, professional qualifications, education, training conditions.*

Introduction

The recognition of professional qualifications at European level is only one of the measures to unify the educational requirements related to those of free movement of labor within the European Union. Although the education system differs from country to country, education is an ongoing concern of Member States. The implementation of these important issues, the EU is a favorable framework for the exchange of ideas and debate best practice, its role being to develop a more effective cooperation between Member States by maintaining the right of each state to decide on the content and organization systems education and training.

The Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications. General aspects

Among the fundamental freedoms in the Single Market are the rights of EU citizens to establish themselves or to provide services anywhere in the EU. These regulations which only recognise professional qualifications of a

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particular jurisdiction are obstacles to these fundamental freedoms. These obstacles are overcome by EU rules guaranteeing the mutual recognition of professional qualifications between Member States.

These rules are mainly the following:

- harmonisation of training requirements which allow for automatic recognition of professional qualifications and which are mainly in the health sector (doctors, nurses, dentists, midwives, veterinary surgeons, pharmacists and architects); further information can be found on the pages "*specific sectors"*
- mutual recognition which applies to all the professions for which Member States require a qualification, with the exception of the professions mentioned in the previous indent; more information is available on the pages "*general system*"
- automatic recognition of professional experience for professions of craft, commerce and industry sectors
- rules applying to lawyers concerning the provision of services and the establishment under the title of country of origin
- recognition of qualifications concerning activities in the fields of commerce and the distribution of toxic substances
- Coordination of the laws of the Member States relating to self-employed commercial agents which harmonizes civil law on the relationship between agent and principal (directive 86/653/EEC).

The EU has recently reformed the system for recognition of professional qualifications, in order to help make labour markets more flexible, further liberalise the provision of services, encourage more automatic recognition of qualifications, and simplify administrative procedures.

As a result of the request made by the Stockholm European Council in March 2001 the European Commission proposed a new directive on the recognition of professional qualifications in order to create a more uniform, transparent and flexible to modernize the entire European system of recognition of qualifications.

The draft directive aimed at bringing together the 15 existing directives - three of the general system of recognition of qualifications and 12 sectorial directives relating to the professions of doctor, nurse, dentist, veterinary surgeon, midwife, pharmacist and architect - for which there are different systems recognition. It is estimated that the directive will contribute to the flexibility of labor markets, to accelerate the liberalization of service provision, to encourage automatic recognition of qualifications and to simplify administrative procedures.

Therefore on September 7, 2005 was approved by the European Parliament and Council Directive no. 2005/36/EC on the recognition of professional qualifications which are repealed Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC,

80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC, 89/48/EEC, 92/51/EEC, 93/16/EEC and 1999 / 42/EC.

The Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (Text with EEA relevance) which has come into effect on 20 October 2007, consolidates and modernises 15 existing Directives covering all recognition rules, except for those applicable to lawyers, activities in the field of toxic substances and commercial agents. This is the first comprehensive modernisation of the EU system since its introduction over 40 years ago.

The directive applies to all citizens of Member States wishing to conduct a regulated profession, as employees or self-employed, in a Member State other than where they obtained their professional qualifications. Not covered by the regulations specific directives on the right of free circulation of services and establishment of lawyers (Directives 77/249/EEC and 98/5/EC) because they do not relate to recognition, but the law authorizes the practice. Recognition of professional qualification of lawyers was previously covered by Directive 89/48/EEC and therefore covered by the new directive.

The recognition of professional qualifications allows beneficiaries to engage in the host country for the profession who obtained qualifications in the Member State of origin and the right to pursue such occupations under the same conditions as citizens of that Member State where that profession is regulated.

The Directive distinguishes between "freedom to provide services" and "freedom of establishment" based on criteria identified by the European Court of Justice: duration, frequency, regularity and continuity services. In the first case, the person can provide services on a temporary and occasional basis, based on the original document of qualifications, without the need for recognition of the qualifications. If the profession is not regulated, the service must provide proof of professional experience of 2 years.

In the second case, involving the establishment in another Member State, the Directive provides three systems of recognition:

- The general system of recognition of professional qualifications - Chapter I: The system applies to all professions where there are no specific rules for recognition, and if the person does not comply with the other recognition schemes. This system is generally based on mutual recognition, subject to countervailing measures if there are large differences between individual preparation and training to conduct business in the host. These compensatory measures may relate to an adaptation period or an aptitude test.
- The system of automatic recognition of qualifications attested by professional experience - Chapter II: The industrial, crafts and trade activities listed in the directive are subject to the conditions set by this automatic recognition of qualifications attested by professional experience.
- The system of automatic recognition of qualifications for certain professions

- Chapter III: This recognition can be done concurrently with the satisfaction of minimum requirements for training in the following professions: doctor, nurse, dentist, dental specialist, veterinary surgeon, midwife, pharmacist and architect .

In terms of language proficiency requirements host Member State, Directive provides the conditions necessary to accomplish this work. Assessment of language skills and recognition is separated from it can be adjusted based on tests of language proficiency level required service provision

It is important to note that the rules of the Directive differ depending on the profession. There are three main categories of professions subject to different rules, i.e.:

- the professions for which the minimum training conditions were harmonised at European level: doctor, nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, pharmacist and architect. These professions are referred to in this guide as the 'sectoral professions';

- the professions in the fields of trade, industry or business referred to in Annex IV to Directive 2005/36/EC;

- all the other professions, which are referred to in this guide as the 'general system professions'.

Who can you benefit from the advantages conferred by the directive 2005/36/EC?

Directive 2005/36/EC is addressed only to professionals who are fully qualified to practise a profession in one Member State and who wish to practise the same profession in another Member State.

It does not apply to those who want to study in another Member State nor to those who are starting a training course in one Member State and want to continue it in another Member State. They should contact the National Academic Recognition Information Centres (NARIC) for information on the academic recognition of diplomas[13].

Directive 2005/36/EC does not apply to professions covered by specific directives, such as official auditors who are covered by the scope of Directive 2006/43/EC, insurance intermediaries who are covered by Directive 2002/92/EC, or lawyers wishing to work in another Member State under their home-country professional titles, who are covered by Directive 77/249/EEC and 98/5/EC. There are also several specific directives in the transport sector[14].

[13] http://www.enic-naric.net/

[14] For example: If a Slovenian air traffic controller wants to work in Italy, the recognition of his professional qualifications is covered by Directive 2006/23/EC; if you he is a Czech airline pilot and he wants to work in Poland, he come under Directive 91/670/EC; several professions in the maritime sector are covered by Directives 2005/45/EC and 2008/106/EC.

Directive 2005/36/EC applies to all the professions that are not covered by a specific directive. A non-exhaustive list of the professions covered by Directive 2005/36/EC can be found by consulting the European official database[3].

Directive 2005/36/EC applies to nationals of 30 countries: the 27 Member States of the European Union and Iceland, Norway and Liechtenstein.

It applies to people who, at the time of requesting recognition, have the nationality of one of these 30 countries, even if they used to have a different nationality. It also applies to people with dual nationality. Thus, for example, it can apply to an Argentine national who also has Italian nationality.

The Directive also applies to nationals from third countries[4] who are members of the family of an EU citizen exercising his or her right to free movement within the European Union[5].

For example: An American doctor who holds a British diploma is married to a British citizen. The couple lives in the United Kingdom, then decides to move to Germany. In this case, the British diploma of the doctor of medicine held by the American doctor should be recognised in Germany in accordance with the rules of Directive 2005/36/EC.

The Directive also applies to nationals of third countries who have the status of longterm residents[6]. However, the rights of long-term residents are more limited than those of the family members of an EU citizen. Thus, the Directive does not apply to the United Kingdom, Ireland and Denmark and only covers permanent establishment. It does not apply to the temporary provision of services.

It also applies to nationals of third countries who have refugee status in a Member State[7]. The refugee should be treated as a national of the Member State in which he or she has been granted refugee status. If a refugee has a professional qualification awarded in another EU Member State, the Member State that granted him or her refugee status should recognize this professional qualification pursuant to Directive 2005/36/EC.

For example: If an Iraqi citizen who holds a diploma in pharmacy awarded in the Netherlands has refugee status in Belgium, he should have his diploma in pharmacy recognized in Belgium in line with the rules of Directive

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[3] http://ec.europa.eu/internal_market/qualifications/regprof/index.cfm?newlang=en .

[4] This refers to countries other than the abovementioned 30 countries, with the exception of Switzerland for which special rules apply.

[5] Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *(OJ L 158, 30.4.2004).*

[6] Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents *(OJ L 16, 23.1.2004).*

[7] Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (*OJ L 304, 30.9.2004*).

2005/36/EC. However, if he decides to move to Denmark, the rules of Directive 2005/36/EC will not apply.

From 19 June 20116 , the Directive will also apply to nationals of third countries who have a higher education diploma and a job offer (holders of an EU blue card), but only for activities exercised as an employee. However, this will not apply to the United Kingdom, Ireland or Denmark.

The Transposition of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 regarding the recognition of professional qualifications in the Romanian law

The Member countries had the deadline for transposition into national law the Directive 2005/36/EC of 20 October 2010.

In order to implement the provisions of the Directive 2005/36/EC in Romania a working group responsible for the transposition of Directive 2005/36/EC, coordinated by the National Centre for Recognition and Equivalence of Diplomas (CNRED)[8] was established in June 2005. This working group consisted of representatives of the main competent authorities for regulated professions in Romania (public authorities and professional organizations. In this context it was decided that Directive 2005/36/EC be implemented by amending the existing legislation on recognition of professional qualifications.

In September 2006, in order to implement the provisions on administrative cooperation, the working group was made responsible for implementing Internal Market Information System - IMI, and on June 23, 2008 the official launch of IMI took place in Bucharest in Romania. The main legislation norm under which Romania has transposed into Romanian legislation the provisions of the Directive 2005/36/EC is Law no. 200/2004 on the recognition of diplomas and professional qualifications for regulated professions in Romania[9]. In the first phase, the law considered transposing the Directives into national law the general system of recognition of professional qualifications for regulated professions, namely Directives no. 89/48/EEC and no. 92/51/EEC, completed with the Directive. 2001/19/CEE. These relate to access to regulated professions, which are not covered by sectoral directives: doctors, dentists, veterinarians, architects, nurses and midwives.

The transposition of new items of the Directive No. 36/2005 was achieved through the adoption of Government Emergency Ordinance no. 10 109 from October 2007 to amend Law no. 200/2004 on the recognition of

[8] In terms of transparency and recognition of diplomas and qualifications for academic purposes was created in 1984, the European Commission's initiative, a network of National Centres for Recognition of Diplomas which are found in all Member States of EU and European Economic Area and and all the associated countries of Central and Eastern Europe. These centers provide advice and information on recognition of diplomas and periods of studies conducted abroad.

[9] subsequently amended by Government Emergency Ordinance no. 109 of October 10, 2007.

diplomas and professional qualifications for regulated professions in Romania. It contains provisions on the new criteria for recognition under the general European system of recognition, the possibility of adopting common platforms, freedom to provide services, administrative cooperation and implementation of Internal Market Information System - IMI.

Throughout the emergency ordinance be amended and make art. 11 of Law no. 200/2004, stating the purpose of theoretical and practical concept of substantially different areas as knowledge of which is essential for practicing and training for which the applicant has gained significant differences in terms of duration and content of the report training required in Romania [art. 11 para. (1), newly introduced]. Also, if the Romanian competent authority intends to pass an aptitude test, you must first check with the principle of proportionality, whether the knowledge acquired by the applicant during his professional experience in a Member State or a third country cover all or part of the substantial difference [art. 11 para. (3)]. These provisions are, moreover, the transposition of art. 14 par. (4) and (5) of the Directive. 2005/36.

Common platforms are a set of criteria of professional qualifications able to compensate for significant differences found between the training requirements of different Member States for a certain profession [art. 5. (1), according to art. Directive No. 15. 2005/36].

Alignment with the Community rules in Romania requires the implementation of Internal Market Information System - IMI, a network that facilitates the exchange of information between national authorities and professional organizations in order to simplify access to employment in the Member States of European Union citizens (according to art. 8:56 of Directive no. 2005/36/EC).

In order to accommodate work with the new European standards and good practice was adopted a new Regulation of organization and functioning of the National Centre for Recognition and Equivalence of Diplomas (CNRED) from the Ministry of Education by Ministry of Education and Research. 5820/2006. CNRED is associated European networks ENIC (European Network of Information Centres, established by the Council of Europe) and NARIC (Network of Academic Recognition Information Centres, established by the European Union) which transmits and receives information from the recognition of diplomas .

Conclusions

The basis of the general system of recognition of professional qualifications is the mutual trust that each member state has in the other study programs and diplomas. A person who in one Member State is sufficiently qualified to practice a profession, can, in principle, have access to the same profession in another Member State, even if the degree program that differs in terms of duration and / or content. They accept their diplomas each other,

without insisting that they represent exactly the same knowledge and skills in all aspects.

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THE OBLIGATION TO REFUND OF EMPLOYEES

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Abstract

The reimbursement obligation of employees appears as a component of economic responsibility that occurs in situations where the employee against the employer receives an unfair amount of money, without having the right, or receives goods and services provided by the unit.

Key words: *asset liability, employee, employer, work payment due*.

Introduction

Labor Code - Law no. 53/2003 governs asset liability in a separate chapter - III from Title XI called "legal liability", including Labour Code, art. 269-275.

In the specialized literature asset liability was defined as a form of legal liability which consists of their obligation to repair the employer's material damage produced because of them or in connection with their work[15]

As regarding the civil contracts there are general rules that apply in principle to all contracts and special rules applicable only to one or some of the civil contracts, and in the matter of economic responsibility we are in the presence of specific rules which derogate from the common law rules that make general rules and regulations if they do not contravene the mandatory labour law.

The institution of the obligation of restitution has its origins in the old labour code since 1972, which in art. 106 established the obligation of the person assigned to either return the amounts they received from it without being legally due, or to pay the unit, an appropriate value of goods received

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[15] IT Stefanescu, *Treaty employment law*, , Wolters Kluwer Publishing, 2007, p. 490; al. Concoct, Treaty of employment law, Legal Publishing House, 2007, p. 803, I. Albu, Contractual Civil Liability for Non-pecuniary Damage (material damage), the Law no. 8 / 1992, p. 29; Ş. Beligrădeanu, op.cit., P. 97, Al. Athanasiu, AC Moarcas, The Worker and the Law. Labor and Employment, Oscar Print Publishing, 1999, p. 271.

from the unfair establishment and no longer may be returned in kind, or what the services were provided by the unit without the right to be returned in nature or the value of the services provided.

In the same terms of the employee restitution legislation is repeated in the new labour code in 2003 in art. 272, which states: "An employee who has received from the employer an amount which was not due is required to pay it back. If the employee has received goods which he / she has earned goods and can not be restituted in kind or if he / she was provided services that were not entitled, he /she will bear their value. The value of goods or services shall be established according to their value at the date of payment.

As rightly noted in the literature, that the obligation of the employee shall be examined independently of the fault, because the foundation of this obligations is to pay the undue, work and to prevent unjust enrichment[2].

So even if we could say that this obligation arises as a separate institution from liability to asset itself is based on a tort committed by guilt, yet it has the same legal regime as asset liability in the employer's property reunification procedure.

Therefore we can say that virtually the provisions of art. 272 Labour Code do not simply repeat the principle of undue payment provided for in art. 992 Civil Code, Labour Code regulations in effect even without derogating from the legal status of undue payment, provided that the recovery of civil damages is the same, unlike the previous legislation the obligation to return enjoys the same Recovery Procedure if liability for damage as the actual material.

On the other hand, if guilt is established and the person receiving the payment amount, delivery of the asset or service provision wrongly, there are incidents of restitution not only rules but also the responsibility of the property.

It was also stated that the obligation of restitution as it is governed by the Labour Code becomes incidental only if the damage of the employer through the sums, the handing over the goods, the providing of undue service are linked with the work, deriving from the employment contract and not the civilian relationships in nature.

Conversely if the accipiens received such benefits in his capacity as a private subject, participating in civil relations, the obligation to refund arise from the provisions and principles contained in Article undue payment. 992 and art. 1092 Civil Code.[3]

Regarding the obligation to repay the sums unduly received it was argued that they can concern all the entitlements paid under the contract of

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[2] S. Ghimpu I.T. Stefanescu, S.. Beligrădeanu, Gh Mohanu - *Labor Law. Treaty*, Scientific and Encyclopedic Publishing House, 1978, Vol II, p. 170; A. concoct - Treaty of labor law, Legal Publishing House, 2007, p. 804; IT Stefanescu, *employment law, treaty*, Wolters Kluwer Publishing, 2007, p. 502.

[3] S. Ghimpu I.T. Stefanescu, S.. Beligrădeanu, Gh Mohanu - op.cit., p. 170.

employment such as: remuneration tariff, supplement to the tariff, remuneration, bonuses, allowances, bonuses, severance pay, delegation detachment in daytime, transport and accommodation etc..

Wisely noted in the literature that it falls into the category amounts to be reimbursed to the employer also health insurance benefits wrongly paid to the employee, according to art. 42 para. 1 and 2 O.U.G. no. 154/2005 [4] .

The Supreme Court decided in this case a solution since 1968, that they are incidents of restitution provisions of art. 20 para. 2 of Decree no. 167/1958 regarding the prescription of extinction.

Thus, in the situation when the unit has paid employed person by the statute of limitation amounts after the deadline, it can no longer claim the latter, the return on the grounds that since the date of purchase, limitation period had expired[5].

Regarding the obligation to pay the value of goods that cannot be resituated in kind, established the doctrine that such goods may be the following: uniforms, bedding - blankets, pillows, sheets, and work safety equipment, various tools, tools, devices , books, etc..

The failure of the restitution of the good should be an objective one in the sense in which that the asset has actually been destroyed or lost, or has been worn to such an extent that it can be used anymore in the state in which it was located.

If the property is partially damaged, the employee is obliged to repair the property and pass it to the employer in running condition, or to hand another one of the same good quality.

Note that notwithstanding the economic liability rule applicable to the beneficiary shall repay in kind goods first, and only if it is not possible, it is obliged to pay their value[6].

Fee for services rendered unfair by the unit employee may refer to the following situations: free accommodation or below the statutory rates in the building belonging to the unit, the exemption in whole or in part the costs of maintenance in these buildings, free or low-cost carrier with vehicles belonging to the unit, the exemption in whole or in part by the cost of meals in their canteens or leased the unit for this purpose so.

In a case, a solution, Bucharest Court of Appeal upheld the Tribunal reasoned and lawful sentence, which established that the the defendant gets after termination of employment, goods or services which it is entitled to, entitles the employer to claim and get their value from it.[7]

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[4] S. Ghimpu, I.T. Ștefănescu, Ș. Beligrădeanu, Gh. Mohanu – *op.cit.*, p. 171.

[5] Al. Țiclea – *op.cit.*, p. 805.

[6] Dec. nr. 644/10.04.1968 a Tribunalului Suprem, publicată în Repertoriu I, p. 639-640.

[7] Court of Appeals, Department of Civil and seventh causes of labor disputes and social security, decision no. 3201 / R on 7 November 2006, published in the directory practice in matters relating to labor disputes and social security from 2006 to 2008, Wolters Kluwer Publishing, p. 353, shoulders 73.

The first court that has taken into consideration the papers filed (the employment contract, the addendum to this decision no. 1295 of 30 June 2005), that the employment relationship ended on 30 June 2005, according to Labor Code, art. 56 point j).

It was noted that the presence collective sheet in July and this month's payroll it is not apparent that the defendant is among the employees. It held that the defendant was aware of the date of termination of employment with the applicant, according to the addendum to the employment contract and letters no. 9550 of 27 July 2005 and 7681 of 29 July 2005 issued by the defendant.

In relation to the date of termination of employment, the defendant had no right to any meal vouchers, or the card machine and food service. Thus, it was retained within the provisions of Labour Code art. 272., given that the employee has received tickets which she has earned and received services was not justified, since the employment contract ended on 06/25/2005.

In close connection with the obligation to repay is analyzed and subsidiary liability.

Wisely it was taken into consideration that the subsidiary liability arises when the payment of an undue sum of money was noted, handing an undue good unfair or improper services of another person or a third party due to the fault of another person/employee whose asset responsibility will undertake provided that the employee or the third party recovery accipiens is not possible for various reasons such as insolvency, disappearance or death of the beneficiary, the statute of limitation.[8]

The application of subsidiary liability - not only in relation to its primary responsibility, but also the obligation to repay, it is necessary for fairness considerations, obviously that should be the prime beneficiary of the obligation to repay what he has received without being due and only if the employer heritage will not be reintegrated should answer those who, by their deed, had facilitated the reduction. For the identity of reason, its subsidiary liability is applicable and where the beneficiary of the amount incorrectly paid, a good or service is rendered unlawfully handed by a third person (physical or judiciar entity).

The subsidiary character of the economic responsibility must be concluded that, whenever it is established that the beneficiaries of the goods or services have no obligation to repay such a reality, as they are legally entitled to, any subsidiary liability may not survive.

Subsidiary liability regime is found more expressly covered by special laws.

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[8] Ş. Beligrădeanu - situations that may lead to asset liability to employees by their employers to injured third parties - borrowers of the latter - the failure to enforce contracts, or by failing to refund, published in "*Studies of the Romanian labor law,"* House CHBECK , 2007, p. 388.

According to art 30 of law no. 22/1969 on hiring managers, provision of guarantees and liability in connection with the goods, responds to the amount of remaining damage not covered by the author directly at the culprit: a person's employment or shift the position of manager or manager without the subordination provided Art. 7 of this law, failure or delay in taking measures to replace managers and personnel within their jurisdiction, despite being warned in writing and reasoned that the staff does not fulfill his duties properly, failing to take necessary measures to establish a damage coverage in management, the timing and failing inventories under the law, where it contributed to causing the damage, failure of any duties, whether it without violating the damage would have been avoided.

Another case of subsidiary liability is governed by Art. 21 paragraph 2 of Law no. 416/2001 on the minimum guaranteed income. According to this text, if you can not recover all or part of amounts wrongly paid to beneficiaries as welfare later than three years of payment, they will be recovered under the Labour Code, the persons responsible for payment for a period not exceeding three years.

Regarding this subsidiary the mayor is responsible, who, exercising the office of chief officers, put into effect a local council decision to increase salaries for the Town Hall personnel illegally.

In connection with this obligation, it was decided that the mayor had acted in good faith by putting into effect the law, the local council decision establishing the remuneration of the hall staff, not liable for damage caused by the cancellation of payments made before the council resolution the court asked the prefect.[9]

Analyzing assumptions explicit legal liability that occurs and identify subsidiary liability of the military (military units and civilian employees), under Art. 19 of Government Ordinance no. 121/1998, which states: "When insolvency author directly finding the damage, respond to the amount of damages recovered, the military (civilian employees) responsible for:
a) breaching the law on employment or appointment as manager, and unincorporated guarantees by managers;
b) failure to take measures to replace the manager or person who manages assets, without managers in the legal sense, although they have been informed in writing and reasoned, that do not fulfill their duties properly;
c) no inventories at the terms and conditions of the law, if this would have avoided the loss or damage;
d) the failure or delay in taking measures to recover damage caused by the formation of the civil party, the imputation decision or other measures;
e) failure to fulfill any responsibilities for service if, without breach, the loss would not have occurred. "

[9] S. Ghimpu, I.T. Ştefănescu, Ş. Beligrădeanu, Gh. Mohanu – op.cit., p. 113.
C.S.J. decizia nr. 755/2002 publicată în „Pandectele Române" nr. 3/2003, p. 83-84.

A third case in which liability may arise and the subsidiary is deducted from the interpretation by the Supreme Court ruling that if the damage suffered by the unit due to a theft committed by others, employees of a subsidiary of negligence liability that has occurred theft, is committed only if the damage could not be recovered from offenders[10].

Conclusions

The repayment obligation and responsibility are subsidiary effective legal instruments designed to prevent injury to the employer by the poor performance of service obligations to those employees with responsibilities in the management and administration of cash and even property of the employer.

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[10] Decizia nr. 118/29.06.1971 publicată în S. Ghimpu, I.T. Ştefănescu, Ş. Beligrădeanu, Gh. Mohanu – op.cit., p. 113.

REQUEST FOR CANCELLATION. REJECTED INVOICES

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Abstract

The request for cancellation is the legal means a debtor may appeal to when issued against a warrant for payment. Should the invested court of law accept the request for cancellation, such court shall void the warrant by issuing a final, irrevocable judgment.

Key words: *request for cancellation, rejected invoices*

Introduction

In order to simplify and expedite the procedure concerning the issuance of a payment summons, the Government Ordinance no. 5/2001 was passed on the payment summons stipulating under article 8 for the possibility for the debtor having been issued against an warrant containing a payment summons to submit a request for cancellation within the 10 days from having been either handed in or notified on such summons.

In order to simplify and expedite the procedure concerning the issuance of a payment summons[1], the Government Ordinance no. 5/2001 was passed on the payment summons stipulating under article 8 for the possibility for the debtor having been issued an ordinance containing a payment summons, to submit a request for cancellation within the 10 days from having been either handed in or notified on such summons.

Should the invested court of law accept the request for cancellation, such court shall void the warrant for payment by issuing a final, irrevocable judgment.

By the request for cancellation recorded on the Oradea Municipal Court roll, the plaintiff –debtor, SC R.T.C. SRL requested in the matter against the defendant-creditor SC E.V.W.H. SRL the cancellation of the commercial ordinance containing the summons for payment of the amount of 11.675,88 lei and of related legal interest.

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[1] *Ordonanţa Guvernului nr. 5/2001 privind procedura somaţiei de plată*, published in the Official Journal no. 422 of July 30th 2001, as subsequently amended and supplemented by E.G.O. no. 142/2002 on the modification and supplementation of the Government Ordinance no. 5/2001 on the payment summons procedure (Official Journal no. 804 of November 5th 2002), approved by Act no. 5/2003 (Official Journal no. 26 of January 20th 2003).

By preliminary proceedings, the creditor requested that the debtor be obligated to pay the amount of 11.675,88 lei and related legal interest, grounding such request on the fact that the two companies carried out commercial relations which translated into the brokering, by the creditor and through creditor's business location, of certain service type repairs for SC R.T.C. SRL.

In order to ground the request, the debtor indicated that the commercial ordinance cancellation is in order, based on failure to comply with the conditions stipulated for, under the Government Ordinance no. 5/2001 on the payment summons procedure.

As per article 1, paragraph 1 of said ordinance, in order to request the obligation of a debtor to pay the owed amount, there are certain requirements to be cumulatively complied with regarding requested debt, namely:

- such must be uncontested, liquid and enforceable;
- such must be assumed by means of contract as attested for through a parties-signed instrument;
- the existence of certain reciprocal rights and obligations must be confirmed in writing regarding the performance of certain services, works or similar.

With regards to this request, we specify that:

1. The requested debt fails to meet these conditions, namely it is not an uncontested, liquid and enforceable debt since, as per article 379, paragraph 3 in the Civil Procedure Code, the uncontested debt is the debt whose very existence results from the very debt document or from further supporting documents as well, even of the unauthentic type, issued by the debtor or acknowledged by same.

But the invoices filed by SC E.V.W.H. SRL, in its creditor capacity, neither originate to debtor SC R.T.C. SRL nor are acknowledged by same, the proof thereof being the lack of acceptance signature and seal.

The debt is not liquid either, since it is not determined by the very debt document, nor is it determinable by means of the account receivable/debt document or of further unauthentic documents as well, either belonging to the debtor or acknowledged by same, as per article 379, paragraph 4 in the Civil Procedure Code.

Given that we do not have a liquid and uncontested debt, it goes without saying that one may not discuss on the enforceability thereof. Since issued invoices bear neither the signature nor the stamp of the debtor company, therefore the reception date is not stipulated for, the debt/account receivable fails to fall under the enforceability requirement[2].

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[2] Bucharest County Court, commercial department VI, commercial judgment no. 6843 of May 18th 2007, in Cristina Cucu, Cătălin Bădoiu, *Somația de plată în materie comercială. Practică judiciară*, 2nd edition, "Hamangiu" Publishing House, Bucharest, 2008, p. 107.

2. The 11.675,88 lei debt claimed by the defendant, must, according to article 1, paragraph 1 in the Government Ordinance no. 5/2001 on the payment summons procedure, be assumed by a written agreement that the parties accepted by signing it, yet the plaintiff and the defendant entered into no such document attesting to the commercial relations, therefore one may talk neither about a parties' agreement meeting their minds, and consequently, nor about the existence of certain rights and obligations concerning performance of certain services, works or any other kind of services.

It was also noticed that the invoices issued by the creditor do not bear the acceptance signature and seal, therefore these had not been accepted or acknowledged by SC R.T.C. SRL.

Given the lack of a debtor company-affixed seal, the invoices provide no proof on the acceptance thereof, thus failing to fall under the evidence value of accepted invoices as stipulated for, under the provisions of article 46 in the Commercial Code. Moreover, unsigned and unsealed invoices may not provide proof of an uncontested, liquid and enforceable debt in relation to the provisions of article 1, paragraph 1 in the Government Ordinance no. 5/2001 on the payment summons procedure[3].

The motivation of the court having issued the commercial ordinance that the debtor had not contested the invoices, thus assuming a tacit acceptance thereof, may not be accepted.

Invoice acceptance is deemed tacit when meeting the minds of the two parties beyond any doubt attesting the intention to accept the invoice; for example, merchandize resale, issuance of a bill of exchange for price payment. The very silence on the part of the consignee may not bear the value of an invoice tacit acceptance[4], in the absence of certain contract detailed clauses attesting that lack of answer is to be deemed as tacit acceptance.

In compliance with Resolution no. 5227/2001 issued by the Supreme Court of Justice, the rejected invoice and the advice of dispatch that are confirmed by a person other than the one recorded in the specified documents, do not provide evidence of a fundamental relation that may imply a payment obligation.

Given such grounds, the Oradea Municipal Court accepted the request for cancellation submitted by the debtor-plaintiff and annulled the

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[3] Bucharest County Court, commercial department VI, commercial judgment no. 5019 of December 9th 2005, unpublished, in Cristina Cucu, Cătălin Bădoiu, *Somația de plată în materie comercială. Practica judiciară*, 2nd edition, "Hamangiu" Publishing House, Bucharest, 2008, p. 158.

[4] Please refer to Stanciu D. Cărpenaru, *Drept comercial român*, 4th edition, "All Beck" Publishing House, Bucharest, 2002, p. 397; Stanciu D. Cărpenaru, *Tratat de drept comercial român*, "Universul Juridic" Publishing House, Bucharest, 2009, p. 484.

commercial ordinance containing the payment summons on the amount of 11.675,88 lei[5].

Conclusions

One may say that invoice acceptance must express the will of the person binding the trader legal entity before third parties. Therefore, the very accepting and not contesting an invoice is simply a material action and does not imply the value of an invoice tacit acceptance. In order to check invoice recording into the accounting books, an accounting technical expertise is required, yet, such being evidence not accepted within the payment summons procedure.

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[5] Oradea Municipal Court, Civil Department, civil matters judgment no. 10512 of September 21st 2010, unpublished.

TRANSPOSITION OF EUROPEAN POLICY OF ENVIRONMENTAL PROTECTION IN ROMANIA

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Abstract

Romania's accession to the EU was a key strategic objective for the Romanian society.

Environmental protection is one of the priority areas for European action and interest in accordance with the principles of sustainable development, having as result the increase of the European competitiveness with the lowest possible cost to the environment.

Keywords:. *protection, environment, waste, strategy.*

Introduction

Once a member of the European Union, Romania has made a series of obligations, including environmental protection. Even in the contents of the Accession Treaty were set deadlines for certain concrete measures to be implemented by the Romanian authorities.

At the local level runs a sustained campaign for the implementation of operational programs focused on environmental issues with priority on the waste management.

In Romania, the waste management activity is based on the OUG 78/2000, which implements a series of directives of the European Council.

Under Law no. 426/2001 for the amendment and approval of OUG no. 78/2000 regaring The Waste regime, the central public authority for environmental protection has developed a National Waste Management Plan, in order to diminish the negative impact of waste on the environment and health.

To comply with the Waste Framework Directive of the Council and European Parliament no. 75/442/EEC as amended by Directive 91/692/EEC, Regulation (EC) no. 1882/2003 a first National Waste Management Strategy which included the ministries concerned strategies has been achieved.

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There were also made County Waste Management Plans. Based on the National Strategy Plans and the County Plans the first National Waste Management Plan has been developed which was approved by HG. nr. . 1470/2004.

These national documents for waste management have undergone a fundamental improvement in the expanded working groups composed of representatives of central authorities, representatives of some associations of local authorities, employers and professional associations, representatives of universities and NGOs, as well as German, French, English and Japanese experts involved in twinning projects with PHARE financing and in the technical assistance program of Japan International Cooperation Agency (JICA).

Based on the Strategy and National Waste Management Plan, the Regional Waste Management Plans have been developed, in stages until 2007, based on a guide to elaborate the Regional Waste Plans in order to reflect more realistically the needs regarding the waste management locally and to ensure an integrated waste management facility.

The National Strategy defines the driving forces and strategic targets on waste management in Romania based on the analysis of the current situation and of the implementation stage of specific directives in the field.

The National Waste Management Strategy is reviewed regularly and approved by Government Decision, taking into account technical progress and the new environmental requirements.

The National Waste Management Plan developed by the Ministry of Waters and Environment, includes general objectives and targets for all categories of waste management. General and specific objectives are provided and targets for the management of certain municipal waste flows, such as for the packaging waste, as well as for industrial waste including dangerous and specific categories of dangerous waste.

The Plan also shows the existing situation in terms of municipal and assimilable waste, construction and demolition waste and sludge from municipal wastewater treatment plants, along with a forecast of the evolution of their generation.

Based on the current situation regarding waste generation alternatives have been developed in order to reach the general and specific strategic objectives both for the municipal waste and industrial waste and dangerous or not dangerous. There are also special waste flows treated such as: waste packaging and paper writing. biodegradable waste, construction and demolition waste, electrical and electronic equipment waste, discarded vehicles, used tires, the mud from municipal wastewater treatment plants.

National Waste Management Plan will be periodically reviewed and approved by the Government.

National Waste Management Plan addresses to a wide range of stakeholders which include local and central institutions of state

administration, producers of goods - raw materials and finished products, merchants and service providers and their professional associations, educational and research institutions, NGOs active in the field and every citizen.

Among the results of the analysis of legislative objectives are:

1. waste management - waste prevention and prevention of their harmful effects; the waste recovery through recycling, reuse or by any process aimed to obtain secondary raw materials or use of certain categories of waste as a source of energy, construction and operation of facilities, methods and technologies , sites and their planning for treatment, recovery and disposal of waste so as not to harm the environment and public health, identification and registration of dangerous waste at each production place, storage or unload, prohibition of mixing different categories of hazardous waste or of dangerous waste with not dangerous waste, with except in certain circumstances, prohibition of the importation of waste in Romania of any kind, raw or processed, except for certain categories of waste being secondary resource useful materials in accordance with the legislation in force proposed by the central public authority in the field of environmental protection and approved by the Government, establish tax incentives for those who manage waste, and particularly for those who value waste, in order to stimulate investment (the government), organizing training and education of people in waste management, etc..

2. dangerous waste management: the obligation to register at each producer; mandatory collection, transport, recovery and separate disposal, development of standards for packaging and labeling of hazardous waste during collection, transport and storage,

3. Waste storage: the classification of deposits in three categories: for dangerous waste, for not dangerous waste, for inert waste, the reduction of the amount of biodegradable waste stored + the national strategy on biodegradable waste reduction, the obligation to treat hazardous waste, etc..

4. Waste incineration: the prevention or reduction of the negative impact on the environment, particularly air pollution, soil, surface water and groundwater pollution, and any risks to public health, setting the operating mode for incineration, their control and monitoring, setting the limit emission of pollutants into the air and the water and how to calculate these values and measurement technique etc.

5. packaging and packaging waste management: setting priorities for management of packaging and packaging waste, organizing a system to ensure recovery for multiple reuse of packaging through the economic agents who sell these products or through specialized centers for recovery of these types of packaging - for economic agents who produce products packaged in reusable packaging.

6. batteries waste regime: the information and the stimulation of the buyers on how to collect batteries waste , research programs to reduce levels

of heavy metals and hazardous substances in batteries, for the use of less polluting substitutes in batteries, as well as finding new methods of capitalization of batteries;

Conclusions

In recent years we have noticed a remarkable improvement in terms of implementing the acquis communautaire in the field of environmental protection, and a continuing awareness of the population and local and central authorities with responsibilities in the field, something that stands out even in the external approaches of our country concerning the environmental problems.

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THE PRINCIPLE OF CONTRACTUAL FREEDOM

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Abstract

The concept of "contractual freedom" understood as the possibility of any person to contract or not, to interact through a contract, has gained increased importance at the legal level. Considering the value attached by law to this legal concept – subjective civil right or fundamental freedom – the legal protection of contractual freedom can be larger or smaller, the limitations due to exercising this right depending by the type of protection. In the Romanian law, contractual freedom benefits from legal protection, achieved on the will of the ordinary judge, having only the value of subjective civil right, a weaker protection than the one in the French law by the will of the constitutional judge, where it acquires a constitutional value likely to be defended against the state itself.

Key words: *contractual freedom, subjective right of action, objective right, autonomy, limitations.*

Introduction

The Romanian literature provides us with some brief definitions of the concept of "freedom of contract", involving essentially the same lines: "freedom of contract" is an abstract possibility circumscribed by the legal framework which can involve both natural and legal persons, on the one hand, to contract, i.e. to engage in contractual relations by creating a contractual relationship, a contract, setting the actual content of this report, and, secondly, not to contract, or to refuse to engage in a specific contractual relationship.

1. Defining the concept of "freedom of contract".

a) The Romanian legal doctrine.

Thus, Professor Ioan Albu believes[1] that "freedom of contract is the possibility that natural and legal persons have, by law, to create contracts and to determine content". Another Romanian author[2] states that "freedom of contract can occur by being able to contract as the parties wish, but also by refusing to contract". Likewise, a general definition establishes that currently

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[1] Ioan Albu, *Libertatea contractuală,* Dreptul, no.3/1993, Bucureşti, p.29.

[2] Gabriel Oleteanu, *Autonomia de voinţă în dreptul privat,* Craiova, Universitaria, 2001, p.49.

"freedom of contract is the subjective right of action in contract matters in accordance with the objective right and its limitations"[3].

Therefore, and as otherwise stated at the beginning of this paper, these definitions, comparable in terms of content, are only a simple shape and a preliminary concept of the "freedom of contract", a concept whose broader development and determination of its normative consequences will be discussed in what follows.

*b) Romanian Constitutional Court***.** Recently and definitely having a particular importance to the Romanian law, is to be retained the definition given by the Romanian Constitutional Court to the concept of "freedom of contract".

It should be noted from the outset that, although this is a reference of the Constitutional Court, among its main tasks being resolving constitutional contentious issues, particularly regarding the protection and guarantee of fundamental rights and freedoms with constitutional value, contractual freedom in the design of the Court is only a freedom which is only legal in nature and not constitutional, but the consequences will be discussed further and we shall refer to them from a more detailed perspective.

Thus, Decision no. 365 of July 5, 2005 provides the current constitutional definition, we could say, although as stated in the Court's interpretation this freedom does not have any constitutional value: *"freedom of contract is the possibility acknowledged to any law subject to conclude a contract within the meaning of mutus consensus, product of its manifestation of will converged with the other party or parties, to determine its content and determine the object, acquiring rights and assuming the obligations whose complying is mandatory for the Contracting Parties "* .

2. Legal and philosophical concepts of "freedom of contract".

*a) Preliminaries***.** The emergence of the concept of "freedom of contract" occurs as a direct result of the medieval legal thought, which under the influence of natural law precepts originally considered that this freedom is a natural right, permanent and immutable, whereas later on it was seen as a legal corollary of the theory of autonomy of will[4].

b) The theory of autonomy of will. The individualistic trend that permeates the thinking of the eighteenth century and which has as a premise and purpose a certain kind of liberalism, total liberalism, leads to substantiate,

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[3] Ion Dogaru, Pompil Draghici, *Drept civil. Teoria generală a obligaţiilor,* Bucureşti, All Beck, 2002, p. 44; Ion Dogaru, Nicolaie Popa, *Bazele dreptului civil. Vol. I. Teoria generală*, Bucureşti, C.H. Beck, 2008.

[4] Ioan Albu, *op.cit.,* p. 30; Ion Dogaru, Pompil Drăghici, *op.cit.,* p.42, P. Durliac, J De Malafosse, *op.cit*, p. 99-100; A.Weill, *Droit civil. Introduction générale,* Paris, Dalloz, 1973, p. 52-53; Ion Dogaru, Nicolae Popa, *idem*..

in legal terms, the civil law, particularly, the principle of autonomy of will, with major representatives such as J.J. Rousseau and I. Kant[5].

Conceptions of both authors lead to the systematization and foundation of the idea of "social contract" and of the idea of "state of nature", which are essentially transposed by the idea that men are born free but at some point, through a pact, an agreement of free will, they agree to abandon some of their rights, of their freedom to the community, in order to take advantage of social life[6]. Basically, the whole social edifice is based and focused on the individual and its independent will. Consequently we have to deal with, in light of the social contract theory, two types of will, namely: first, the general will, which is the limitations on individual wills to achieve relative social coexistence, and on the other hand, the individual will, whose sphere of autonomy includes any free expression of will in any area of human life, limited only by the precepts of order declared imperative by law[7]. The relation between the two types of will be shown as a rule-exception relation, the individual will being the rule and the general will the exception, so, the state is "obliged to maintain this relationship and to ensure the coexistence of two wills".

Even if today, as we shall prove, the theory of autonomy of will seems to be lagging behind the contemporary realities, its importance remains significant especially because economically, it led to economic liberalism *(laissez faire, laissez passer),* which requires a legal counterpart, freedom of contract *(laissez faire, faiser contracter)*[8]. Man is essentially free and may be subject to a duty only by his own volition.

Ideas deriving from the theory of autonomy of will within the general concept of freedom of contract are: - freedom to interact or not through contract; - freedom of concrete ways of contracting, significant being the agreement between wills not the form of expression; - liberty of content given by Contracting Parties, the existence or not of a balance between rights and obligations of contractors having a low importance.

The principle of autonomy of will implies that the contract will be based solely on the will of the contract undertaker, nothing being able, in principle, to affect this. The fact that will in contractual matters is independent means that the will of contractors and only this, will lead to the creation of the contract and any effects arising directly from it. Hence the contract extracts its

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[5] See J.J.Rousseau, *Contractul social,* Bucureşti, Ştiinţifică, 1957; I.Kant, *Întemeierea metafizică a moravurilor. Critica raţiunii practice,* Bucureşti, Ştiinţifică, 1972.

[6] George Burdeau, *Droit constitutionnel,* Paris, L.G.D.J, 1984, p. 133 în Dan Claudiu Dănişor, *Drept Constituţonal şi Instituţii Politice. Teoria Generală, vol.I,* Craiova, Sitech, 2006, p. 85.

[7] Ioan Albu, p. 31; Ion Dogaru, Nicolaie Popa

[8] *Ibidem.*

binding force only from the will of the parties[9]. Human will is the essence of the contract, the parties supporting the effects of their wills[10].

Applied to the law of contract, the theory of autonomy will leads to the postulation of three fundamental principles: the principle of freedom of contract (the individual is free to contract or not choosing the partner and determining the content of the contract, consent being an essential element in the formation of contract), the principle of binding force of contract (open willingness to be bound by a contract is reflective on the parties in the manner in which they agreed) and the principle of relative effect of conventions (the contract binds only the parties who expressed their wish to do so, no one can be liable for something that they have not subscribed to)[11].

Seen, the theory of autonomy of will in contractual matters promotes a certain kind of freedom of contract, a total freedom, absolute, this kind of "wild freedom", by its excesses, with adverse consequences for human society in the economic and social environment which requires rethinking of the concept and a drop in the obscurity of the theory dictated by the need for a state contractual guidance to restore the general contractual unbalance, not to replace freedom of contract, but as a complement to ensure a minimum protection to all members of society[12].

c) Contemporary concept. The theory of autonomy of will, inspired by the individualism which marked philosophical thinking in the centuries past, was transformed by the realities of today in a genuine myth or dogma, as many authors even deny to the possibility to set a base for freedom of contract, because of more extensive restrictions still imposed on it, which, as a corollary of the autonomy of the will should not engender limitations, only the Contracting Parties establishing the scope and content in each case according to their will.

There has been promoted an idea that the conceptualization of autonomy of will by the legal doctrine and the time of its expression is relatively recent, placed in the late 19th century and appearing as a direct result of the occurrence of the first signs of threat of its main consequences - freedom of contract - which is to develop new types of contracts, different from the classical negotiable contracts, contracts of adhesion[13]. Basically, the role of will was differentiated from one category of contract to another; thus,

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[9] See Valerie Toulet, *Droit Civil. Les Obligations,* Orléans, Paradigme, 2004, p. 16-17; Yvaine Buffelan-Lanore, *Droit Civil,* 7 éd., Paris, Armand Colin, 2000, p.20-21.

[10] Gabriel Olteanu, *op.cit.*, p. 32.

[11] Marie-Laure Izorche, *La liberté contractuelle,* in Remy Cabrillac, Marie-Anne Frison-Roche, Thierry Revet, *Libertes et droits fondamentaux,* Paris, Dalloz, 2001, p. 654.

[12] Ion Turcu, Liviu Pop, *Contracte comerciale,* vol. I, Bucureşti, Lumina Lex, 1997, p. 15.

[13] V. Ranouil, *L'autonomie de la volonté: Naissance et évolution d'un concept,* Travaux de l'Université de Paris II, 1980 in Marie-Laure Izorche, *op.cit.*, p. 656.

under the volitional aspect, "there is a shift from creative will to the formally-creative will of contract"[14].

The classical contract, the traditional contract, considered by the French civil code authors (1804), to be an operation type "in which two persons of the same legal position and equal economic power expose and discuss in a free debate the claims that they oppose to one another, make mutual concessions and end up with an agreement in which all terms were carefully thought and which is the genuine expression of their common will"[15], was followed by the emergence of new categories of contracts, the adhesion contract, unilaterally drawn by only one party, being defined by a "unilateral will that establishes the economy of contract in which one of its elements, the will of the adherent, does no more than give legal efficacy to this unilateral will"[16].

Obviously, there is a sharp difference between the two categories of contracts, the former essentially negotiated contracts and the latter non-negotiable, the contract of adhesion becoming a contract in which "the consent of one party is a mere acceptance of the conditions imposed by the power of another"[17], and in which the freedom of contract is "unilateral, working only for the profit of the stronger". Most contracts today are contracts in which all the terms and procedures are established only by a Contracting Party, the other having only the right to choose to accept or reject the conclusion of that contract.

The importance of the classical contract, unnamed, a direct result of the theory of autonomy of will, is still considerable, even if one of its assumptions incorporated by the famous phrase *"Qui dit contractuel dit juste"*[18] *(Anything contractual is fair)*[19] is shown illusory in the context of the new category of contracts mostly used by the legislature through imperative rules of contracts of adhesion to achieve an equivalent contractual benefit or even a general social protection becoming a necessity. Subsequently, however, the field of unnamed contracts offers an inexhaustible reservoir of freedom in all spheres, still unexploited by the legislator, the imagination of

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[14] Ioan Albu, *op.cit.*, p. 30.

[15] E. Gounot, *Le principe de l'autonomie de la volonté en Droit privé,* Thèse Dijon, 1912, p. 13 in Pascal Lokiec, *Contrat et Pouvoir*, Paris, L.G.D.J, 2004, p. 59.

[16] G. Berlioz, *Le contrat d'adhésion,* Paris, L.G.D.J, 1973, p. 13 în Pascal Lokiec, *op.cit.*, p. 60.

[17] G. Ripert, *Les forces créatrices du droit,* Paris, L.G.D.J, 1955, p. 271 în Pascal Lokiec, *op.cit.*, p. 61.

[18] Alfred Fouillee, *L'idée moderne du droit,* 2 éd, 1883, p. 187, în Pascal Lokiec, *op.cit.*, p .59.

[19] Free will contributes to the realisation of justice, a debtor not being able to invoke the unlawfulness of an obligation while he has willingly signed on to it. Each individual represents the best defender of its own interest, the only existing danger being that the contracting party will sacrifice the interest of another.

practice continually renewing itself and freedom finding its necessary exercise[20].

However, the importance of the principle of autonomy of will cannot be denied, the authors of the first modern civil code themselves referring indirectly to it and strengthening their predictions according to its precepts. Thus, the French civil code of 1804, Art.1134 (1) stipulates that "legally formed agreements have the power of law for those who have formed them" and the 1866 Romanian Civil Code prescribes, similarly, in Art.969 (1) that "legally made agreements have the force of law between the contracting parties". Autonomous means one that governs one's own laws, this resulting even from the semantic meaning of the word which is of Greek origin, presenting the combination of two terms: "authos" (himself, his own) and "nomos" (law). It is clear that the principle of autonomy of will, a fundamental principle of social organization that defies time, is highlighted by the two law texts cited, to be considered fundamental in contract matters.

3. The principle of contractual freedom seen as the abstract possibility of the person to act in the contractual field.

a) Abstract possibility. As stated earlier contractual freedom refers to an abstract possibility of the person to act in a contractual field. Thus, contractual freedom is practically like "the freedom to be bound" to another person through a legal instrument, the contract, or an agreement that will create obligations on the parties, which at a first glance may appear as paradoxical caused by an association of two terms essentially opposite: freedom-binding. To be meaningful, the words designating in the easiest way the liberty to alienate a part of freedom must have a postulate that lays a foundation and it can only be autonomy of will: the person cannot be constrained only by a link that he wanted and to the extent of what he wanted. So, the autonomy of will implies freedom of contract[21].

No doubt, whatever the nature of this freedom, legal or constitutional, contractual freedom should be understood as relative and not absolute freedom, and whose exercise may actually bear some limitations, but that does not have as a result the damaging of the very essence.

*b) Regulation***.** In the Romanian law, the principle of contractual freedom is recurrent: the Civil Code of 1866 Article 5 - "It is not permissible by agreement or by special provisions of the laws which concern public order and morality", Art. 966 - "Duty without a case or based on false or illicit case cannot have any effect", art.968 - "Case is illicit where prohibited by law, where contrary to good morals and public order, Art. 969 - 1 - "legally made agreements have the force of law between the contracting parties"; Law Decree No. 31/1954 regarding the legal and natural persons, Law Decree No.

[20] Marie-Laure Izorche, *op.cit.,* p. 661.
[21] *Ibidem,* p. 651.

66/1990 on the organization and operation of handicraft cooperatives, Law Decree No. 67/1990 on the organization and operation of consumer and credit cooperatives, Law No. 31/1990 on trade companies, Law No. 15/1990 on reorganizing state economic units as autonomous and commercial companies, Law No. 36/1991 regarding agricultural companies and other forms of agricultural associations. According to the present legal framework, people may conclude both named contracts, covered by law, and unnamed contracts not covered, or will be able to combine the two types of contracts.

Of all the texts of law that enshrine the principle of contractual freedom we should pay special attention to Art.969 (1) which consists of the common regulations in contract matters. The article, as stated earlier, is a faithful copy of Art.1134 (1) of the French Civil Code of 1804.

The first step is to notice and analyze the analogy made by the editors of the civil code between contract, the legal document which binds the parties, and the law, the state act, an instrument for the exercise of sovereignty: the contract is the law of parties, according to Art.969. The method of initiating the contract and the legislative process by which law arises essentially implies similar situations: in both cases we are dealing with an exercise of will - private will or legislative will, the will also proclaiming independence. The contract is presented as a process of creating rules, a specific procedure for the creation of legal effects, showing in this regard in relation to legal rules only a difference of form. "The contract makes the universal law of relations between individuals"[22]. In law, the contract rule is on a second benchmark related to legal rule, so we could say that the contract draws its power from the approval which the law, being superior, bestows. Its binding force would exist only by law and for the law and only in the space given by the law with its approval[23].

So if we wondered why the contract binds, according to the reasoning above, one might be tempted to answer by stating that this is because the law wants it and only as far as it wants.

Yet, this conclusion cannot be accepted, it is dangerous and inaccurate for several reasons: firstly, it results in the denial of autonomy of the will theory, secondly it is dangerous because if it is left in the hands of state law, the principle of binding contract would create a dependency on its strength to the existing political considerations, and, thirdly, it is incorrect because, in historical terms, the contract appeared before the law and there are even areas of law such as, for example, international contractual relations, where the contract is binding even without the support of law[24].

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[22] Laurent Aynes, *Loi et contrat.Le contrat, loi des parties,* Cahiers du Conseil constitutionnel no.17, 2004, p. 2, at http://www.conseil-constitutionnel.fr.

[23] *Ibidem.*

[24] The international contract is not mandatory because of law, but because the international community recognizes to the agreement of will a mandatory effect. If there will be adopted a national law to regulate the content of a contract, this will be done through the choice of the

*c) "Contract law"***.** To conclude regarding the relationship between contract and regulations provided by the Civil Code, we can say that this analogy between the state law and contract law should be avoided, because the second has a different nature. We could state that "the law" – the term used by Art.1134 of the French Civil Code and Art.969 of the Romanian Civil Code, represents rather a measure of partition or a principle of conduct, the law in effect, psychologically or mathematical, "the law of parties, far from being a binding rule, is above all a rule which allows to assign each contracting part his right"[25]. So, "contract law" is binding because it expresses a "thought process over which the parties have agreed, this agreement being the best way to become a rational human being"[26]. Thus, the two founding articles of the civil law of French and Romanian contracts can be read in the following manner: *"agreements, provided their conclusion valid, are the measure of mutual obligations of the parties".*

Furthermore, "contract law" must be respected by the state law as its source can be considered to be of higher legislative nature, namely the basic human right to govern by the will of their own, individual freedom, which, both in the Romanian law and in the French, has a fundamental value which enjoys constitutional protection[27], the French constitutional court agreeing with this fact and creating an obligation for the legislator not to *affect* the *"economic agreements and legal contracts concluded"*[28]*, a* position which, as we shall demonstrate, is not followed by our Constitutional Court. "State law should in principle respect the contract, just as it bows to human rights".

Thus, the contract becomes binding, and generates legal effects, not because the law impose it, but because it results from the exercise of a fundamental right, which is imposed to the legislator[29].

This does not mean that contractual freedom is intangible and that its exercise cannot be limited by the state law, the Civil Code and the Constitution itself allowing for this possibility, but only under certain circumstances and for some reason expressly determined. The state law can and must establish a minimum of mandatory conditions to be met in order to conclude a contract, to ensure the "order" and "balance" in society. Thus, contractual freedom is a relative freedom that entails certain necessary

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certain law by the contracting parties, this being the meaning of the principle of autonomy of will.

[25] J-P Chazal, *De la signification du mot loi dans l'article 1134, alinéa 1er du code civil,* RTD civ., 2001, p. 265.

[26] Laurent Aynes, *op.cit*, p. 3.

[27] Art.23 of the Romanian Constitution of 2003 and Art.4 of the Declaration of Human Rights of 1789, actualy the Preambul of the French Constitution of 1958.

[28] Decision no.98-401 of 10 June 1998, French Constitutional Court.

[29] Laurent Aynes, *op.cit*, p.3; other authors have opted for a version contrary holding that the foundation of the principle of contractual freedom is the recognition by law of power-generating legal effects of the will of the legal subjects - Vasile Pătulea, *Principiul libertăţii contractuale şi limitele sale,* Bucureşti, Dreptul, no.10/1997, p. 24-26.

limitations, the most important and also general referring to limits on capacity[30], consent[31] (manifestation of decision to conclude a legal act), cause of the legal act[32] (the purpose of concluding the act), public order and morality[33].

Another aspect that should be considered is also to be seen in the fact that the contract develops into law of parties, namely in what its binding force consists. Thus, in principle, effects resulting from the contract could only be relative regarding only the parties[34]whose agreement leads to the birth of contract (the principle of relative effects of contract), and obligations can be censored for the purposes of waiving in carrying them only by agreement of the will of the parties, none of the parties can cancel the contract on their own (the principle of irrevocability of contracts). In reality, it is not exactly so.

*d) "Res inter alios acta allis neque nocere neque prodesse potest" and the principle of contractual freedom***.** Regarding the relative effects of contract, the principle would be simple: the contract will take legal effect only inside the contracting circle, just between the Contracting Parties[35]. And, yet, there are legal cases where the effects of contractual law are or may become enforceable against other persons, thus constituting the exceptions to the principle in question. Thus, the legal institution of stipulation for another is present, a real exception to the rule, which requires the birth of a right for the benefit of a third party, resulting from the conclusion of the contract between the parties, although it is not a party to the contract. Also, although the position of third parties to the contract is given by the principle *of res inter alios acta allis neque nocere neque prodesse potest (third parties do not contract any benefit, nor harm), however, in some cases, they cannot ignore the contract on the condition of being alien to it: contracts which establish*

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[30] Art. 949, Romanian Civil Code: "Any person which is not declared uncapabale by law, can enter a contract", Art. 950: "Uncapable of contracting are: minors, the forbidden and basicly all who were prohibited by law."

[31] Art. 953, Romanian Civil Code: "Consent is not valid when it is given through error, taken by violence or (...)", so the manifestation of will may produce legal effects only if it was free and conscious, meaning real and unaltered by a vice of consent - Gheorghe Beleiu, *Drept civil roman,* Bucureşti, Universul Juridic, 2001, p. 132, Gheorghe Boroi, *Drept civil. Partea generală,* Bucureşti, All Beck, 1999, p. 168, Sebastian Cercel, *Introducere în dreptul civil,* Bucureşti, Didactică şi Pedagogică, R.A., 2006, p. 149.

[32] Art. 966, Romanian Civil Code: "The obligation without a cause or based upon a fake cause, or illicit cause, cannot have effect", Art. 968: "Cause is illicit when it is prohibited by law or contrary to moral or public order."

[33] Art. 5, Romanian Civil Code: "It cannot be departed by conventions or particular dispositions from laws which interest public order and morals"; Art. 6, French Civil Code: "It cannot be departed by particular conventions, from the laws which interest public order and morals."

[34] Art . 973, Romanian Civil Code: "Conventions have no effect except between contracting parties"; Art. 1165, French Civil Code: "Conventions have no effect except between contracting parties".

[35] Ion Dogaru, Pompil Drăghici, *op.cit.,* p. 139; Ion Dogaru, Nicolaie Popa, *op.cit.*

real rights because of these rights being absolute and opposable erga omnes, create, for all, the general obligation not to bring prejudice; in the same way, preventing claiming rights resulting from contracts triggers liability for damage caused to contracting parties by third parties. Another situation is the one encountered by those entitled, for whom, not being contracting parties or third parties to the contract, the contract will benefit them being opposable to them: universal heirs and with universal title, unsecured creditors.

With respect to the irrevocability of the contract, it should be noted, firstly, that the law of contract that binds the parties is in fact a promise of individual behaviour whose efficiency depends often on external circumstances of the Agreement itself[36]. The principle considers the idea that a contract can be cancelled only by consent of the will of the parties. By exception, there are legal situations in which such a contract is revoked not in the way it was concluded - by mutual agreement, but by expressing the will of one party[37]: open-ended contracts, termination of an essential element in the contract, in successive execution contracts with the advent of a phenomenon of case of force majeure, etc.

The effects resulting from the reporting of contractual law, contract that binds parties are also to be highlighted, on the judge institution. The force of the contract law can be implemented by the judicial irrevocability of the contract, by the impossibility for a judge to modify the consent of will expressed in terms of the contract by the parties. So, if a legal dispute arises between the parties, the judge will be held by "contract law", s/he cannot in principle affect the content of the contract. However, the legal contract naturally seems to open a gate to the judge regarding the legal indirect possibility to interpret (creative process) contractual terms t in order to discover what the parties rationally wanted - Art.970 "Conventions should be done in good faith. They bind not only to what is expressly between themselves, but to all the consequences like equity, custom or law of binding, according to its nature "(Romanian Civil Code); Art.1135:" Conventions bind not only to what is expressed between them, but also to all the consequences like equity, custom or law given to the bind, according to its nature" (French Civil Code).

Thus, it might be said that, in light of the legal obligation of implementing the agreements in good faith, the judge can "neutralize or reshape, indirectly, the contract law"[38], this kind of judicial activity can and must be accepted as long as it is not hostile, and, in fact, it is highly favourable to the contract law itself.

e) "Contractual public order" and the relative nature of freedom of contract. As stated earlier, contractual freedom is a relative freedom which,

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[36] Laurent Aynes, *op.cit,* p. 4.

[37] See for further more Ion Dogaru, Pompil Drăghici, *op.cit.,* p.139; Ion Dogaru Nicolaie Popa, *op.cit.*

[38] Laurent Aynes, *op.cit,* p. 5.

according to legal regulations, has limited exercise mainly for reasons related to the protection of public order or morality (Article 5 Romanian Civil Code and Article 6, French Civil Code).

Hence, we can refer to a contractual public order that imposes certain limits to the possibility of concluding certain contracts by certain persons, with the aim of ensuring the protection of social values (public protection). It was stated that "public order and contract live a parallel existence, both find reason to be in the autonomy of will, one limiting it, the other springing from it. But when even the agreement detaches from the autonomy of will, public order continues to control the contract"[39].

From the normative point of view, public order appears through legal mandatory rules passed to protect political values, social and economic, i.e. a set of legal rules established by the legislator in the vital interest of society and to ensure respect, primarily, of social fundamental demands, "the smooth functioning of institutions indispensable to society"[40]. Thus, law is of public order when it more directly appeals to the society than to the individual, practically corresponding to the assertion of the supremacy of society over the latter[41] in order to ensure the social balance.

Public order seeks protection of essential social institutions against infringements that may be made by contractors, translated by bans imposed by mandatory rules[42]. Thus, we have to deal with what is called "public order of protection", consisting of all imperative rules adopted by the legislator to protect the parties considered in a situation of weakness in a contractual relationship[43]. It is about securing protection of contractors who "are in a position of inferiority so exercising their own will cannot guarantee contractual justice"[44], in this sense, "to eliminate the imbalance, the law requires or prohibits certain provisions that the most powerful contractor can, without the authorization of law, refuse or impose, as appropriate"[45].

Basically, public protection plans aim at restoring the balance of "strong-weak"; compared to contractual freedom, it is translated by imperative regulation of the content of certain contracts, such as the insurance contract that meets a constant worry of protection of the insured person or beneficiary

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[39] Ph. Malaurie, *L'ordre public et le contrat,* Paris, Matot-Braine, 1953, p. 19 în Pascal Lokinec, *op.cit*, p. 58.

[40] The Supreme Court of Belgium, Decision No.48-1-699 of 9 December 1948: "It is of public order per say only the law that concerns the essential interests of the state or community or which establishes in private law the legal base for economic and moral order".

[41] Dominique Bureau, *La reglementation de l'economie*, in *Archives de philosophie du droit. Le prive et le public*, Tome 41, Paris, Dalloz, 1997, p. 326.

[42] J. Flour, J-L Aubert, *Les obligations*, Paris, Armand Colin, 6e éd, 1994, p. 203.

[43] J. Mestre, *L'ordre public dans les relations économiques,* în *L'ordre public á la fin du XX éme siécle,* dir. T.Revet, 1996, p. 34.

[44] S. Le Gac-Pech, *La proportionnalité en droit privé des contracts,* Paris, L.G.D.J, 2000, p. 30.

[45] J. Flour, J-L Aubert, *Les obligations*, Paris, Armand Colin, 9e éd, 2000, p. 119.

of the insurance, because of the inferior status of that party in relation to the insurer, the lease contract, in light of the situation of "weakness" of the leasee considering the economic strength of the lesser, the work contract, whose imperative to protect one of the parties - the employee – in relation to the other - the employer - is practically natural, the consuming contract, to prevent and limit the consequences of an abuse of power of the professional over the mere consumer.

Conclusions

"Morals, public order and freedom of contract". As for the second series of the main limitations of the freedom of contract, as noted, the Romanian Civil Code and the French Civil Code operate the concept of "morals". The concept itself is fluid, that leaving room for interpretation, due to its bordering two broad and fluid concepts, morals and manners[46]. As far as the legal consequences of this concept are concerned - limit of the freedom of contract, the concept of "morals" seems to encompass the two categories of rules: the social mores (natural skills resulting from consistent practice, concerning what is good or bad), and social morality concerning public morals (all moral precepts accepted by a particular society as the essential rules of coexistence and social conduct). The need to find a single generic concept to designate both categories included by "morals" has led to the formulation of "rules of social coexistence"[47] or "social rules of conduct concerning the public order"[48]. Thus, it must stipulated that practice imposed "where, contrary to *the rules of social coexistence,* a contractor has taken advantage of ignorance or coercion of the other, to obtain benefits that are disproportionate to the counter work received, that convention will not be considered valid, because it was based on an immoral question"[49].

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[46] For the distinction between moral and morals see E. Speranția, *Introducerea în filozofia dreptului,* Sibiu, Cartea Românească, 1944, p. 349-361.

[47] A. Ionașcu, *Drept civil. Partea generală,* Bucureşti, Didactică şi Pedagogică, 1963, p. 208-210; C. Stătescu, C. Bârsan, *Tratat de drept civil. Teoria generală a obligaţiilor,* Bucureşti, Academiei, 1981, p .34.

[48] Ioan Albu, *op.cit.,* p. 35.

[49] Romanian Supreme Court, Civil Section, dec. nr.73/1969.

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Art.968: "Cause is illicit when it is prohibited by law or contrary to moral or public order."

Art.966, Romanian Civil Code: "The obligation without a cause or based upon a fake cause, or illicit cause, cannot have effect",

Art.949, Romanian Civil Code: "Any person which is not declared uncapabale by law, can enter a contract", Art.950: "Uncapable of contracting are: minors, the forbidden and basicly all who were prohibited by law."

Art.6, French Civil Code: "It cannot be departed by particular conventions, from the laws which interest public order and morals."

Art.5, Romanian Civil Code: "It cannot be departed by conventions or particular dispositions from laws which interest public order and morals".

LIMITS OF ACTION OF AUTONOMOUS ADMINISTRATIVE AUTHORITIES IN THE ROMANIAN LAW SYSTEM

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Abstract

The emergence, in the Romanian public administration, of such institutions as "autonomous administrative authorities", which exercise their own specific functions under the flag of independence, represents a relatively new phenomenon for the Romanian society since the Constitution of 1991.

Autonomous administrative authorities represent, nowadays, an aggregate of original structures within the Romanian state administration system. The general image of these legal institutions is that of structures which are created on the purpose of exercising actions free of the political influences and of the pressure of different economic or professional interests, in certain areas considered to be "sensitive" and to require objective protection.

Key words*: administrative authorities, political influences, professional interests, legal competence, power of investigation.*

Introduction

The achievement of the purpose for which these authorities were created, running activities in key areas of the state, involves allowing these institutions to exercise certain specific "powers". These "powers" from which the autonomous administrative authorities benefit, by virtue of the place held by this generic institution within the state system – as part of the public administration, cannot have but a circumstantial nature: an administrative nature.

Thus, in the Romanian legal system, autonomous administrative authorities have a number of special "powers", such as: investigative power, the power of informing, the power of recommendation and issuance of points of view, power of settlement, power of referral to state bodies, the power of sanctions.

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I. The legal Romanian system and the institution of autonomous administrative authorities

Autonomous administrative authorities[!] are legal institutions that benefit, within the Romanian legal system, of double consecration and legitimating. Thus, these structures have, as a first legal foundation, Romanian constitutional provisions, and, secondly, by drawing the legislative framework necessary for carrying out such undertakings from the Parliament and Government of.

The French law is still facing a real controversy at the doctrinal and case-law level relating to the legal value of independent administrative authorities. Unlike the Romanian legal system where, as stated above, and in what follows, these institutions have a double foundation, legal and constitutional, in France, with the emergence of this new legal category, a constitutional text to define them is missing. The foundation of this new category of legal authorities with a novel configuration is the French legislator initiative. The creation of these new institutions by law was within the reach of French legal doctrine, where they are named "independent administrative authorities".

The jurisprudence of French Constitutional Council and of the Council of State varies in relation to these authorities, mainly due to their undefinement at the constitutional level and because in general, as we show later, their existence is within an apparent contradiction with the fundamental principles of the organizing of state administration.

In the Romanian legal system, the Romanian Constitution of 1991 enshrines a special place for these authorities called "*autonomous administrative authorities*". Thus, in Chapter V - "*Public administration*", Section I, "*Specialized central public administration*", Art. 116, which outline the central administrative system, is stated: "*(1) Ministries are organized only in subordination to the Government". (2) Other specialized bodies may be organized in subordination to the Government or to the ministries or as autonomous administrative authorities*". Art. 117 (3) provides that "*Autonomous administrative authorities may be established by organic law*".

[!] For more details on the legal institution of autonomous administrative authorities see Marie-José Guédon, *Les autorités administratives indépendantes*, Ed. L.G.D.J, Paris, 1991; George Dupuis, *Les autorités administratives indépendantes*, Ed. Presses Universitaires de France, Paris, 1988; Michel Gentot, *Les autorités administratives indépendantes*, 2e édition, Ed. Montchrestien, Paris, 1994; Olivier Gohin, *Institutions administratives*, 5e édition, Ed. L.G.D.J, Paris, 2006, p. 234-269; Charles Debbasch, Frédéric Colin, *Administration publique*, 6e édition, Ed. Economica, Paris, 2005, p. 927-971; Verginia Vedinaş, *Drept administrativ*, ediţia a III-a, Ed. Universul Juridic, Bucureşti, 2007, p. 345-348; Ioan Vida, *Puterea executivă şi administraţia publică*, Ed. R.A "Monitorul Oficial", Bucureşti, 1994, p. 140-166; Aantonie Iorgovan, *Tratat de drept administrativ, vol. I*, ediţia a 4-a, Ed. All Beck, Bucureşti, 2005, p. 446-447; Dana Aopstol Tofan, *Drept administrativ, vol.I*, Ed. All Beck, Bucureşti, 2003, p. 211.

II. Limits of action of autonomous administrative authorities in the Romanian law system

Autonomous administrative authorities enjoy a wide range of powers, which vary according to each specific subject. Nearly all these authorities have broad powers to achieve their purpose, expressly recognized by law, to approve or recommend to public powers, to conduct investigations or inquiries where appropriate, to regulate certain fields by making general or individual decisions creating rights and obligations, as well as to apply direct sanctions to law breakers and to refer to certain state bodies (court, government, etc.)

A. The power of investigation

This power of investigation[1], which is recognized by law far certain autonomous authorities, is reflected in two aspects: on the one hand, these authorities, to fulfil the general inspection and supervision of a particular sector must be fully informed about the concrete realities of that area so that they should be able to have *free access to all public information and documents* needed, and on the other hand, these institutions have proper *legal competence to conduct inquiries, investigations and inspections*.

With reference to the first point, in many cases the law establishes an obligation to inform and a right recognized to certain autonomous authorities to collect any information that is useful without the public authorities being able to oppose, in principle, the secrecy of documents held. Also, sometimes the law establishes an obligation to respond to requests for information made by the autonomous authorities to State bodies or to other private legal persons. Thus, as stated in Art. 26, (g) of Law 21/1996, the Competition Council "market intelligence reports", ordered by the President of the Council - Art. 20 (3) - and these reports with the possible objections to them are examined in the plenary Council - Art. 20 (4). Art. 35 of the same law states that „in conducting investigations and the powers conferred under this Act, inspectors *may require economic agents or associations of economic agents information and documents they need*, mentioning the legal basis and purpose of the request, *and may set time limits within such information and documents are supplied*, under the sanction provided in this law".

Besides, The National Integrity Agency as shown in Art. 1 (1), Law 144/2007 carries out "*verification of assets* acquired in the exercise of mandates or the performance of public functions or dignities, as appropriate, of conflicts of interest and incompatibilities". During these auditing activities, the Agency may require all institutions and public authorities involved and other legal persons, public or private law *documents and information required to draw up the act of finding* - Art. 5. On the reasoned request of the inspector of integrity, authority agency managers, or public or private companies, those

[1] Michel Gentot, paragraph 66-67; Marie-José Guédon, *idem*, p. 109-113.

of autonomous public companies *must provide them, no later than 10 working days*, with the data, information, records and documents required, regardless of their support, and data, information or documents in their possession, which could lead to solving the case - Art. 6.

Similarly, public authorities *are required* to communicate or, where appropriate, *to provide the People's Lawyer*, within legal terms, *information, documents or papers they have* on applications that have been to the People's Lawyer, giving him/her support to exercise his/her duties (Art. 4, Law 35/1997). The People's Lawyer[2] *has the right to carry out his/her own investigations*, to require from the authorities of public administration any information or documents necessary to the investigation, hear and take statements from managers of public administration authorities and any official who can give information necessary to solve the application that has been addressed to him - Art. 22 (1).

Regarding the second point stated above, certain administrative authorities are vested with legal jurisdiction to conduct inquiries, investigations and inspections and are entitled to conduct these investigations.

In this regard, the Competition Council[3] may order investigations, according to its duties, upon the request of the natural or legal persons affected by a real and direct violation of the provisions of Art. 5 (1), Art. 6, 12 and 15, upon the request of economic agents or economic associations, or upon the request of the authorities, institutions, organizations or any of those bodies mentioned in Art. 29 a)-f) - Art. 34, Law 21/1996.

To investigate breaches of the law, competition inspectors are empowered to inspect and may enter the premises, land or means of transport that economic agents or associations of economic agents legally own, to examine any documents, records, financial or commercial documents and other records relating to undertakings of economic agents or associations of economic agents, regardless of where they are stored, to obtain copies or extracts from any documents, records, accounting and commercial documents and other records relating to the activity of the economic agents or association of economic agents. However, these investigations by competition inspectors may be made only under an order issued by the Competition Council president and legal authorization given by the conclusion of the president of the court in whose constituency the economic agents are located or by a judge delegated by him/her - Art. 38 (1).

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[2] For more details on the institution of ombudsman in comparative law and the People's Lawyer in the Romanian legal system see Ioan Muraru, *Avocatul Poporului - instituţie de tip ombudsman*, Ed. All Beck, Bucureşti, 2004; Monica Vlad, *Ombusdman-ul în dreptul comparat*, Ed. Servo-Sat, Arad, 1998.

[3] For more details on the Competition Council's powers in the Romanian law system and comparative law see Gabriel EedmondD Olteanu, *Dreptul concurenţei comerciale*, Ed. Universitaria, Craiova, 2002; Camille Maréchal, *Concurrence et propriété intellectuelle,* Ed. Litec, Paris, 2009.

B. The power to inform

Some autonomous authorities have the power to issue notice[4], exercising, thus, counselling attributions which represent their power to influence. Notices issued by the autonomous authorities may be voluntary notices or mandatory notices, the law providing for separate situational circumstances and people that can demand the issue of such opinions.

Regarding the first generic notices that may be issued, voluntary notice, which is essentially a consultation of certain state bodies with some autonomous authorities in connection to a specific problem in a specific area, in which the first want to intervene but are not bound by the contents of the notice issued. However, in some cases public authorities cannot legally decide unless the notice was previously issued, not being bound to their content, but sometimes being forced to seek such a consultation notice which will accompany the decision made.

In this respect, the main task of the Legislative Council is to review and approve bills, legislative proposals and draft orders and normative decisions of the Government, for their subjection to law-making or adopting - Art. 2 (1), Law 73/1993.

The bills and legislative proposals are submitted to the Parliament without notice of the Legislative Council within the time limit established by the Standing Committee or the Permanent Commission of the Chamber of Parliament that made the request. *If the notice is given in due time, it does not hinder the legislative process*, the notice being consultative and having a circumstantial object - Art. 3 (1), (2) and (3).

The draft ordinance and normative decisions are subject to adoption of the Government *only with the notice of the Legislative Council* on the legality of the measures and how they are achieved as stated in Art. 3 (3), which is applied accordingly. The notice is *consultative* and will be delivered within the time limit requested by the Government, which is not less than 10 days for projects of usual procedures and 2 days for those of emergency procedure - Art. 4 (1), (2) and (3).

The Legislative Council approves, within legal terms, the amendments to be made after the passing of laws, if material errors are spotted. *The publication of amendments of normative acts* in the Official Bulletin of Romania, Part I, *is made only with the consent of the Legislative Council* - Art. 5 (3).

Besides, among the attributions of the Economic and Social Council, analysis and approval of draft decisions and orders of the Government and bills to be submitted for adoption to the Parliament are included - Art. 6, Law 109/1997. The initiators of draft normative acts and national or sectored programmes and strategies relating to the areas referred in Art. 5 *are required to apply for this advisory notice* of the Economic and Social Council, *which*

[4] Michel Gentot, *op.cit.*, paragraph 68-71.

will necessarily accompany the draft normative act, programme or strategy until its adoption - Art. 7 (1) and (2).

As *binding notices* are concerned, sometimes the law provides a separate procedure, so that a public authority vested with the power to decide being obliged to consult a certain independent authority. A decision in this case without having received a binding legal notice is flawed and may be cancelled for power abuse.

Admittedly, Art. 4, d), Law 415/2002 provides: The Supreme Defence Council *approves of draft bills made or issued by the Government on matters of* national security, the general organization of the armed forces and other institutions with responsibilities in national security, organization and operation of the Supreme Defence Council, preparing the population, economy and territory for defence, budget proposals of the institutions with responsibilities in national security, budget allocations for ministries and services involved in the field of defence, public order and security, conditions of entry, movement or staying in Romania of foreign troops and appointment with the rank of Lieutenant General, Vice Admiral, their counterpart to higher.

In performing its duties The Supreme Defence Council issues decisions, according to law, *binding on* public administrative authorities and public institutions to which they refer - Art. 3.

Likewise, the Competition Council according to Art. 26 (l), of the law of organizing and functioning, „issues a *notice for draft* bills that may have an anti-competitive impact and proposes to amend those with such an effect".

C. The power of recommendation and of issuing of points of view

Powers of recommendation and issuing points of view[5] accepted by the legislature for certain autonomous administrative authorities are very close to the power of informing. The recommendation amounts to an "urgent request"[6] made by the independent authority to bodies of state administration system and pursuing the adoption of a certain conduct, to proceed to a particular reform, to change legislation or to propose any legislative changes, etc.

Basically, recommendations, having no enforceable legal framework, do not create legal rights or obligations, which would be incumbent to public authorities, unless there is a legislative provision to that effect.

In the Romanian law system, the People's Lawyer, according to Art. 13 d), Law 35/1997, *may formulate points of view*, upon the request of the Constitutional Court, and according to Art. 21, in exercising its attributions, the People's Lawyer gives recommendations that are not subject to parliamentary scrutiny and to judicial review (1). Through the recommendations made, the People's Lawyer shall inform the public administration authorities on the unlawful acts or administrative actions. The

[5] Michel Gentot, *op.cit.*, paragraph 71-73.
[6] *Ibidem.*, paragraph 72.

silence of public administration bodies and late issuance of documents are assimilated to administrative acts (2).

The Competition Council, according to Art. 26 m) of Law 21/1996 „*makes recommendations* to the Government and local public administration bodies to adopt measures to facilitate market and competition development". In the application of the competition law, the Competition Council „examines *points of view, recommendations* and notices to be made in plenary sessions" - Art. 20 (4) d). Art. 29 of the same law states the legal obligation for this independent authority to communicate its point of view on any aspect of competition policy upon the request of certain authorities and elements of civil society (President of Romania, parliamentary committees, senators and deputies, central and local public administration bodies, professional organizations, employers and trade unions concerned, consumer protection organizations, courts and prosecutors).

Inspectors of the National Integrity Agency, as stated in Art. 11 (1) of Law 144/2007, if they notice formal deficiencies in filing property or interest statements, shall *recommend* in writing, no later than 20 days, the person's correction of statement. The statement can be accompanied by supporting evidence.

D. Power of settlement

The power of settlement[7] available to certain autonomous administrative authorities is their ability to lay down general and impersonal rules creating rights and obligations on individuals and legal persons. The specificity of such power recognized by the legislature to independent authorities is that they may organize execution of the law and carry out law enforcement, having such an administrative power without the ability to legislate. This power is a "special settlement power stationed in the implementation of the law having to comply not only with laws but also with other regulations" therefore being a "subordinate and limited power"[8].

The French Constitutional Council, by virtue of Decision 88-248 of January 17th 1989, has defined, in a precise and restricted way, the exercise of settlement power of independent administrative authorities. Thus, the Council confirmed[9] that an independent authority may be authorized by the legislator to adopt rules for law enforcement, but stressed that this empowerment concerns only "measures of limited scope, both in their field of application and their content"[10]. We highlight the specificity of this settlement power available to some independent authorities in our system of law in terms of

[7] Michel Gentot, *op.cit.*, paragraph 73-79; Marie-Joseé Guédon, *op.cit.*, p. 113-119.
[8] Michel Gentot, *op.cit.*, paragraph 74.
[9] Recall that in French law these authorities do not have a specific constitutional consecration.
[10] Michel Gentot, *op.cit.*, paragraph 75.

legislative provisions enshrining the power of enforcement, scope, organization of law enforcement in each specific area.

According to Art. 3 of Law 21/1996, "*the administration of this law and its implementation* is entrusted to the Competition Council as an autonomous administrative authority, vested to this end, in the conditions, procedures and limits set by provisions set out below". So, in the competition field, the authority vested by law with settlement jurisdiction is the Competition Council. It should be noted that in some cases a regulatory decision made by the Council may be censored by the Government. Thus, as stated in Art. 48 (1), "the decision of the Competition Council pursuant to Art. 46 on a merger transaction that involved an autonomous company will be notified to the competent ministry" and (2): "within 30 days of the decision, according to (1), the Government, at the proposal of the minister, on its own responsibility, can take a decision different from that of the Competition Council for reasons of public interest. The decision is enforceable and will be published together with the Competition Council decision in the Official Bulletin of Romania".

In the same manner, Law 415/2002 in Art. 4 f), states that the Supreme Council of National Defence "approves: draft treaties and international agreements in national security matters or incidents in this area, action plans to declare a state of mobilization and war, plans of action to establish a state of siege and state of emergency, planning objectives concerning territory for ensuring the operational needs of the national defence forces, the rules on planning, record, use, justification and cost control intelligence for achieving national security for institutions with responsibilities in this area, operational costs for achieving security, main directions of activity and general measures necessary to remove the threat to national security, etc.", practically being the authority with the ability to regulate national safety.

E. The power of referral to state bodies

The power to refer to certain state bodies[11] recognized to certain autonomous administrative authorities is their ability to notify certain public institutions empowered in situations of illegality it finds in its action and on which it cannot, in a direct manner intervene to restore the state of lawfulness.

Thus, The Competition Council, according to Art. 26 of Law 21/1996 "refers to the Government cases of interference of central and local public administration bodies to implement this law (k) and (...) the existence of monopoly or other cases (...) and propose measures to remedy the failures detected" (h) or "refer the cases to courts which are competent" (i).

Likewise, the inspectors of the National Integrity Agency may refer the the court, fiscal or criminal prosecution bodies in cases of non compliance to the framework law by the qualified subjects.

[11] Michel Gentot, *op.cit.*, paragraph 82-84; Marie-Joseé Guédon, *op.cit.*, p. 123-125.

Art. 4 (3) of Law 144/2007 provides with: “If after comparing data from statements, and after the analysis of the additional documents received, the integrity inspector finds that there is a notable difference between the wealth gained while exercising their functions and revenue collected during the same period, it shall proceed as follows: a) checks whether the obvious gap is justified. If the integrity inspector finds that the difference is not justified, she/he notifies the authorized court to determine the wrongly gained wealth part or the determined property wrongly acquired, which calls for a seizure; b) notifies the fiscal authorities, where there is infringement of tax legislation; c) suspends verification and refers to the criminal investigation bodies, where there is evidence or indications that there are grounding evidence concerning committing criminal offenses”.

Furthermore, the People's Lawyer may refer to the Constitutional Court on the unconstitutionality of laws, before promulgation - Art. 13 e) of Law 35/1997, or can refer directly to the Constitutional Court with the exception of unconstitutionality of laws and ordinances (f). According to Art. 25 from the same law the People’s Lawyer is entitled to refer the Government with any unlawful administrative act or fact of central public administration and of the prefects (1), and Government not adopting, within 20 days, the measures concerning the illegality of administrative acts or facts noticed by the People's Lawyer is notified to Parliament (2).

F. The power to sanction

Some autonomous administrative authorities also have power to sanction[12], usually of payment of compensation order, the subjects of legal relations in the specific area of operation of these authorities. The penalties issued by these authorities are always subsequent to law, have the character of administrative acts and may be censored by the courts.

Conclusions

Thus, according to Art. 26^1 (1) of Law 504/2002, to encourage and facilitate the pluralistic expression of the currents of opinion, broadcasters are required to reflect the election campaigns in a fair, balanced and impartial way. As stated in (2) of the article, The National Audiovisual Council, in the correct application of the provisions of (1) issues binding rules, monitors compliance with legal provisions and regulations issued and *punishes their violation.*

Also, the Competition Council may apply specific penalties provided in Chapter VI of the Law, "Sanctions", to economic agents who violate the provisions of Law 21/1996

[12] Michel Gentot, *op.cit.*, paragraph 84-86; Marie-Joseé Guédon, *op.cit.*, p. 118-123.

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FREE MOVEMENT OF THE GOODS, REFLECTING THE PRINCIPLE OF MUTUAL RECOGNITION OF SINGLE MARKET

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Abstract

In reference to the free movement of goods the removal of national barriers within EU is one of the principles contained in the EU Treaties. Starting from a traditionally protectionist approach EU countries have continuously removed restrictions in order to form a common or single market.

Key words: *goods, movement, market, state.*

Introduction

Free movement of goods is one of the basic principles of functioning of the European single market. Accordingly to art. 28 şi 29 ECT quantitative restrictions are prohibited between Member States both when refer to the import and export and all measures having equivalent effect. EU Treaty gives member states the right to limit the free movement of goods when there is a specific common interest such as environmental protection, public health or public policy. To stress, if importing a product is deemed by national authorities of the Member State as a potential threat to public health, public morality or public policy, the authorities can deny or restrict access to its internal market. Examples of such products: genetically modified food or certain energizing beverages. Although generally there are no restrictions regarding the purchase of goods in another member state, as long as they are for personal use, there are a certain number of European restrictions for some certain categories of products such as alcohol and cigarettes.

Within the single market area basically works the principle of origin rule. This principle ensures compliance with the principle of subsidy, by creating detailed rules at EU level in strict conformity with local, regional and national traditions, which make it possible to maintain the diversity of

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products and services and economic integration. The Commission monitors the way of compliance of member states to these principles and prepare assessment reports every two years by which the member states are advised about the problems and solutions that are needed. Inoculating these principles acquires as targets citizens and economic operators through a twofold action at the Commission, and the second to the member states.

In order to enforce the mutual recognition of the principle of free movement of goods, namely to eliminate or reduce barriers that hinder goods trade, the Commission intends to conclude an international agreement within the GATS under the aegis of OMC. Although the EU has pledged to remove all internal barriers that hinder the free movement of goods, not all sectors have been liberalized. The European Union decided to bring under regulation at European level, the economic sectors which might present a greater risk for European citizens - such as pharmaceuticals and constructions. Most products (treated with 'low risk") are subject to the so called principles of mutual recognition, meaning that any product legally manufactured or marketed in one Member State can move and can be freely sold within the EU market. The principle of proportionality has begun to play an increasingly important role in balancing the two opposing principles: freedom of movement of goods and the requirements imposed by a national system of trade.

After a long and varied period of developments, the Court established a flexible casuistry approach referring to the freedom of movement of goods, with clear definitions of prohibited measures within the Community space.

Article 30 ECT states that the provisions of Articles 28 and 29 ECT *are not opposing to the prohibitions or restrictions on imports, exports or transit justified on grounds of public morality, public order, public safety, preservation of the health and life of humans or animals, plants conservation, the protection of any national treasures of artistic, historical or archaeological value or the protection of industrial and commercial property. However, such prohibitions or restrictions must not constitute a mean of arbitrary discrimination or a disguised restriction on trade between member states.*

The principle of proportionality has a crucial role to play in this area. The Court highlighted that it isn’t enough that a member state to invoke one of the reasons above, because the named restrictive measure must be justified and to respect the limits given by the principle of proportionality. Thus, in terms of restrictions to the free movement of goods imposed by a member state justified on grounds of public health protection, the Court held that "a state authority to ban imports of those products from other member state should be limited to what is necessary to achieve the legitimate aim of protecting health, consequently, national regulations providing such a ban are

justified only if market approvals are offered when they are compatible with the need to protect health."[16]

In case **"banana market settlement"**[17] the Court involved in a process emerged as a result of an action brought by Germany against the Council, was asked to rule on the legality of a regulation (404/1993) issued by the Council by which a single way of organizing the banana market was introduced, and as a result the banana traders from Germany were affected because they could not bring in sufficient quantities bananas. The German government have shown that by this regulation has been violated the property of right and the right to a profession of the traditional importers. By its decision, the Court stated that no one can claim a property right to a share of the market which could be lost after the reorganization of the market because holding a share of the market at a certain moment is just an economic position exposed to risk with changing market conditions. The Court also noted that although the right to property and right to free exercise of a profession are fundamental rights recognized by the Community, this does not mean that their performance could be restricted in some circumstances, and especially within the common market while the restrictions aim the protection of the public interest, general welfare as communion purpose and does not represent a disproportionate intervention and does not affect the essence of those rights.

The court decided that the legality of a measure taken in this area could be questioned only if the measure were known to be unfit and inappropriate for the purpose intended by the issuing agency. But in this case the Council took into account the mutual interests of member states that have divided into the bananas producers party who were willing to provide a profitable activity for their citizens and to prevent social problems and the party of those who wanted to ensure by any means the minimum price for bananas to their customers.

Court overruled the opinion of Germany according to which the Council could take more appropriate measures, showing that it cannot replace the measures taken by the Council since they are taken on an erroneous assessment of goodwill, saying that the applicant has not demonstrated that this organ based on the data at their disposal should have taken an inappropriate and an incorrect measure. Therefore the Court dismissed the action brought up by Germany and the German government objections that the measure taken by the Council would be contrary to the principle of proportionality that the actions of the authorities and member states are reported to.

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[16] Ioan Alexandru, *Dreptul Administrativ in Uniunea Europeana*, Lumina Lex Publishing House, Bucharest, 2007, p. 391.

[17] Decision of CJE from Oct 05 1994 in case no. C-280/1993 Germany/Council, Handbook 1994, p. I-4973.

In "*Hedley Lomas*" case[3] the Court was called to answer the question whether a Member State may take unilateral measures of protection and compensation to counter a possible breach of Community law by another Member State.

The state of facts was as follows: in the period 1990-1993 the Ministry of Agriculture, Fisheries and Food of Great-Britain have systematically refused to grant permits for the export of live animals to Spain on the ground that animals in the butcheries from this country are tortured, because it does not comply with the Directive no. 577/18.11.1974 accordingly to which the animals must be anesthetized before scarifying.

In 1992 Lomas Company that wanted to export sheep from England was refused to be granted with such approval, for which its representatives have opened a case against the above named ministry and the English court have asked the Court with the above question.

Court in its decision noted that Spain has taken in its legislation the above named directive but no sanction was provided for non-compliance. Nevertheless, the Court decided that the refusal of a member state to grant approval for export constitutes a quantitative restriction on exports which is contrary to the Article 29 (34) of the Treaty. Also held that a member state is not entitled to take unilateral action on compensation and protection to counter a possible breach of Community law by another Member State.

More precisely the community law forbids to a member state as being based on art. 30 (36) of the Treaty EEC, to justify restricting the export only by the fact that a member state on its suspicion or opinion would not comply with a harmonizing directive. In other words, Community law does not provide a basis for individual "Community retaliatory".

Following the adoption of the Law of conformity assessment of products and the significant progress in taking over the sector community *acquis* during 2001, in March 2002, Romania has opened negotiations for Chapter 1 - free movement of goods.[4]

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[3] CJE decision from May 23rd 1996, case no. C-5/1994 „The Queen/Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas Ltd. (Ireland), Handbook *1996*, p. I-2553.

[4] Additional information regarding:

- Mutual recognizing principle of free movement of goods: http://europa.eu.int/comm/internal_market/en/goods/mutrec.htm
- Restrictions, statistics, specific schemes, general rules regarding the safety of products and technical harmonizing within the union and with the candidate states**:** http://europa.eu.int/scadplus/leg/en/s07000.htm
- Problem solving system related to the single market and to the national centres addresses: http://europa.eu.int/comm/internal_market/solvit/
- Member states cooperation for consumer protection: http://europa.eu.int/scadplus/leg/en/lvb/l32047.htm
- Phone and online assistance: http://europa.eu.int/europedirect/index_en.htm

Developments in the field of national standardization have especially targeted the creation of the necessary conditions for increasing the rhythm of adoption of European standards in the Romanian standardization system. In July 2001 the Romanian Government approved the "Strategy to adopt European standards", in order to take over by the end of 2003 the least of 80% of European standards. Romanian Accreditation Authority (RENAR) has signed several multilateral agreements for recognition, and the Romanian Institute for Standardization (ASRO) continued its programs of transposing European standards, having so far implemented about 15% of the harmonized European standards. Romania has made little progress on the free movement of goods. Mainly, complying with the *acquis* in this area has been considerably limited by the lack of framework legislation based on the principles of New Approach and Global Approach, which prevented further progress from the specific legislation sector from areas covered by New Approach directives. The implementation of the *acquis* referring to the elevators, gas installations, electromagnetic compatibility, medical devices, recreational craft, legal metrology, pressurized equipment and telecommunications and radio terminal equipment was delayed. Romania has implemented only one part of the *acquis* related to the textiles, motor vehicles and cosmetics. Poor progress can be reported in the pharmaceutical field. Substantial progress is needed especially in the transposition of the *acquis* for pharmaceuticals and food. Also, major efforts are needed to improve the overall administrative capacity to implement the *acquis* in the industrial products domain, which still remains very weak.

Furthermore, the ability of administration to develop legislation on the free movement of goods is still limited and needs to be strengthened. To fulfill the requirements of complying with the community *acquis* in the free movement of goods domain, Romania has proposed the adoption of short and medium term measures. Romania adopted some series of normative acts by which transposed into national law many European directives. Special efforts are needed to reshape the system. Both the management and food business operators should be prepared in order to comply with the specific principles of European food safety system

Administrative is provided by the Ministry of Health and Family in the food hygiene domain, by the Ministry of Health and Family and the National Sanitary Veterinary Agency in the hygiene and sanitary – veterinary control, by the Ministry of Agriculture, Food and Forestry in the production of food designated to the marketing and by the National Authority for Consumer Protection in the consumers protection domain. In the *textiles* domain the provision of Directives 96/73/EC and 97/37/EC referring to the textiles names they have been taken over entirely by Government Decision no. 332/2001 regarding the designation, marking and labeling of textile fiber. This bill introduces uniform rules on textile names and specifications that appear on labels, marks or accompanying documents in various stages of textile

processing and distribution. By the Minister of Agriculture and Food Order no. 146/2000 (harmonized with Council Directive 88/320/EEC) and Minister of Agriculture and Food Order no. 154/2000 (harmonized with Council Directives 88/320/CEE and 99/12/CE), the medical and veterinary norms have been approved which refer to the standards of good laboratory practice within animal health diagnostic activity as well as within hygiene and animal public health. The directive 88/378/EEC about *toys* has been transposed by Government Decision no. 710/1999 on the safety of toys users. Applying the decision of the Government the Ministry of Industry and Comerce Order no.54 / 2000 was issued for approval of the List of Romanian standards which adopt the harmonized European standards for toys safety.

Conclusions

Free movement of goods is one of the basic principles of the European single market functioning. The removal of the national barriers regarding the free movement of goods within the EU is one of the principles enshrined in the EU Treaties. Starting from a traditionally protectionist approach, EU countries have continuously removed restrictions in order to form a common or a single market. This commitment to create a European trading area without frontiers has led to wealth growth and to creating new jobs, transforming the EU into a main actor at a global level in the commerce domain.

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NORMATIVE OVER ORGANIZATION IN THE CONTEXT OF EUROPEAN UNION INTEGRATION

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Abstract

The changes of the state policy as well as the options for reorganization in wider formations existent at international level have determined an uncontrolled increase in the number of norms and rules of law, phenomenon described in the judicial literature[1] *as "judicial inflation". Therefore, the transformations in the Romanian society have determined some analysts to wonder whether today the state of law ensures the liberty of the individual. More than that, we are now talking about a crisis of the state.*

Key words: *public administration, legislative codification, European integration, normative over organization*

Introduction

Generically, the administration presents the stage of development of a state. It is obvious that where the public administration is strong already, "few ideas are born, few desires and few interests and passions are met"[2]*. But when the desire for reform of the entire society is raised, the state has to intervene in the social and economic life conferring the individuals' solutions for all their problems. Together with the intensification of the adhesion process in the European Union and the efforts of integration of the Romanian public administration in the European administrative space, Romania hasn't avoided the adoption of laws and ordinances in such a great number that the succession of modifications and abeyances have raised a sign of doubt from the European Commission regarding the administrative capacity of our country to adopt the community acquis.*

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[1] D. C. Dănişor, *Drept constituţional si instituţii politice*, Vol.1, Teoria generală, Tratat, Ed. C.H.Beck, Bucharest, 2007, p. 180-184; see also Virginia Vedinaş, *Notă cu privire la Tezele prealabile ale proiectului Codului de procedură administrativă,* Revista de Drept Public, nr.4, Bucharest, 2008, p. 96-97.

[2] A. de Tocqueville, *Vechiul regim si revolutia*, Ed. Nemira, Bucharest, 2000, p. 12, 188, 189.

The phenomenon of *judicial instability* at national level

If in some of the opinions the actual *crisis* of the Romanian state represents only the expression of the need for social protection[3] most of the opinions have sustained the guilt of the public powers, the sole responsible for the complexity of the law and at the same time for its instability. The individual becomes suffocated by the multitude of laws, the state becoming "a machinegun" that "spatters" laws[4]. The same unstable environment affects not only the regular citizen and the entrepreneurs that feel uncomfortable in an environment that lacks judicial stability but also the entire society. In the first place, the legislator itself feels helpless. The legislator is followed by the public servants in administration and justice, the one that should apply the law. *But, unlike other categories, the public servants and citizens are among the first that feel the effects of the block*. The public servants have to take more pains that require more study, together with a bigger need for technical ad personnel means. From here the question: the excess supra organization determines a tendency towards the diminishing of the democracy or just signals its absence?[5] In order to answer this question we have to start from the role of the theory of power separation among the democratic states. This theory was conceived as being a receipt for institutional organization able to ensure the liberty of the individual facing the spread of the state power. Or, as long as the mechanisms offered by the three powers are not affected, ensuring the protection of the individual from these blocks, we can conceive the intervention of the state in the reorganization of the state as being legitimate. The thing is that at the moment we cannot take pride in *judicial stability* at national level. *Among the causes of normative instability, we can mention for example the political factor, respectively the changes of power, the lack of political will, incapacity or just lack of experience in a context in which the judicial phenomenon gained such power from the Romanian adhesion at the EU. In the first case, once installed in power, most of the parties put into practice reforms that abrogate or entirely modify the anterior laws, thus the change of those governing always bring a legislative frame t hat doesn't modify much*. In the second place, due to the fact that the new laws have a rapid frequency, *too little attention is given to the coherent and clear character of the methodological norms applying certain laws*. It is also very important the person leading the reform: the superior public servant who is also a politician, the public servant that sympathizes with the politics or the public servant independent of any political *color*?! We would add another

[3] V.Ionescu, I.Navroțchi,*Democratie-vis şi realitate*, Ed. C.H.Beck, Bucharest, 2006, p. 111.
[4] J. O. y Gasset, *Europa şi ideea de naţiune,* Ed. Humanitas, Bucharest, 2002, p. 173-175.
[5] D.C.Dănişor, *Drept constituţional şi instituţii politice,*Ed. Universitaria, Craiova, 2003, p. 399.

reason, unfortunately much more dangerous, about which Tocqueville[6] wrote almost two centuries ago, criticizing the French administration, namely that *even the laws do not change, the way in which they are applied changes from one day to another*. Thus those governing do not break the law but "every day they make it fold in every direction, according to each situation appearing and in order to facilitate the most the administrative problems". What's more serious is the fact that like the state in which the governments get out of control out of the wish to issue laws without ensuring a unitary character, the member states of the EU are not distinct.[7]

Another cause regarding the legislative abundance is determined by the existence of the *specific mores*. There were states for which the law has a very strong symbolic value, being solicited by the citizens. For example, "the French are in love with laws and do not stop soliciting new ones, as if any new problem requires a specific treatment. This appetite for laws is alimented by those governing. The governments and ministries that have succeeded, as well as the members of the parliament, have multiplied the legislative initiatives answering thus to the mediated desires of the citizens".[8] Some authors[9] found the explanation in other directions that stem from education, culture and history of an entire continent. Thus, in a context regarding the "international legitimacy between the US and Europe" the European and labeled as being keen for the existence of a general judicial frame, preferring the international laws and norms while the Americans *prefer the unilateral*.[10]

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[6] F. Furet, *L'importance de Tocqueville aujourd'hui - L'actualité de Tocqueville*, Cahiers de philosophie politique et juridique nr. 19, Centre de Philosophie Politique et Juridique de l'Université de Caen, 1991, p. 138, în Cristian Preda, preface on Alexis de Tocqueville, *Vechiul regim si revolutia*, Ed. Nemira, Bucharest, 2000, p. 6,7.

[7] For example, in France, in 1997, there were 8000 laws and 110.000 decrees in force, their number growing annually with 1500 new laws and many more decrees. See R. Fauroux, B. Spitz, *Notre Etat: Le livre vérité de la fonction publique,* Paris, Robert Laffont, 2000, p. 185 quoted by V. Ionescu, I. Navroţchi, *op. cit.*, p. 114; Until 1st July 2007, there were 2619 laws in force, out of which 2114 laws and 519 ordinances, and on July 1st 2008 there were 23883 decrees and 64 codes in force (www.legifrance.gouv.fr.).

[8] Conseil d'État, Rapport public 2006, *Bilan d'activite du Conseil d'État et des juridictions administratives. Considérations générales: Sécurité juridique et complexité du droit*, France, 15th March 2006, http://www.conseil-etat.fr/ce/rappor/pdf/dos_pres_2006.pdf. Regarding the decentralization the data have indicated a serious fact. The General Code of Territorial Collectivities in France numbered 4492 articles, among which 3029 suffered modifications between January 1st 1996 and September 1st 2005, out of which 2085 only at legislative level.

[9] R. Kagan, *Of Paradise and Power: America and Europe in the New World Order,* Ed. Knopf Publishing Group, New York, 2003, p. 31, quoted by D. Mazilu, *Uniunea Europeană în sistemul global. Tendinţe de reconfigurare a echilibrului de forţe la nivel mondial în Revista Română de Drept Comunitar, nr.4/2008*, Bucharest, p. 37.

[10] The American unilateral feature is based on the desire of the Us to not get involved in nay king of relations with other states that would result in constraining the latter from a judicial point of view. (See N., Păun, *Europa şi America: între profiluri, valori şi interese distincte, articol apărut în ziarul Monitorul de Cluj din 27 noiembrie 2008).* Or, if the appetite for laws in comparable with the longer political and military stability (the Us declared its

Also, in Germany the rules, laws and the application of the law play a very important role in the everyday life of its citizens.[11]

There are considerations based on which the public powers cannot be made responsible for the phenomenon of *legislative inflation*, such as the ones regarding the evolution of the international and customary law, the geographic or sector decentralization and the solicitation for certain laws from the citizens.[12] Therefore, the national public powers cannot be responsible for the multitude of laws issued by the EU institutions or for the international treaties that the signatory states are obliged to respect and grant internal law statute. Another issue is born from this perspective, namely the problem to ensure certain standards that would allow the harmonization of the legislation to be able to talk about a common legislation at the EU level. Regarding the phenomenon used by the EU institutions to issue European legislation (regulations, directives, decisions), compulsive for the member states, this is an obligation assumed through the adhesion treaties and not respecting it attracts the responsibility of the state.

The necessity of introducing some judicial standards regarding the adoption of national legislation and transposing the European Union's legislation

In the context of *coherence* and *need for accessibility*, the European Commission has encouraged the elaboration of *standards* regarding the national legislation. In 2003, the Commission elaborated a *Joint Practical Guide of the European Parliament, Council and Commission* for all people involved in drafting the legislation within the community institutions.[13]

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independence from the Great Britain in 1776, forming the United States) then the Europeans can be understood for loving the laws, the recent historical past being the one that left them a bitter taste. But we cannot balance the preference for unilateral with imposing force and blending in the internal affairs of other states (for example the conflict in Iraq).

[11] The reports regarding the procedures of the German courts are present in all the papers; the graduates in law have very good methodological skills; they study other European law systems as well; there is 1 lawyer for each 600 citizens; all these elements make the German, especially the civil law, one of the best in the world which is the reason why many East-European states have restructured and codified their internal laws after the German model of law system. See for details M. J. Schermaier, quoted, p.273.

[12] Conseil d'Etat, quoted.

[13] The Guide comprised some techniques regarding the elaboration of community legislation, so that the latter is better understood and correctly implemented, respectively be conceived in *intelligible* and *consistent* manner, *clear, simple and precise*; *in accordance to the uniform principles* to present and formulate the legislation; compatible with the type of act considered and according to its mandatory character (or not); the formulation of the acts so that the persons targeted are better identified, respectively their rights and obligations; the articles and phrases too long are to be avoided, the complicated vocabulary that in unnecessary and the excessive use of abbreviations; provision in the content of the acts (especially in case of those with immediate applicability the date of entering into force of the date in which the provisions of the acts are applied. In the latter case, mentioning the date in the act was important for the Commission when it had to verify if Romania transposed a certain directive and decide on the manner in which our country fulfilled or not its

In the context in which it was in full process of organization and monitoring the process of adoption of European legislation in view of adhesion to the EU, Romania adopted *Law no. 24/2000 in view of elaborating normative acts, according to which all the normative acts that were to be adopted had to be compatible with the community law regulations as well as with the ones existing in the international treaties Romania is part of (article 20).* These norms had a special impact at national level, through *Law no.189/2004 for elaborating normative acts* being taken over and imposed as obligation for the form of drafting of laws, legislative proposals and other drafts of normative acts: *drafting* the judicial norms *in own prescriptive format*; stating some elements regarding the imperative character, suppletive, permissive, alternative, derogatory, optional, transitory, temporary, of recommendation etc. of normative draft; *clear, fluent and intelligible phrasing*; correlation with the provisions of normative acts of superior level or same level[14]; including regulations that have the same level or are of superior level, in the possible extent, in a sole normative act; avoiding parallelism – by abrogation[15] or concentrating the matter in unique regulations; express abrogation of obsolete legal dispositions or dispositions contrary to the stipulated regulation; the *codification* of the regulations subordinated to common principles; incorporation in an homogenous structure, presents as a codex. Another new aspect of the law was represented by *the special attention given to the research and scientific analysis for the solid knowledge of the economic-social realities* that were to be regulated and the history of the legislation in this area as well as similar regulations in other countries, the Legislative Council having a very special role in this context. *After the adhesion of Romania at the EU, one of the priorities of the European Commission was to sustain the continuity of the process of improvement the quality and simplification the national regulations,* the measures being included in the *Strategy for a better regulation at the level of central public*

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obligations. For example, for the directives on the free movement of goods, people and services, "in order to prevent creating a barrier in virtue of the differences in applying the provisions of the member states until the end of the period of transposition, a date from which the national provisions will be applied has to be mentioned". European Communities, *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions,* Luxembourg: Office for Official Publications of the European Communities, 2003, http://eur-lex.europa.eu/en/techleg/index.htm.

[14] This obligation stems from the regulations existent at the level of the Constitution, that provision the priority of the international law over the internal one (with certain exceptions related to the provisions regarding the human rights) as well as following the Romanian adhesion at the EU.

[15] From the necessity of ensuring clarity for the legislation of the Union, within the Decision of the European Parliament, Council, Commission, Court of Justice, Court of Auditors, European Economic and Social Committee and Committee of Regions no.2009/496/EC, EURATOM, it is mentioned that by adopting the present document, the Decision 2000/459/EC, CECO, Euratom (art.15) is abrogated.

administration 2008- 2013[16]. They reflected much of the objectives the European Commission focused on in the *Action program on reducing the administrative tasks in the EU* that stated that the administrative tasks generated by the EU legislation were to be reduced with 25% by 2012, in this context the member states being solicited to establish the plan of measures on reducing the administrative tasks.

The simplification of the national legislation is therefore imposed by Law no.24/2000 in view of ensuring the coherent, unitary and flexible character of the legislation. This process shouldn't ignore a very important factor, *namely the necessity to train the public servants and the ones involved in the process of drafting the regulations* by organising some training programs, namely the necessity of elaborating handbooks for this purpose.

If we analyse the procedure of adopting the EU legislation, we will notice that the technique used for applying the requirements related to the clarity of the legislation when new provisions appeared was the *replacement of a certain legislative act*[17] rather than modifying it, so that the former regulation would be abrogated and not determine confusions. Or, in Romania there were many practices. Most of the normative acts have backed away from the requirement of unitary frame[18]. Thus, our country received countless notifications from the European Commission[19] regarding the *uncontrolled manner of issuing emergency ordinances*. We must mention the fact that the point of departure in regulating the legal condition of correlating the practice of issuing normative acts by the legislative power and the practice of the Romanian instances regarding the vagueness and imprecision of normative acts was also accomplished through *Law 189/2004*. What is certain is the fact

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[16] According to the Strategy, these measures focused on the improvement in evaluating the impact of the regulations and consultancy; reducing the administrative tasks for the business environment; facilitating the interaction between the economic sector and the central public administration; improving the process of regulating at the level of agencies and regulating authorities; simplifying the national legislation; applying effectively the community legislation. For the accomplishment of these objectives, the programs mentioned above had to reflect the application of the following principles: *the principle of proportionality, the principle of effectiveness, the principle of substantiation, the principle of responsibility, the principle of consistency, the principle of transparency, the principle of specificity, the principle of ensuring the compatibility with the community legislation.*

[17] Regarding this issue, see the reasons mentioned in the Preamble of the *Council's Decision on June 28th 1999 on establishing the norms on exerting the competencies of execution conferred to the Commission* (1999/468/EC).

[18] We can mention the *G.O. no. 27/2002 on regulating the activity of solving petitions*; *G.E.O. no.27/2003 on the procedure of tacit approval*; *G.O. 33/2002 on regulating the release of certificates and notifications by the central and local public authorities*.

[19] Even if within the periodic monitoring report issued by the European Commission in 2004 it is indicated that our country "made progress in restricting the use of emergency ordinances", this progress didn't represent the elimination of these practices in the present. The Commission of European Communities, *Periodic Report on the progress of Romania in adhering to the EU, 2004*, Brussels, 06.10.2004, SEC (2004) 1200, p. 13.

that in general, in the matter o the Law of administrative contentious, the modifications have been accomplished late.[20]

We notice that in the practice of the instances, whose decisions are mandatory, the fact that although the principle of *judicial security* has an older tradition within the jurisprudence of the Court of Luxemburg, being consecrated by *Decision De Geus c. Bosch* on April 6 1962, these instances, especially the Constitutional Court, prefer to make reference to the jurisprudence of the European Court of Human Rights and very rarely to the Court of Justice of the European Union. What is certain is that the Romanian state itself was convicted art CEDO for breaching the predictability of the law and in the last period of time, the cases for breaching this principle are more and more numerous. Still, considering the adhesion of the EU to the Convention, this can only offer greater guarantees for *a better administrative justice* in Romania. For example, Law on approving *EGO no.37/2009 on measures of improving the activity of the public administration* on amending *Law 188/99 on the Statute of Public servants was declared as being unconstitutional*[21] based on the consideration that the normative judicial act lacked the quality of being *predictable and easily accessible*. In motivating the Decision, the Constitutional Court accuses the legislator of lack of legislative technique in adopting the normative act due to the manner of drafting which is *wrongful and imprecise*. Thus, in the mentioned cause, through Decision no.710 on May 6th 2009, the Constitutional Court notices the breach of the provisions of article 11 in the Constitution, namely that the Law adopted does not correspond to the exigencies regarding the *accessibility*[22]

[20]Article 19 if this law provisions that any normative project, in view of a good substantiation, must take into consideration the *practice of the Constitutional Court* in the normative area and that of the *judicial instances* in applying the regulations in force as well as the *judicial doctrine* in the matter. Thus, in a cause regarding the exception of unconstitutionality of dispositions in article 20, paragraph 1 in the *Law of administrative contentious no.554/2004* the author of the exception sustained that these provisions breach the dispositions of article 21 and those of article 129 of the Constitution, allowing the judges to "add to the law", corroborating it with the dispositions of the Code of Civil Procedure, as the text of the law does not provision the causes, conditions and parties in the communication of the appeal, limiting the *right to defence* of the parties and the *access to justice*. In the subsequent drafting, namely after the adoption of Law 262/2007 amending Law 554/2004, the ***accessible*** character of the law is re-established, article 20, paragraph 1 provisioning that "the decision issued by the first instance can be appealed within 15 days from communication". (Constitutional Court, Decision no. 189 on March 2006, published in the Official Monitor no.307 on April 5th 2006).

[21] Constitutional Court, Decision no.710 on May 6th 2009, published in the Official Monitor no. 358 on 28.05.2009.

[22] Due to the *accessibility* of the law, the fulfilment of the condition of publishing the law is understood and the collocation "according to the law" we could appreciate the *limit of the legal protection in the national law against the arbitrary interferences of public authorities.* A norm fulfils the predictability character if it offers a certain guarantee against the arbitrary breach from the public authorities, namely its *clarity,* offering adequate indications so that no

and predictability[23] of the judicial norm established by the European Court of Human Rights in its jurisprudence.

Conclusions

In Romania, in what concerns the *stage of codification of legislation in national administrative law*, there is no *Code of Administrative Procedure*, this being only at the stage of project. *Given the tendencies existent at the level of the EU in view of codifying the administrative law, we must notice that in the EU this phenomenon found, at least for the moment, a remedy regarding the role played by the Court of justice*. Still, we expect that in a not very distant future, the codification of the principles defined by the Court to be clearer in regulations that the Court would then legitimate through its decisions and possibly represent a guide for the public administration at the level of the member states.

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public authority performs abuses of power. (ECHR, Decision on April 3rd, 2007, Cause Copland v. United Kingdom).

[23] In the cause Rotaru v. Romania on March 29, 2000 the ECHR states that the *predictable* character of the norm has to determine the fact that the law is applied to the citizen and he is able therefore to correct his conduct. The quality of the law results not only from the fact that it has to be provisioned in the internal law, but also from the precision in which establishes conditions in which a right of the person cannot be restrained. (ECHR, Decision on March 29th 2000, Cause Rotaru v. Romania, published in the Official Monitor no. 19 on January 11th 2001).

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PROTECTING CADASTRE AND REAL ESTATE PUBLICITY THROUGH THE INCRIMINATION RULE COVERED BY ARTICLE 65 PARAGRAPH 3 OF LAW NO. 7/1996

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Abstract

This article approaches the issue regarding the destruction offence according to the provisions of the article 65 paragraph of Law no. 7/1996. Examining the crime as established by the monographic research scheme, the author emphasizes the provisions of the private law in cadastre and real-estate publicity domain.

Keywords: *cadastre, land registry, real-estate publicity, crime, destruction*

Introduction

In the concept of the Law on the cadastre and on real-estate publicity[1] *as amended and supplemented by Government emergency Ordinance no.*[2] *, the cadastre*[3] *and the land book*[4] *form a unitary and compulsory system of technical*[5]*, economic*[6] *and legal*[7] *record, of national importance, of all immovable property from the country's whole territory, having as goals: determining the technical, economic and legal information regarding the property; providing real-estate publicity rights on the basis of the documents which have been established, transferred, modified or extinguished these*

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[1] Republished in The Official Gazette of Romania no. 201, March 3th, 2006.

[2] Published in The Official Gazette of Romania no. 451, July 7th, 2010; after approval of the Government Emergency Ordinance by law, Law no. 7/1996 shall be republished in The Official Gazette of Romania, giving the texts a new numbering.

[3] The cadastre makes the description of real-estate properties and their representation on cadastral plans.

[4] Land Book includes the description of land, showing the real estate rights.

[5] See article 9 paragraph 1 of the Law No. 7/1996, as amended and supplemented by Government emergency Ordinance no. 64/2010: Cadastral technical function is performed by determining the boundaries of neighbouring buildings, based on measurements. Measurement works are executed by any graphic, numeric, photogrammetric or combined method.

[6] Ibidem, art. 9 paragraph 2: In the economic function of the cadastre are highlighted the technical elements, which are necessary to establish the taxable value of buildings or, where applicable, contributions or taxes on these buildings.

[7] Ibidem, art. 9 paragraph 3: The legal position of the cadastre is achieved by identifying real estate owners and by registering immovable property in the land book.

rights; supporting the tax system and the housing market; helping to ensure the security of real estate transactions and facilitate mortgage loans[8].

Real-estate publicity based on the cadastre record system has as object the inscription in the land book of the juridical acts and deeds referring to the buildings from the same administrative territory and it is carried out by the territorial agencies for the buildings situated in their activity area[9]. Real estate publicity covers all legal means provided by law through which is publicly outlined the legal and financial status of the buildings, in order for it to give full safety to the security of the static and dynamic civil circuit, security relating to immovable property[10]. The static security means protection of rights, which currently exist for a property and the dynamic security means protection of rights that will be acquired in the future, in accordance with the law, for a property[11]. In another opinion[12], real estate publicity covers all legal means provided by law that are publicly determining the legal and financial status of the real-estates, particularly through the records that are kept by state authorities, to safeguard the interests of the holders' real estate rights and insurance-related rights for their circulation according to the law.

The cadastre is the unitary and compulsory system by which the identification , registration, representation on cadastral maps and plans of all land, as well as of other immovable property from the country's whole territory shall be achieved, regardless of their purpose and owner.

Chapter II Sanctions of the Law no. states that the Ministry of Administration and Interior, through the National Agency for Cadastre and Land Registration, is empowered to control the activity of all individuals and legal entities that are operating in Romania in the areas of cadastre, geodesy and cartography[13]. Regarding the material prejudice brought to the social values protected by cadastre and real estate publicity, in addition to infringements[14] and the offence of possession[15] disturbance that tackle the

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[8] Ibidem, art. 1 paragraph 1 of Law no. 7/1996, as amended and supplemented by Government emergency Ordinance no. 64/2010.

[9] Ibidem, art. 17 align. 1.

[10] See I. Sabău-Pop, *Drept civil. Drepturi reale - sinteză teoretică şi practică / Civil Law. Real rights - Theoretical and practical synthesis*, „Petru Maior" University, Târgu-Mureş, 2004, p. 378.

[11] See I. Albu, *Curs de drept funciar /Land law course*, Lithography and Printing of education, Bucharest, 1957, p. 342 apud L. Pop, L. M. Harosa, *Drept civil. Drepturile reale principale / Civil Law. Main real rights*, Universul Juridic Publishing House, Bucharest, 2006, p. 333.

[12] See C. Bârsan, Civil Law., *Drept civil. Drepturi reale principale*, ediţia a III-a */ Civil Law. Main real rights*, Third Edition, Hamangiu Publishing House, Bucharest, 2008, p. 342.

[13] See article 64 paragraph 1 of the Law No. 7/1996.

[14] Ibidem, article 64 paragraph 2 of the Law No. 7/1996, describing the behaviors which present the social danger that is characteristic to the seriousness of offenses.

[15] See article 65 paragraph 4 of the Law No. 7/1996: the setting up or displacement of boundary marks and of the zone limit markings of railways, roads, canals, airports, ports,

subject, is also indicted the offence of destruction, according to the provisions under article paragraph of the Law no.

The legal content of the offence of destruction is as follows: the degradation or destruction of landmarks, bench marks, surveying marks, and of geodetic signals from the national network, located on ground or on buildings, or the hindrance of conservation measures for these assets.

a. Concept and characterization

topic refers to the crime of destruction of landmarks, bench marks, surveying marks, and of geodetic signals from the national network or the hindrance of conservation measures for these assets, with economic value belonging to another person.

In contrast to other property crimes[16], the crime of destruction does not have as a result a material profit for its author, the result (consequence) of the act is merely consisting of the damage or deterioration or disposal of the belongings of another person.

When such an act is committed with intent, it can be inspired and carried out by negative feelings of - hate, revenge, predatory, punishment of any kind. Destruction of property may occur as an eventually - unwanted result, but accepted by the defendant - in an action related with another action that is a distinct offense, committed in concurrence (theft and destruction, injury and destruction, outrage and destruction). Finally, the destruction may be the result of a fault attitude[17].

Destruction Offences[18] are built on a common frame material, but have different identities, the differences between these mainly appear in the subjective element (the author's mental attitude) with which the act is committed and in its consequences.

b. The purpose of criminal protection

The special object of the crime is complex. The social relations that are establishing, and growing out in defense of the public and private property of

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navigable lines, forest, geological, and mining delimitations, without the approval provided by law, shall constitute an offence of possession disturbance and shall be punished according to the provisions under article 220 of the Criminal Code.

[16] These have as consequence the passing of a good - by various means of stealing (accompanied or not by violence) or fraud - from the ownership sphere of the victim within the grasp of the offenders, causing material damage to the first category and bringing material profits to the second category.

[17] See Gh. Diaconescu, C. Duvac, *Tratat de drept penal. Partea specială / Treaty of criminal law. Special Part*, C.H. Beck Publishing House, Bucharest, 2009, p. 303.

[18] According to the provisions of article 217-219 of the Romanian Criminal Code.

the state and private property of other individuals or legal persons[19], and also in cadastre and real estate publicity[20] are the main legal object.

The secondary special legal object consists of social relations that are defending the existence and the state of facts of the property listed by law, property whose destruction may jeopardize the work for border delimitation of various land and land records accuracy.

The material object is represented by landmarks, bench marks, surveying marks, and of geodetic signals from the national network, located on ground or on buildings. In addition, the landmark [21] is a pole, which is fixed on a roadside to indicate the mileage, the distance to the settlements on the road; a pole, which is implanted at a regular distance on the side of a roadway Topographically speaking, the bench mark is a gauge used to calculate or to check the altitude of a point on the field[22]. Likewise, the level is represented by all methods, procedures and operations which determine the altitude of some land points in order to represent them on a map or a plan[23]. A surveying mark is a distinctive sign affixed to an object on the ground[24], to be used for determining the altitude of land points in order to represent them in the cadastral work[25.]

Geodesy is the applied science dealing with the study of the shape and size of the land, with the technique of measuring and with the cartographical or numerical representation of its surface[26]. The geodetic sign means a conventional sign (sound or visual) or a group of such signs, through which it is precisely positioned a point on the surface of the earth to serve for the terrestrial measurements and also to the cartographical or numerical representation of the earth's surface[27].

All the movable effects[28] that the owner has *in perpetuu*[29] placed on the land fund are immovable property by destination. For this is necessary to have

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[19] See A. Ungureanu, A. Ciopraga, *Dispoziţii penale din legi speciale române, comentate şi adnotate cu jurisprudenţă şi doctrină / Romanian penal provisions of special laws, commented, annotated with case law and doctrine*, vol. VI, Lumina Lex Publishing House, Bucharest, 1996, p. 713.

[20] See M. Gorunescu, M. Popescu, *Infracţiuni privind cadastrul şi publicitatea imobiliară, /Offences on cadastre and real estate publicity* in „Revista de drept penal" („Journal of the Criminal Law") no. 4/2003, p. 71.

[21] See *Dicţionarul explicativ al limbii române / The Explanatory Dictionary of the Romanian Language*, Univers enciclopedic Publishing House, Bucharest, 1998, p. 107.

[22] Ibidem, p. 916.

[23] Ibidem, p. 696.

[24] For example, on a pole, a rock or a tree or less often on a building.

[25] See A. Ungureanu, A. Ciopraga, *in the work cited*, p. 718.

[26] See *Dicţionarul explicativ al limbii române / The Explanatory Dictionary of the Romanian Language*, Univers enciclopedic Publishing House, Bucharest, 1998, p. 418.

[27] See A. Ungureanu, A. Ciopraga, *in the work cited*, p. 718.

[28] Such as landmarks.

[29] When they are reinforced with gypsum, lime and cement, or when they can not be removed without damaging or deteriorating the fund on which are placed.

a good relationship between the mobile property and the immovable property to which it servs, both having the same owner. It is not important whether the property has a certain degree of wear, the condition is that it must be usable[30].

c. Subjects of the crime

The active subject (the author) was not circumstantiated by the text, so it can be any person. The active subject may be a legal person according to the provisions of article of the Romanian Criminal Code. Criminal participation is possible in all its forms - authors, incitement[31], complicity.

The passive subject is the public[32] institution against which the criminal activity was directed, to which are belonging the landmarks, bench marks, surveying marks, and geodetic signals and that is dealing with the location and maintenance of these assets.

d. The objective side

The material element of the offence of destruction is expressed, as a rule, through action and, more rarely, through inaction, giving rise to prejudice to the material integrity of a property[33].

These actions/inactions may be of destruction or degradation of a property that belongs to another person or prevent taking the conservation measures for a property.

By degradation we understand an action directed against an asset, after which it loses one or more of its qualities, it becomes unfit for the purpose it was intended for, it is damaged, broken. The property exists, but has a reduced economic value. Is out of interest if the property could be repaired or if it could have any use although being degraded [34]. There is decay even when the act affects the aesthetics of the property.

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[30] See M. Gorunescu, M. Popescu, *in the work cited*, p. 72.

[31] For the existence of the incitement of crime of destruction by fire is sufficient to find out, from the subjective point of view, that the perpetrator acted with indirect intent, foreseeing and accepting the result of the deed that was committed by the author, at his instigation.

[32] The National Agency for Cadastre and Land Registration is the sole authority in the field, with legal personality, subordinated to the Ministry of Administration and Interior, resulting from the reorganization of the National Office of Cadastre, Geodesy and Cartography and by acquiring the activity on real estate publicity from the Ministry of Justice.

In exercising its functions, it coordinates and controls the execution of the cadastre. As appropriate it coordinates and controls works of cartography, surveying, geodesy, photogrammetry and remote sensing across the country, and runs through the National Centre of Geodesy, Cartography, Photogrammetry and Remote Sensing these works; in accordance with the law and in cooperation with the Ministry of National Defense it offers the execution, completion, upgrading and maintaining in a proper state the national geodetic network; it develops and maintains land parcel identification system as a subsystem of the Integrated Administration and Control System in cooperation with the Ministry of Agriculture and Rural Development.

[33] See Gh. Diaconescu, C. Duvac, *in the work cited*, p. 305.

[34] See Al. Boroi, *Drept penal. Partea specială / Criminal Law. Special Part*, C.H. Beck Publishing House, Bucharest, 2006, p. 259.

Destruction is an action carried out against a good, resulting in disintegrating, annihilating, destroying or ruining it. The destruction of property consists of the violation of the substance of the good, so that it ceases to exist.

By the expression hindrance of taking conservation measures must be understood those actions that are obstructing the people's work - carried out individually or by intervention teams of the public services - designed to prevent the destruction of a property, or to remove the existing danger of damaging, which is surrounding the property. The perpetrator does not act directly on the object to destroy it, but through its unlawful action he prevents, stops the act of taking the necessary measures to defend the property from the danger that threatens it. It is about serious and effective actions of the perpetrator, and not mere futile or isolated attempts without effectiveness[35].

The actions listed in the indictment rule have an alternating nature, it's sufficient to commit one of them in order for the material element of the crime in question to exist. Committing more of these actions against the same property, even sequentially, through a continuous activity or against several goods simultaneously, does not affect the crime itself[36].

Immediate consequence is mainly the endangerment of the activity in the field of cadastre and real estate publicity, without the need for an inaccurate land record.

The secondary result is the destruction of properties listed in the law or the simple alteration of the quality of these assets belonging to public institutions, therefore causing a loss[37] to the institution in question.

It is necessary to establish a link between the actions/lack of action of the defendant and the produced result, namely the damaging of the good.

e. The subjective aspect

The subjective element of the crime is expressed exclusively by intent, in both its forms - direct and indirect. If the action in cause is committed without intent, it is considered an offense in according to the provisions of article 219 of the Romanian Criminal Code[38].

The elements of purpose and motive are not relevant for the fulfillment of the crime.

f. Shapes. Methods. Penalties

Shapes. The crime of damaging is likely to all imperfect forms of the offense, but the preparatory deeds are not provided by Romanian laws in force and, therefore, are not punishable.

Referring to the attempt, as article of the Law no. 7/1996 refers specifically to article 217 of the Romanian Criminal Code, and interpreting

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[35] See M. Gorunescu, M. Popescu, *in the work cited*, p. 72.

[36] See V. Dongoroz a.o., *Explicaţii teoretice ale Codului penal român, Parte specială / Theoretical explanations of the Romanian Criminal Code. Special Part*, vol. III, p. 550.

[37] See M. Gorunescu, M. Popescu, *in the work cited*, p. 73.

[38] See Al. Boroi, *in the work cited*, p. 261.

these two provisions in conjunction with that of article 222 of the Romanian Criminal Code, we can affirm that even for special crimes, the attempt will be investigated. Based on the same reasoning, the crime may also be committed in its qualified form according to the provisions of article 218 of the Romanian Criminal Code, because the previously mentioned rule has an explicit reference to article of the Criminal Code as well.

The fulfillment of the crime occurs at once with property damage, degradation or bringing the property in a state of disuse as a result of any of the actions that constitute the material element. In the absence of actual damage caused by the action/lack of action of the author, the offense is not fulfilled and can eventually be analyzed in terms of its imperfect state – the attempt[39].

The offense may be committed in a continuous form, in which depletion takes place at once with committing the last act of the objective side structure[40].

Methods. The offense presented in article paragraph 3 of the Law no. is a variant of species assimilated to the destruction provided in article 217 paragraph of the Romanian Criminal Code and is regulated in three ways: destruction, degradation and prohibiting the taking of conservation measures regarding the goods listed in the text. Each of these normative ways can be linked to a variety of factual ways.

Penalties. In its species version, the crime of destruction is also punishable under the regulations regarding the simple version stipulated in article of the Romanian Criminal Code, namely imprisonment between one month and three years or a fine.

The legal entity shall be punished by a fine between 5.000 to 600.000 lei.

Procedural Issues

Criminal proceedings shall be initiated *ex officio*, and no reconciliation between the sides shall impair the criminal liability. The prosecution and trial of the actions are done according to the ordinary rules of procedure.

Conclusions

Real estate publicity covers all legal means provided by law through which is publicly outlined the legal and financial status of the buildings, in order for it to give full safety to the security of the static and dynamic civil circuit, security relating to immovable property[41].

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[39] See Gh. Diaconescu, C. Duvac, *in the work cited*, p. 306.

[40] See M. Gorunescu, M. Popescu, *in the work cited*, p. 73.

[41] See I. Sabău-Pop, *Drept civil. Drepturi reale - sinteză teoretică şi practică / Civil Law. Real rights - Theoretical and practical synthesis*, „Petru Maior" University, Târgu-Mureş, 2004, p. 378.

In another opinion[42], real estate publicity covers all legal means provided by law that are publicly determining the legal and financial status of the real-estates, particularly through the records that are kept by state authorities, to safeguard the interests of the holders' real estate rights and insurance-related rights for their circulation according to the law.

The cadastre is the unitary and compulsory system by which the identification , registration, representation on cadastral maps and plans of all land, as well as of other immovable property from the country's whole territory shall be achieved, regardless of their purpose and owner.

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the Government Emergency Ordinance by law, Law no. 7/1996 ;

[42] See C. Bârsan, Civil Law., *Drept civil. Drepturi reale principale*, ediţia a III-a */ Civil Law. Main real rights*, Third Edition, Hamangiu Publishing House, Bucharest, 2008, p. 342.

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The Romanian Criminal Code.

THE CONSEQUENCES OF THE MIGRATION OF HIGLY-SKILLED, LOW SKILLED AND UNSKILLED WORKERS

Nicolaie Iancu*

Abstract

International migration is a phenomenon that is in a general ascending trend. Thus, migrant population represents at present (2010) around 2.9% of the world population – or approximately 190 million, as compared to 2.2% in 1970[1]*. Migration related experiences are different depending on individuals, countries, regions, rural or urban environment or, in other words, migration is not just a global phenomenon, but a local one, as well.*

Key words: *skilled worker, unskilled worker, migration.*

Introduction

Migration has always been a part of human existence and we have all the reasons to believe it will stay like this in the future. In the future, more and more people, from developed and developing countries will take migration into consideration, whether permanent or temporary, as an opportunity to improve their lives or their individual or family perspectives. The progress in transport and international connections has made traveling much easier and faster, while the Internet, which is constantly expanding, is a source of information regarding the perspectives of finding workplaces and living in other countries.

To quote Ban Ki-moon, Secretary General of the United Nations Organization, "we are entering an age of mobility, when an ever increasing number of people will cross borders, looking for opportunities and a better life, having the possibility to wipe away the inequalities that are characterizing our age."[2]

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[1] Keeley, Brian, (2009), *International Migration-The Human Face of Globalisation,* OECD Insigts, 2009.

[2] Human Development Report 2010, http://hdr.undp.org/en/statistics/data/mobility/.

The image of migration is, and always has been, very complex and we think we ought to distinguish three major traits of migration at the beginning of the 21st century.

1. Firstly, migration has been growing since the 1980s. The tendency is neither stable, nor continuous – for instance, the growth rate slightly diminished in the 1990s as compared to the previous decade. Still, there is clear evidence showing that migration affects an increasing number of people all around the world. As the tendency is to migrate to a relatively small number of destinations, they will receive considerable amounts of migrant population. Thus, in the OECD area, migrants represent more than 23% of the population in Australia and Switzerland, but only 3% in Finland and Hungary.

2. Secondly, migration analysis presupposes, essentially, an analysis of the population movement from poor to rich areas – from developing to more developed countries. If we stick to this assertion, we may often commit some errors, by ignoring the great movement amount between developed countries (the so-called North-North movements) as well as between developing countries (South-South), which, cumulate, each of them, between 25% and 30% of the total volume of international migration. In other words, the end of the 20th century shows a clear change in the field of migration; if in the middle 1970s, about 42% of the migrants came from the less developed countries, at present just one third of the migrants come from these countries.[3]

3. Thirdly, international migration is part of an ample social and economic process, that has been changing the world over the past decades, i.e. globalization. The way that goods and services are traded almost unrestrictedly all around the world, more and more people are looking for jobs and a place to live outside their origin country. Although freedom of movement is not necessarily an encouraged and growing phenomenon – with the exception of a few economic areas such as the European Union – there is recognition of the role of migration as a component of globalization and, at national level, of the role of migrants in stimulating economic growth. During the next few years, we will certainly face increased competition, particularly between the developed countries, in order to ensure their necessary amount of highly-skilled migrants.

There is not a single flow of work force migration and, in some respects, it is difficult to draw a line between work migration and other forms of migration.

I. The migration of highly-skilled workers

For the past few years, there has been a unanimous consent regarding the importance of international recruitment and movement of highly-skilled workers. Most industrial and service sectors, which are increasingly modern, rely upon the acquisition, installation and use of human expertise to add value

[3] Keeley, Brian, *op. cit.*

in their operations. When this expertise is locally unavailable, employers often resort to "importing" it.

If during the period 1995-2005, the foreign workforce in the European OECD countries increased by around 3% a year, while in the USA it increased much faster, by over 4%, as regards the migration of the highly educated and highly skilled, it increased at a much accelerated pace in the majority of the developed countries, from almost 35% annually in the United Kingdom[4], to 14% in the USA and 6% in Canada[5], which are very high rates of growth, surpassing any historical comparisons, and which reflect the fundamental changes in the field of production technologies and structures in industrial countries.

Entrance gateways for migrants

Most countries have three formal entrance gateways for the admission of the highly skilled and a fourth one, "the back door", for asylum seekers and illegal migrant workers, among whom some are skilled people[6]. The three formal gateways are:

- The admission gateway for professionals and persons with exceptional abilities which exists, practically speaking, in all countries, due to the common desire to facilitate the transfer of knowledge and know-how;
- The gateway of transfers within the company, to facilitate international business and, particularly, to encourage capital inflow;
- The gateway for international students (graduates).

The first gateway is important because, today, many countries are widely opening their gates for the admission of the highly educated and highly skilled. Most developed countries are officially closed to unskilled workers, but apply a liberal policy to the admission of highly skilled people in some professions, such as university professors. Germany grants permanent residence permits to "specialists who are necessary for the positive economic development of Germany"[7], and the United States annually admits the entrance of about 140,000 highly skilled foreign workers[8].

Many governments have created programmes in order to facilitate the entrance and integration of foreign scientists. For instance, in France, Alfred Kastler National Foundation helps foreign scientists to obtain visas and reduce

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[4] Over the past 3 decades, for holders of long-term work permits, cf. John Salt , *Types of Migration in Europe:Iimplications and Policy Concerns*, Migration Research Unit, University College London 2005.

[5] John Salt, *op. cit.*

[6] Abella, M.I., (International Labour Office*) Global Dimensions of the Highly Skilled Migration,* GTZ Conference on Migration and Development, Berlin, 20-21 October 2003, http://www2.gtz.de/migration-and-development/download/abella.pdf.

[7] Werner, H., (2000) *From Guests to Permanent Visitors?,* in http://www.ilo.org/public/english/protection/migrant/download/imp/imp42.pdf

[8] Competing for Global Talent, International Labour Organization (International Institute for Labour Studies), 2006.
http://www.ilo.org/public/english/bureau/inst/download/competing.pdf

administrative procedures, offering a variety of services, including health insurances, housing, etc., in order to facilitate adjustment to life in France.

It is important to note that the gateway for the highly educated and highly skilled tends to be indifferent to the country of origin, therefore, it is the gateway that allows the entry of many aspirants from poor or developing countries, even if most of the inputs still come from other technologically advanced countries.

The second gateway has always been the main point of entry for the movement of managers and other professionals, whose volume has increased along with overall growth of transnational corporations. The movement is general – from North to North, from North to South, from South to North, and from South to South. The recorded data show entries in all OECD countries[9], of which the U.S. is the leader, leaving far behind its follower, The United Kingdom. Thus, the number of those transferred within companies increased from 112,000 persons in 1995 to over 200,000 in 2000[10].

It is worth mentioning that moves within companies are perofrmed by using other gates too, for example, those who come for short periods of time avoid the bureaucratic procedures for obtaining work permits and use the advantage of liberal policies of admission for short-term visitors as tourists, and only those who travel for longer periods of stay seek ways of admission that provide tax exemptions, incentives, etc. (e.g., favourable treatment of foreign investors).

The third gateway, that for international students/graduates, is considerably increasing and is, probably, the most worrying, being often related to what we traditionally call "brain drain". The candidates are self-selected, well educated and quite often belong to the wealthier strata of the population in countries of origin. Most of them initially want to stay just for the period of study, but a large number remain as permanent migrants. OECD reports show for the year 2005 a number of about 1.5 million foreign students who study in OECD countries, of whom more than a half come from non-OECD countries. Of these, about 27% attend European colleges and universities, and the U.S. has the largest number of foreign students, their number having increased 16 times since 1995 to the present[11].

Finally, there is the non-official gateway, which provides the fewest data on the abilities of those who pass through it. Most of these people enter as tourists, but prolong their stay, becoming illegal workers. And there are also asylum seekers, some of whom are highly qualified persons.

The composition of highly skilled migrant flows

[9] Approximately 76% of movements within companies in USA in 2000 originate in OECD countries, the rest in East Asia and the richer Latin American countries: Brazil, Argentina and Venezuela, cf. Manolo I. Abella, *op. cit.*

[10] OECD, Policy Brief, International Mobility of the Highly Skilled, July 2002, http://www.oecd.org/dataoecd/9/20/1950028.pdf

[11] Abella, M.I. *op. cit.*

Even if things are actually quite clear, conceptually there is no universally accepted definition or agreement on what is a highly qualified *("highly skilled")* person, which leads to the assumption that they do not make up a homogeneous group, although, in general terms, they can be described as specialists with professional, managerial and higher technical (PMT) skills. The group as a whole consists of a series of sub-concentric and non-competing groups, in which the skill level and the duration of the training are likely to lead to low elasticity of supply. The nature of the work they perform and the experience required generate additional complications in defining this concept. Entry into certain PMT occupations is connected to a large extent to a general academic education of a very high standard, in other cases training is based on a specific occupational experience, subsequently leading to obtaining a diploma or a general qualification in the workplace. The ability to perform a highly skilled activity is sometimes linked to past experience, or a combination of experience and qualifications (such as an MBA). Certain work places, rightly considered to require high qualification, may rely less on formation or experience than on innate talent: for example, sports people, artists, musicians. Many of them are very mobile internationally, but rarely does their situation get to be analyzed in migration specialty literature.

The following enumeration tries to identify the most important categories of temporary highly skilled migrants, thus illustrating the complexity of work migration flow.

Corporate transferees. The movement of these persons is performed internationally, within the internal labour market specific to large organizations. This is probably the reason why there are few data regarding this movement and, when available, the numbers are small (Table No. 1), but we must note that this movement too is defined, accepted and recorded for statistic and administrative purposes. There are many reasons underlying the movement of these people and the periods of time when it occurs are also diverse. Most frequent are motives related to career development and professional training, but they can also belong to the fields of production, trade or research, the movement generally reflecting the organizational structure of the employers. These persons usually have above-average conditions, including private health insurance, schooling for children and the covering of their housing costs by employers. As specialists, they diversify and elevate the level of local labour market supply, increasing the efficiency of local workers.

b. Professionals, experts, who work in the public sector, especially in the fields of health and education, as well as in the private sector. These people are highly educated and their specializations are internationally recognized. Their movement is usually for a limited period of time and may be either mediated by recruitment agencies or done individually. Some of them are employed by NGOs, and, to some, external commitments of this

kind can become permanent. Housing, the aspects related to education and healthcare comply with the welfare requirements imposed by such a level and are often paid by employers, in the form of an allowance or special allowances for these expenses. In general, no certain algorithms can be identified, no steps forward to be taken in such a career. Often the decision to migrate is the result of a desire for wealth, but also for career development, and the transfer can be done both inside and outside the country of origin. When moving, these people are usually accompanied by their families.

c. Project specialists and "visiting firemen". Their movement is connected to specific projects abroad, often in construction. Movements may occur in domestic labour markets, although often these people are recruited through the external labour market, being under contract for a limited period (several days to weeks). They usually travel alone, without their families, so there are no educational implications, as for dwellings, they are either specific to these situations, or a rented house, hotel room, etc. The economic and skilled labour market implications of these movements are considerable, as these specialists, through their expertise in the fields they are involved in, bring about a growth in the efficiency of general economy. Movements are often unpredictable, addressing the needs of crisis management.

d. Specialists, consultants. Organizations increasingly resort to recruiting specialist consultants for a wide range of business services. Locations where they are required are becoming diversified, all across the globe, so that consulting firms are becoming increasingly trans-national. Their movement may be in the short or in the long term and is similar to that of project specialists or to movement within corporations, visited and surveyed routes and entities are often established through contracts with customers and depend on the types of services the consultant provides. Movements are mostly short and are usually done without families, so that the consequences for the health or educational system of the host country are minimal. Accommodation is provided by hotels or flats owned by the company.

e. Migrants for purposes of personal career development and professional training. Many people seek employment opportunities on external markets for their career development and training, involving travel abroad for different periods of time. This group is quite heterogeneous, including nurses and also young people in the early stages of their careers, looking for experience in various environments. This type of movement includes those in later stages of their careers, the so-called "speculation of opportunities". The conditions of housing, education and healthcare depend on the career stage reached at the moment of migration and the path of that career.

f. Clergy and missionaries. Religious and quasi-religious orders traditionally send their adherents abroad, for various periods of time; often their activities and goals overlap with other tasks and types of expatriates,

such as healthcare, education, etc. In most cases, accommodation is made available or conditioned by the workplace.

g. Entertainers, athletes and artists. This is a very diverse group, often moving internationally, mostly for short periods of time. Sometimes, movement can turn into permanent residence. Those who are extremely well paid (like footballers) will normally use private educational services and health facilities.

h. Business people, entrepreneurs and wealthy independent people. This group may include business people and entrepreneurs with traditional connections to the countries they move to, investors or people with considerable fortunes who choose to leave their country of origin to address personal circumstances (including the avoidance of taxes). In most cases, there is no intention to stay for longer periods of time or to settle permanently in the receiving countries. These people are often accompanied by their families, which will use medical and educational services, whether public or private. They tend to settle in the major urban areas.

i. Academics, including researchers and teaching staff of higher education institutions and other similar forms. There is a substantial exchange of academics and researchers between universities and similar institutions, for different periods of time. Some movements are for relatively short terms, for a semester, others have a quasi-permanent character (the classic phenomenon of brain drain). An increasing number of young people hold research positions abroad, initially entry level positions, and subsequently manage to be promoted to positions that often influence their decision to prolong their stay in the host country.

j. Military personnel. These people are normally excluded from the category of migrants, although a substantial number of officers and military experts are included in the movement of highly skilled people discussed above. On the other hand, we must not ignore the subsequent influence of periods spent abroad in the armed forces on people who had become civilians and then had migrated. An important aspect is to include the children of military staff who move from one military base to another in the local school systems.

Causes and motives for cross-border movements of highly skilled persons

The speed of technological changes is clearly one major cause, but it is difficult to quantify and is certainly not the only cause of the cross-border movements of highly skilled people. In the U.S., the workforce engaged in science and engineering increased by 5.5% per year during 1990-2005, and part of that growth has its source in inflows of foreign labour. The number of foreign scientists and engineers in the U.S. increased by 9.3% during the period in question. The share of foreign scientists and engineers in the U.S. has doubled, from 7.6% in 1970 to 17.8% in 2007. Asia has become a major

source of qualified personnel in technical areas, with approximately 56% of the total, Europe and Canada have contributed about 24% and the rest come mainly from Latin America. The five most important countries of origin of the foreign technical personnel in the U.S. are India, China, Japan, Philippines and Vietnam. In the universities in the U.S., for the period 1995 - 2005, a quarter of the graduates in natural sciences and engineering were foreign. At doctoral level, foreign students are present in proportions ranging from 39 % in natural sciences, to 50 % in mathematics and computing and 58 % in engineering[12].

The motives for the international movement of highly skilled migrants show considerable variation. For most of them, movement actually reflects the priorities of the employers in using them, in allocating the staffing resources of their firm at international level. In other cases, movement reflects the number and importance of the projects in which the company is involved abroad and the necessity to employ contract staff for limited periods of time. For some migrants for employment, the motive reflects their individual decisions and professional aspirations, for example, entertainers, trainers, those moving for career development, to enrich their experience and connections, for training purposes. Some highly skilled persons may also be admitted on the basis of selections overseen by the authorities in the receiving country, including a special treatment for entrepreneurs, independent individuals with considerable wealth, etc.

Other researchers[13] classify the motives and causes of the constant increase of highly skilled migrant flows into three main categories:

1. Increased education in developing countries (which induces a general increase in migration options, even if migration propensity is constant at all education levels);

2. Globalisation: it contributes to increased self-selection effects: human capital is attracted towards places where it is already abundant;

3. Selective immigration policies promoted by developed countries since the 1980s: *Point-systems* in Australia, Canada and Britain, H1-B visas in the United States, the Green Card in Germany, "immigration choisie" in France, the European Blue Card, etc.

The effects of highly skilled workers migration on the development of origin and destination countries

The economic analyses conducted in OECD countries[14], but also in third countries, have made it possible to assess the economic impact of skilled workforce migration in the respective countries of origin and destination. The

[12] Abella, M.I., *op. cit.*

[13] Rapoport, H., Brain Drain and Development: an Overview, in *International Migration: Trends and Challenges*, OECD-CEPII Conference, Paris, October 23-24, 2008.

[14] OECD, Policy Brief, International Mobility of the Highly Skilled, July 2002, http://www.oecd.org/dataoecd/9/20/1950028.pdf.

results of these researches are unanimous in identifying a group of net positive effects for the main host countries, especially in terms of capacity for fostering innovation, increasing the stock of available human capital and international dissemination of knowledge, but also a number of contradictory effects for the issuing countries:

- The contribution of foreign-born scientists (mostly originating from Asia or Europe) is shown, perhaps most suggestively, by the number of Nobel prizes granted to the United States of America, for example, 32% of American Nobel Prize winners in Chemistry from 1985 to 1999 were born abroad[15]. According to The National Science Foundation, the share of professors in American universities born abroad is about 37% for engineering specializations and about 25% for mathematics and computer science specializations[16];
- Skilled migrants are also a highly valued source of entrepreneurial initiatives in high technology fields. Thus, it is estimated that a quarter of the IT firms in Silicon Valley during the period 1998 - 2003 were founded and / or run by immigrants from China and India. These companies have achieved total revenues of almost 17 billion euros per year and have created over 200,000 jobs[18];
- Developing countries could be potential beneficiaries of the international movement of technical experts, professionals, managers and engineers if foreign direct investments in these countries are encouraged and stimulated, especially through the operations of multinational corporations. However, not all developing countries benefit accordingly from this phenomenon; foreign direct investment depends to a large extent on the cooperation between OECD countries and, secondly, on the relationships between the main developing countries (notably China, Brazil, etc.) and developed countries.
- For countries of origin, loss of human capital can be, at least partially, offset by international transfers of funds to families in the countries of origin, the return of migrants and the development of networks to facilitate the movement of other categories of skilled workers between host countries and countries of origin. In addition, it is considered that many developing countries provide few highly skilled jobs, and in this case, migration cannot be seen as a limiting factor for the development of their industries, at least in the short term, but rather as a means of efficient use of the professional and creative capacity of the holder of such skills and knowledge[19];

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[15] Competing for Global Talent, International Labour Organization (International Institute for Labour Studies), 2006.
http://www.ilo.org/public/english/bureau/inst/download/competing.pdf

[16] http://www.nsf.gov/statistics/

[18] Abella, M.I., *op.cit.*

[19] John Salt, *op. cit.*

- The consequences are totally unfavourable when immigration affects the provision of basic socio-economic services (e.g. education and healthcare);
- It is estimated that, in order for the countries of origin themselves to benefit from the positive effects of migration of the highly skilled, it is essential that they invest in education, science, technology and infrastructure, foster business opportunities, and accept that the results of these actions will be seen in the long term. For example, the experiences in Korea, Taiwan, Ireland suggest that when skilled migrants returned to their home country after a long stay abroad, their contribution to the expansion of high technology sectors in the domestic industry was considerable[19];
- International students, whose number is growing rapidly, especially in the U.S. and EU countries, could be a significant factor contributing to the transfer of technology to developing regions. The regional distribution of students is, however, very uneven; students from Asian countries represent almost half of the foreign students in OECD countries, those from South America represent only 3.6% and about 12.5% come from African countries;
- There is also a certain ambiguity regarding the repatriation of those who study in advanced countries. It is considered that, of those who obtained an engineering doctorate in the U.S. between 1988 and 2000, approximately 25% remained in the U.S. for post-doctoral studies, while 17% found jobs there[20];
- Rapid economic growth in the countries of origin accelerates the return home, for example in 1994-2005, in Taiwan, the average number of annual returns exceeded 6500 persons[21].

II. The migration of unskilled and low-skilled workers

Unskilled and low skilled workers form another extremely diverse group, well represented and with a clear tendency towards the younger age category. Geographically, they are concentrated in the big cities and certain regions of the countries of adoption and their entry and employment may be subject to quotas, as is the case with seasonal workers in the U.S., Switzerland, Italy, Spain, etc.

The terms of unskilled or low skilled can either refer to the skills needed for work, the work itself, or the level of the worker's education. In other words, "low skilled" can be a characteristic feature of the work or of the worker. In this chapter, the term "low-skilled" or "unskilled person" will refer to those whose educational level is below secondary education (high-school, vocational school, etc.). By definition, people of different trades, artisans,

[19] Abella, M.I., *op. cit.*
[20] http://www.nsf.gov/statistics/.
[21] John Salt, *op. cit.*

graduates of secondary education or vocational training (of different degrees) are excluded from the group of the low educated, or the unskilled (Table A2).

We certainly have some compunctions against defining in this way a low level of training, since the labour market and recruitment techniques are organized around skills and job skills required. However, concerns over the skill level of migrants are focused on the relationship between the skill level and the duration of the immigrants' integration, rather than on the interaction between the qualifications held and the job the immigrant has at a given time.

Furthermore, it is known that certain low-skill jobs are occupied by highly educated immigrants, at least in the initial period. Although the over-qualification of immigrants remains a common phenomenon in many OECD countries[22], many skilled immigrants advance from low-skill jobs, as time passes and they accumulate experience, achieving a certain wage convergence with the natives. In addition, the children of highly educated immigrants tend to have better educational outcomes than those from families of less educated immigrants, as demonstrated by the OECD PISA study[23].

Although there is a tendency to find a close correlation between the level of skill required for a specific job and the worker's education, the correlation is far from perfect, and for reasons of prudence it is advisable to avoid any possibility of distortion, and focus on the education level of workers.

Empirical research in the 1950s and 1960s[24] led to the theory that the flows of low skilled or unskilled migrants go, from a demographic perspective, through four phases:

a. The first stream is made up of mostly unaccompanied male immigrants who intend to stay for a short period;

b. These flows are followed by the stream of older men, many of them married and whose length of stay is greater;

c. In the third stage, the flow of adults continues, including the arrival of the wives of those already established in the host countries;

d. Finally the children arrive, who were initially left home with their grandparents and other relatives, now joining their parents and, thus, the reunion of the family in the new country is complete.

Although logically conceived, the process undergoes continuous adjustments, so it is not clear whether the current flows of migrants from Central and Eastern Europe fall within this pattern.

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[22] PISA 2006: Science Competencies for Tomorrow's World, OECD 2007, in http://www.pisa.oecd.org/dataoecd/15/13/39725224.pdf.

[23] International Migration Outlook SOPEMI, *Management of Low-Skilled Labour Migration*,OECD 2008.

[24] Bohning, W.R. (1972) *The Migration of Workers in the United Kingdom and the European Community*, Oxford University Press for the Institute of Race Relations,London, New York.

Low-skilled immigrants need cheap housing, usually for rent, located close to the workplace, which is a priority in order to keep the costs of displacement low. Discussions on the implications of less skilled migrants on service (public or private) delivery are highly contentious and polarized, both in terms of producing these services and of using them. On the one hand, there is the talk regarding the important role that they play in providing care assistants in the field of national health services and elderly care[25]. On the other hand, many low-skilled migrants are prone to physical and mental health problems as a result of family separation and poor living conditions[26]. For example, in 2002, the IOM reports speak of an increased degradation of the health status of migrant workers as compared to other categories, as a result of the jobs found and accepted, including exposure to toxic substances and frequent accidents[27].

The most important feature of this type of migrants on the labour market is that they accept employment that the indigenous people avoid. The sectors they work in are those with few barriers of entry, especially agriculture, construction and hospitality industry (hotels and catering). The situation is slightly different from 20 or 30 years ago, when a greater proportion of migrants worked in industrial sectors[28]. Wages are low and the working conditions are difficult and with no prospects, and it is actually rather common for many of the migrants to be engaged in illegal conditions. Their position on the labour market is a reflection of the generations that preceded them. A key to understanding this situation is the degree to which there is an equivalence between their professional education and training and that of the locals and whether for the same type of training, experience, etc., their progress and skills create conditions for a non-discriminatory treatment on the labour market.

[25] In France, about 51,000 foreign workers are covered by the provision of home care services for the elderly and children, in Italy it is estimated that more than 950,000 families have committed this type of people to provide home care services, and in the United Kingdom over 75% of the needs of this type are covered by people belonging to such foreign minorities, see John Salt, *op. cit.*

[26] Carballo, Mourtala Mboup (2005), *International Migration and Health,* International Centre for Migration and Health, Global Commission on International Migration, http://www.gcim.org/attachements/TP13.pdf.

[27] IOM, 2002. *Migration, Health and Human Rights.* Migration and Health Newsletter 2/2002. IOM, Geneva.

[28] Cf. John Salt, *op.cit.*

Conclusions

- international migration is a phenomenon marked by a general upward trend;

- migrant population is currently (2010) about 2.9% of the world's population – or about 190 million, up from about 2.2% in 1970[29];

- migration has always been a part of human existence and we have all the reasons to believe that it will remain so in the future;

- most countries have three formal entrance gateways for the admission of highly skilled and a fourth one, "the back door", for asylum seekers and illegal migrant workers, some of whom are qualified people[30]. Specifically:

*The admission gateway for professionals and persons with exceptional abilities which actually exists in all countries, due to the common desire to facilitate the transfer of knowledge and know-how;

*The gateway of transfers within the company, to facilitate international business and, particularly, to encourage capital inflow;

*The gateway for international students (graduates).

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SANCTIONS IMPOSED UNDER THE LAW 554/2004 TO PUBLIC AUTHORITIES FOR THE REFUSAL TO ENFORCE DECISIONS GIVEN BY THE ADMINISTRATIVE COURT

Maria Ioniche[*]

Abstract

Given the importance of the institution of sanctions imposed to public authorities for non-enforcement of decisions given by the administrative court, I looked closely at theoretical aspects of the enforcement of such judgments, at the sanctions imposed in case of failure of enforcement by public authorities, at the legal practice in this field and I think that the matters covered by this paper may be useful for all practitioners.

Key-words: *persons injured in their rights by an unlawful administrative act, administrative contentious, public authority's refusal to settle a request, public authority's refusal to enforce a court order, sanctions imposed to public authorities*

Introduction

At present, in the Romanian state subject to the rule of law, the legislature has translated into practice some of the European directives in specialty fields, amending legislation in accordance with Community norms. With respect to administrative laws and the laws applicable to public administration, the legislature was equally concerned with the harmonization of Romanian national administrative law with the rules of Community law. However, in the practice of the courts we find that the legislative changes have not produced the expected results, meaning that adaptation must be achieved through the joint efforts of both the legislature bodies of public authorities but also of citizens benefiting from these legal regulations. As a practitioner, I found it necessary to treat the topic entitled "The sanctions imposed under the law no. 554/2004 to public authorities for the refusal to enforce decisions given by the administrative court" because it is actual, it is a concern of both lawyers, magistrates and public authorities involved in administrative disputes, but also of citizens who consider themselves injured in their rights by public authorities through unlawful administrative acts.

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The importance of administrative contentious[1]

Since the activity of public authorities is very diverse, the legislation is very dense, the duties and powers of public authorities are complex, and, at this stage, the needs of citizens are increasingly complex, we have reached a situation where the acts issued by public authorities can sometimes be made in violation of the law, and, sometimes, the public authority refuses to issue acts requested by citizens. As a result, we reach a situation of conflict between the citizen and the public authority. Such situations can often be settled amicably, or via administrative appeal, by complaints and appeals brought forward by the injured person, but most often it comes to litigations before the administrative court.

Given my activity as a judge in the administrative and fiscal contentious section, I have found that administrative disputes can be grouped into two main categories: disputes concerning the annulment of an unlawful administrative act, compelling the public authority to issue a legal act, to observe the injured person's rights, to award compensation for losses caused by an unlawful administrative act, etc., litigations terminated by a final and irrevocable decision of the administrative court. But these decisions must be enforced and, since they are not enforced voluntarily by public authorities, they bring about the responsibility of the winning party (the injured person) to file a new lawsuit when the public authority refuses to enforce a final and irrevocable decision of the administrative court. Therefore, a second category of disputes are disputes on the refusal to enforce a court decision by public authorities. For this reason, I have chosen this subject matter for study and research.

The refusal to enforce a decision of the administrative court[2] represents a common situation in the practice of administrative and fiscal sections of courts. The refusal to enforce a court decision is also a cause of increased losses incurred by the injured person[3], winner of a lawsuit, person injured by an unlawful administrative act issued by a public authority.

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[1] According to art. 2 par. 1 letter f) of the Law no. 554/2004, „administrative contentious is the activity of settlement, by the administrative courts which are competent according to the law, of the litigations in which at least one of the parties is a public authority, and the conflict was generated either by issuing or concluding, as the case may be, an administrative act, within the meaning of the present law, or by the failure to settle within the legal time limit or by the unjustified refusal to solve a petition referring to a right or a legitimate interest."

[2] According to art. 2 par. 1 letter i) of the Law no. 554/2004, „the unfounded refusal to settle a request is the explicit expression, with excess of power, of the will not to solve the request of a person; is also treated as unjustified refusal the failure to enforce the administrative act issued pursuant to the favorable settlement of the requestor, if applicable, of the preliminary complaint".

[3] According to art. 2 par. 1 letter a) of the Law no. 554/2004, „the injured person is any person holding a right or a legitimate interest injured by a public authority through an administrative act or failure to settle a request within the legal term; for the purposes of this law, are also assimilated to the injured person the group of individuals without legal personality, holder of subjective rights or legitimate interests, as well as private and social

According to the principle of civil law, the prejudice must be fully covered, under art. 998, art. 1082 Civil code[4]. Also, art. 21 par. 1-4 of the Romanian Constitution stipulates that "every person is entitled to address the court to defend her rights, freedoms and legitimate interests. No law may restrict this right. The parties are entitled to a fair trial and to resolve cases within a reasonable time. Administrative special jurisdiction is voluntary and free."

The administrative contentious law expressly provides what can be requested in a dispute of this kind, fact regulated by the provisions of art. 8, art. 18 and art. 19 of the Law no. 554/2004[5].

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organizations claiming injury by the contested administrative act either of a legitimate public interest or of the rights and legitimate interests of determined individuals".

[4] Art. 998 Civil code: „Any human act that causes injury to another obliges the one from whose mistake it rises, to repair it."

Art. 1082 Civil code: „The debtor is condemned, if appropriate, to pay damages either for default, or for delay to perform the obligation, although it is not bad faith on his part, unless he will not justify that the failure comes from a foreign cause which cannot be attributed to him."

[5] ART. 8 - Object of judicial action

(1) The party injured in a right acknowledged by the law or in a legitimate interest, by a unilateral administrative act, and which is dissatisfied with the answer received by the preliminary complaint addressed to the issuing public authority or if it did not receive any answers within the time limit provided in Article 7 (4), may notify the competent administrative disputed claims court, in order to request the full or partial cancellation of the act, the redress of the damaged caused and, possibly, satisfaction for moral prejudice. Likewise, the party injured in one of its rights, acknowledged by the law, by the failure to settle the petition within the time limit or by the unjustified refusal to settle the petition, may resort to the administrative disputed claims court.

(2) The administrative court shall be competent to settle the litigations which arise in the preliminary phases of concluding an administrative contract, as well as any litigations related to the implementation and execution of the administrative contract.

(3) In settling the litigations provided in paragraph (2) there shall be had in view the rule according to which the principle of contract freedom is subordinated to the principle of the public interest priority.

Art. 18 - Solutions which the court may give

(1) The court, by settling the petition referred to in Article 8 (1), may, as the case may be, cancel the administrative act in full or in part, may force the public authority to issue an administrative act or to issue a certificate, a voucher or any other document.

(2) The court shall be also competent to rule, except for the cases provided in Article 1 (8), on the lawfulness of the administrative acts or operations underlying the issuing of the act subject to trial.

(3) In case of settlement of the case, the court shall also decide on the compensations for the material and moral damages caused, if the applicant requested it.

(4) When the object of the proceedings in the administrative disputed claims is an administrative contract, depending of the state of fact, the court may:

a) order its cancellation, in full or in part;

b) force the public authority to conclude the contract to which the applicant is entitled;

c) impose to one of the parties the carrying out of a certain obligation;

d) substitute the consent of one party, when the public interest requires it;

e) to force the payment of certain compensations for material and moral damages;

The petitions brought forward to the administrative court must be supported by evidence in the court of the first instance.

Following non-enforcement of administrative courts decisions, the petitions brought forward by injured parties can also be completed with requests on the award of damages, penalties of delay for non-enforcement of the court decision but also on applying a fine to the manager of the public authority who refused to enforce that decision (Art. 24 par. 2 of the Law no. 554/2004 republished[6]). Under a decision of the High Court of Cassation and Justice[7], the administrative and fiscal section, to the compensation granted to the applicant under art. 24 par. 2, final thesis of the Law no. 554/2004, for failure by the public authority to meet the 30 days term prescribed by par. 1 of the same article for the enforcement of the final and irrevocable decision is to be added the compensation awarded by the unenforced decision for damage caused by the administrative act contested, these being cumulative for the benefit of the applicant.

The legal nature of the administrative decision

Administrative decisions are subject to the legal regime of administrative law applicable to administrative acts, also with respect to their enforcement, and, also, are subject to the legal status and legal force equal to that of the law in view of their definitive and irrevocable character. This follows from the fact that acts issued by public authorities who have been subjected to judicial review by administrative and fiscal contentious courts of first instance and appeal are essentially characterized by the rapidity of case settlement, but also by the rapidity of court decisions enforcement.

The legal nature of the administrative decision is characterized by the fact that it is enforced immediately, promptly, i.e. within 30 days from the day when it becomes final and irrevocable (Art. 24 par. 1 of the Law no. 554/2004).

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(5) The solutions provided in paragraph (1) and in paragraph (4) b) and c) may be established under the sanction of a penalty for each day of delay.

Art. 19 - Prescription term for compensations

(1) When the injured party having requested the cancellation of the administrative act, without claiming compensations at the same time, the prescription term for the compensation petition shall resume its course from the date when it was aware or had to be aware of the extent of the damage.

(2) The petitions shall be addressed to the competent administrative disputed claims court, within the one year-period provided in Article 11 (2).

(3) The applications provided in paragraph (2) shall be subject to the norms of the present law concerning the judgement procedure and the stamp fees.

[6] Art. 24 par. 2 - In case the time limit is not complied with, a fine of 20% of the minimum gross wage on the economy shall be applied for each day of delay to the head of the public authority or, as the case may be, to the obliged person, and the applicant shall be entitled to compensation for delay.

[7] Decision no. 870 of February 13, 2007, în judge Gabriela Victoria Bârsan – Administrative Contentious Law no. 554/2004 annotated, Hamangiu Publishing House, Bucharest, 2008, p. 176.

In practice, the question is who should enforce the administrative court decision?

Where a natural or legal person wins the lawsuit, or even a public authority other than the defendant public authority, the decision must be enforced by the defendant public authority with the observance of the principle of rapidity, without violating the principle of priority of public interest.

Sanctions applied under the law to the public authority guilty of not enforcing an administrative court decision

The refusal of the public authority to enforce the administrative decision has several serious consequences both on itself and on the person injured in her rights.

These consequences can lead to applying fines to the manager of the defendant public authority guilty of non-enforcement of the decision, which, according to the law, are quite significant and will be paid for each day of delay in the enforcement of the decision, but also to compelling the public authority to pay compensation.

Legal framework of sanctions applied to public authorities for non-enforcement of administrative court decisions

The legal framework is represented by art. 24 of the Law no. 554/2004 republished. Therefore, the legislature has clearly set the term of administrative decisions enforcement, i.e. 30 days from the day when they become final and irrevocable, and the percentage of the fine of 20% of the gross minimum wage applicable to the manager of the authority.

In addition to these consequences, there is another effect due to non-enforcement of the court decision, which consists of granting compensation to the winning party, if it intends to claim them separately, as provided by art. 24 of the Law.

Of course, such compensation must be substantiated by some documentary or other evidence allowed by law, regarding the extent of the damage incurred by a person injured as a result of the non-enforcement of the final and irrevocable decision by the public authority.

The legislature has provided thus limits for the enforcement of administrative decisions, limits to be observed, contrarily the public authority will bear the consequences caused by non-enforcement, consequences also regulated by law.

Usually, by enforcement is obtained what the administrative court decision sets forth, but, when applicable, a fine can also be applied to the manager of the public authority who refused to enforce or delayed the enforcement and, also, compensation can be granted, the manager of the public authority being jointly liable with the defendant public authority.

Some practical aspects

I have selected a relevant decision from the judicial administrative practice with respect to the provisions of art. 24 of the Administrative Contentious Law concerning the fine applied to the manager of the public authority and awarding compensation.

Case Study

In a case heard on appeal before the Brasov Court of Appeal, the plaintiff X. brought proceedings against the National House of Pensions of Romania, demanding, in front of the court of first instance, that the manager of the public authority is sanctioned, respectively the president of CNPAS, for non-enforcement of a definitive and irrevocable court decision issued by the administrative court, which became irrevocable on December 12, 2009.

The court of first instance rejected his request, considering that, from the evidence produced in the case, the plaintiff failed to prove the public authority's refusal to enforce the decision and that, in fact, the decision was enforced by the defendant public authority.

The plaintiff's appeal, a former civil servant of the defendant, criticized the decision of the court of first instance, reiterating the arguments raised before the court of first instance and asking the court of appeal to allow the appeal, to modify the decision given by the Brasov Court, for the purpose of admitting the request, applying the sanction to the President of CNPAS Bucharest, respectively the fine of 20% of the gross minimum wage in the economy since 13 December 2009 until the effective enforcement of the decision. The plaintiff also asked that the defendant be compelled to pay compensation for the non-enforcement of the final and irrevocable court decision.

The court of appeal acquiesced in the documentary evidence in addition to that existing on record, documents submitted by both parties. On the basis of the whole evidence on record, corroborated with the decision to be enforced and with the provisions of art. 24 par. 1 and 2 of the Administrative Contentious Law no. 554/2004, the court gave the following decision:

"It allowed the plaintiff's appeal against the civil decision given by Brasov Court in 2009, which it modified it in the sense that: it partially admitted the action brought forward by the plaintiff, ordered the manager of the defendant – the President of CNPAS Bucharest to pay a fine amounting to 20% of the gross minimum wage in the economy since December 13, 2009 until the date of April 30, 2010, per day of delay for non-enforcement. It rejected the plaintiff's application concerning the defendant to be ordered to pay compensation as unsubstantiated. Irrevocable. Delivered in public session. August 26, 2010."

In essence, the court found that the plaintiff's action was justified, that the defendant did not enforce the final and irrevocable decision according to which the applicant had to collect a series of labor rights.

As the law provides that irrevocable decisions must be enforced within 30 days and the defendant was aware of this decision, was part of the lawsuit before the court of first instance and in appeal, was asked by the plaintiff by written request to enforce the decision, as such, the legal provisions setting forth the sanctioning of the manager of the defendant public authority for refusing to enforce a court decision within the term prescribed by law were applied.

The fine imposed is lawful and justified in the case. It represents the penalty prescribed by the law for the manager of a public authority who refuses to enforce that decision. As the sentence was enforced only on April 30, 2010, the sanction has been applied to this day. With respect to the compensation claimed by plaintiff, the court of appeal held that the evidence on the record does not substantiate his application for compensation, which is why this request was rejected.

In my opinion, as a practitioner and theorist in the field of administrative litigation, it is necessary that public authorities enforce voluntarily court decisions, especially since the public authority was a defendant party in such litigations and has been bound by a decision to have a certain conduct: to issue an administrative act, to endorse the legality, to prepare a decision, an order, to conclude a contract, etc., obligations corresponding to legal provisions.

However, public authorities do not always willingly enforce such judgments, so that the winner party is put in a position to bring forward a new request, in terms of art. 24 of the law, addressing a new petition to the competent administrative court, petition to be made under art. 112 Civil Procedure Code and which shall be dealt with rapidly, summoning the parties and hearing them in the council chamber, with exemption from stamp duty and legal stamp.

As such, there are two practical situations with respect to the enforcement of administrative court decisions:

1. In one case, the court decisions are enforced voluntarily by public authorities, and in this case there is no question of applying any sanction to the public authority or its manager. Such cases are rare in practice.
2. In another case, we are dealing with the non-enforcement of definitive and irrevocable court decisions given by the administrative court, in which case we meet the public authority's refusal to enforce those judgments. Such cases are very common in the legal practice of specialized courts and involve a lot of discussion and demand plenty of attention from the court, also involving the diligence of the person injured in her rights, who, although she has a decision in her favor, is not satisfied by its enforcement and the realization of the right infringed by the public authority.

In such situations, it belongs to the winning party (natural person or legal entity or another public authority) to ask the administrative court, separately, to award compensation for which the manager of the public

authority is jointly liable with the public authority mentioned in the respective decision, to award penalties for delay, to apply fines to the manager of the public authority who refused the enforcement.

As for the award of compensation, in all cases, it must be proved by the plaintiff, the legislature establishing a fine in a percentage of 20% of the minimum gross wage in the economy to be calculated according to the annual government decision, such as G.D. no. 1051/10.09.2008, effective from January 1, 2009, decision still applicable, since the gross minimum wage in the economy in 2010 is still of 600 lei per month, but which is to be applied by the administrative court in its ruling taking due account of the evidence on record and the applicable legal provisions.

If the public authority still refuses to enforce the decision given under art. 24 par. 1 and 2 of the Administrative Contentious Law, then the refusal of the authority leads to committing an offense that can be judged by the criminal court.

If the public authority refuses to enforce administrative decisions based on art. 24 par. 1 and 2 of the Administrative Contentious Law, this leads to the criminal aspect of the public authority's refusal - as an act committed by its manager, with criminal consequences under art. 24 par. 3 of the Law, in which situation such offence may be referred to the prosecutor or to the criminal court[8].

Given the situations found out in the legal practice of administrative and fiscal courts, the conclusion is that in our society there is not a high level of due awareness of public authorities created by the managers of those authorities with the purpose to observe the law, the judiciary power, to enforce the law, to enforce court decisions, especially administrative ones and that it is required that the government take action to increase the confidence of citizens in government, justice and law enforcement in Romania.

Conclusions

In this paper I have tried, in a relatively small space, to treat some aspects related to the importance of administrative contentious in the current stage in the Romanian and European legal system, the meaning of an administrative court decision, the responsibility of public authority to enforce such decisions voluntarily, but also the refusal of public authorities to enforce them. Following the refusal to enforce the decision, the public authority will bear the legal consequences consisting of a fine applied to the manager of the public authority responsible for not enforcing a definitive and irrevocable court decision, the manager of the authority being also obliged jointly with the public authority to pay compensation. I also presented what the refusal to

[8] The failure to enforce or to comply with the final and irrevocable judgements delivered by the administrative disputed claims court and after the applying of the fine provided in paragraph (2) shall constitute an offence and shall be sanctioned with imprisonment from 6 months to 3 years or with fine from ROL 25 000 000 to ROL 100 000 000.

settle a request of a petitioner means, what the refusal to enforce a court order means and which is the legal framework for imposing sanctions to the guilty public authority. I have also mentioned cases from the judicial practice of courts.

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DEBTS RECOVERY - THE PAYMENT ORDER PROCEDURE

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Abstract

Besides the well known action of claim governed by the Civil Procedure Code, the Romanian legislator introduced certain special procedures regarding the recovery of debts in the court of justice, with the purpose of obtaining an enforceable title in a shorter period of time, by which the creditor can recover its proper debit.

These procedures are regulated by Government Order No. 5 / 2001 on the payment order procedure and the Government Emergency Order No. 119/2007 on the measures of fighting against the late payment of the obligations resulting from the discharging of the trading contracts.

Keywords: *debt, Regulation, payment order*.

Introduction

The theoretical importance and especially the practical rules established within the European Union and transposed into the national laws of the Member States on the rapid recovery of the claims is indisputable and highly actual under the circumstances of the global economic crisis. This is explained by the fact that the delay in payment is one of the main causes of insolvency, which threatens the continuity of business enterprises, especially small and medium enterprises, and causes the loss of numerous jobs.

1. **Common Law Procedure**

In the process of the common law, the possibility of too complex evidence (documents, interview, auditing) that can lead to endless trials and cases in which the debters have no other claim than "buying time", is a serious obstacle to obtaining a writ of execution for the speedy recovery of the debt by a trader.

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In a brief description, we can mention the following steps in the common law procedure:

1. Compulsory conciliation prior achievement (an attempt to amicably settle the dispute);
2. Filing of summons, together with supporting documents, followed by the summoning of the opposing party (parties);
3. Receiving of the contestation filed by the defendant, and if the defendant has mutual claims from the complainant - a counterclaim;
4. Producing proofs to clarify the facts (documents, surveys, interviews, witnesses);
5. The settlement of claims, exceptions and procedural points of law;
6. Announcing the verdict, drawing up the judgement and communicating it to the parties;
7. The possible declaration of an appeal against the decision, sending the case to the court of appeal and summon the parties before the court of appeal;
8. Resolving the case on appeal (filing reasons of appeal, of a possible contestation, producing proofs on appeal), drafting and communicating the decision on the appeal;
9. The possible declaration of an appeal, sending the case to the court of appeal and solving the appeal.

2). **Ordinance 5 / 2001**

The ordinance on the payment order procedure governs a simple, operative way of obtaining the title enforceable according to the rules of the French Code. We can mention a same procedure in the German Code of Civil Procedure. The legal ground is in Ordinance 5 / 2001, amended by Law No. 295/2002 and Law No. 195/2004.
Thus, according to Government Ordinance No. 5 / 2001 on the payment order procedure, this procedure was introduced in the Romanian law, being directly inspired by the French law where it is called "procedure d'injonction de payer", and in the German law "Mahnverfahren".

Of course, the current local realities were taken into consideration in the development of this ordinance, in addition to the previously mentioned legislative model.

The payment order procedure is a special procedure, thus derogating from the common law, to solve the requests by which the debtor is claimed to pay a sum of money, to the extent that certain conditions are met and its purpose is to obtain an enforceable title in a procedural framework characterized by a quick settlement of the problem.

The payment order procedure is the simplest and most common procedure that was developed as a result of the need to simplify the procedure for debts recovery from the persons involved in the debts. The legislator wants to put at an action at the disposal of the creditor, an action by which he can

use his right to claim in a short time without going through other steps which are necessary in the common law.

This procedure, which became applicable in the Romanian courts since August 15, 2001, is designed to enable the creditor of an obligation consisting in the payment of a sum of money, to quickly obtain a writ of execution, but without the rights of the debtor to be disregarded. Passing this new special legislation, preliminary and non compulsory, highlights the interest of the legislator to complete the legislative framework with a procedure that would provide the creditors a procedure for obtaining the writ of execution in quick settlement conditions and less financial strain. Thus, by the regulations stipulated in Law No. 295/2002 for the approval of the Government Ordinance No. 5 / 2001 on the payment order procedure, as amended and supplemented, it was ment the replacement of the common law on the recovery of real, ready and due debts, through a greatly simplified procedure.

The practical experience showed that the procedure by which the creditors are acknowledged their rights to claim and to require the prosecution and the execution of the borrowers is most often discouraging. In the case of the unpaid delivered products, many companies were forced to appeal to the commercial courts, claiming the buyers to pay for the delivered products.

Systematically, they faced the problems of high stamp duties, long periods of time between the terms of a trial, granted by the court, a long period of time for drawing up the decisions and, in general, with the bureaucracy of the judicial procedures.

If controversial issues of substance were added to these more or less formal issues, regarding the very existence of the sale, its value, the quality of goods or services, then the trader would certainly be facing a very difficult process with an uncertain outcome , into which he needed to invest money, time and resources.

Due to this fact a new regulation was imposed in the civil and commercial matters, taking into account that many of the pending processes aiming at achieving claims go through the procedure of the common law, although not all its phases and stages are necessary.

Therefore, the establishment of a way that was intended to be a faster one, allowing the lender to obtain his claim within a shorter time and a simplified procedure can only lead to an improvement in the efficient administration of the system of justice and even to an increase of the security of the trading and civil circuit.

The purpose of the procedure set out in Art. 1 of the Government Ordinance No. 5 / 2001 and consists of the voluntary payment or by enforcement of the real, ready and due debts.

(3). **G.U.O. No. 119/2007**

The theoretical importance and especially the practical rules established within the European Community and transposed into national laws of the Member States on the rapid recovery of claims is indisputable and highly actual in the global economic crisis conditions.

Given the fact that the rapid and effective recovery of claims, where there is no litigation, is of primordial importance for the economic operators in the European Union the payment delays are one of the main causes of insolvency with disastrous effects, especially on the small and medium sized businesses.

The different approaches in the national laws of the EU member states regarding the debt recovery proceedings, uncontested by the simplified procedure for the payment orders, lead to unacceptable or impractical procedures in the transboundary disputes.

Taking into account that it is absolutely necessary to develop uniform or harmonized European regulations for the recovery of uncontested claims, thus overcoming the incompatibility of the rules of civil procedure applicable in the Member States, as well as the malfunctions of the procedural tools available to creditors in different Member States, the European Parliament and The European Council, adopted Regulation (EC) No. 1896/2006 of December12, 2006 establishing a common European procedure for calls, with reference to the Treaty of Instructing the European Community, particularly Art. 61, Point (C).

The main purpose of the Regulation is to simplify, accelerate and reduce the costs of proceedings in the cases concerning the transboundary uncontested pecuniary claims by creating a European procedure of payment and ensuring the free circulation of the payment order in all the European member states in terms of establishing those minimum standards to eliminate the obligations of the intermediate proceedings in the State of enforcement.

Given the differences between the rules of civil procedure in the Member States, the Regulation aims at the detailed defining of the minimum standards that should applied in the proceedings of the European payment order.

According to the Regulation, a European payment order issued in a Member State, which became enforceable in the State that requests the enforcement, will be acknowleged as it would have been issued by that State.

Mutual confidence in the administration of justice in the Member States determines the situation in which a court of a Member State can consider that all the conditions for issuing a European order for payment are met, for the payment to be carried out in all other Member States without the need for judicial control in the European State where the payment will be made.

An important idea regarding the Regulation enforcement is that the procedures of the European order for payment should be governed by the

national legislation without any prejudice to the provisions of the Regulation, particularly those relating to the minimum standards stipulated in Art. 22, Paragraph (A) and (2) and Art. 23. The Regulation is binding and directly applicable in the Member States (Article 33).

After the Regulation was adopted, regarding the establishment of a European order for payment, respectively on July 11,2007 the European Parliament and the Council of the European Union adopted the Regulation (EC) No. 861/2007 establishing a European procedure on small claims.

Comparatively studying the explanatory reasons of the two regulations, one can easily see that the arguments (reasons) that formed the basis of these regulations are largely the same.

Thus, even in case of the European procedure on small claims, the primary objective is to simplify and accelerate the settlement of boundary disputes concerning small claims, which reduces costs and is, as in the European order for payment, a tool to complete the opportunities provided by the laws of Member States.

Regulation (EC) No. 861/2007 of the European Parliament and Council establishing a European procedure on small claims is binding in all its elements, entirety and directly applicable in the Member States in accordance with the Treaty of Instructing the European Community (Art. 29) .

The Regulation was preceded by a series of measures and regulations to accelerate and simplify the solving of the litigation concerning the small claims. Among these measures, we can give the example of the Green Paper regarding the drafting of a European order for payment procedures adopted by the European Commission on December 20, 2002, and especially Regulation (EC) No. 1896/2006 of the European Parliament and the Council of December 12, 2006 creating a European order for payment procedures.

In the Romanian legislation there are applicable regulations, of course, civil and commercial internal legal relations, with the purpose of simplifying the recovery of certain claims by the creditors of certain, liquid and demandable debts, namely G.O. No. 5 / 2001 on the order of payment procedure, amended and supplemented, and G.E.O. No. 119/2007 on measures to fight against the late payment obligations resulting from the carrying out of commercial contracts, approved with amendments by Law No. 118/2008, legislation transposing into Romanian legislation Council Directive no. 2000/35/EC on combating late payment in commercial transactions.

By O.U.G. no. 119/2007, amended, a procedure for issuing the order to pay for rapid recovery of certain receivables is established, consisting of certain, liquid and demandable debts arising from the trading contracts, as defined in Chapter I of the previously mentioned normative papers.

Conclusions

In the end it should be mentioned that although the main purpose of the Regulation lies in simplifying, accelerating and reducing the costs of the

proceedings in those cases concerning the transboundary uncontested pecuniary claims - by establishing European procedures for payment and ensuring free movement of payment orders in all the Member States by establishing the minimum standards to eliminate the obligations of intermediate proceedings in the Member State to be carried out - in fact, the great number of differences between the rules of the civil procedure in the Member States, but also the substantial law, are not fully solved by establishing the minimum standards and requires a comprehensive examination of the doctrinal analysis of the particularities which creates major obstacles of interpretation.

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A COMMUNITY POLICE IS A "BODY" IN SERVICE OF SOCIETY AND NOT A "FORCE" USED IN SOCIETY

Leucea Crăciun*

Abstract

Community Police is a "body" in the "service" of society and it is not a "force" used in society. Actions and its efforts are conducted under community's strict monitoring. By what it does, it must be very, very transparent and predictable.

Constant defining quality of work is the preparation of development in progress. Basic quality of a community police officer is communication.

Key words: *service, body, force, society.*

Introduction

The consequences of European integration on the legal system in Romania is manifested as strongly as in other areas and what it means Community Police, seen by the organization, legal basis, action, staff recruitment, staff training, transparency and predictability in what there is and undertakes, international and domestic cooperation and of course in that it is subject to the community.

Starting from the idea that the aim of the Council of Europe is to achieve a greater unity between its members and, aware that one of the objectives of the Council of Europe is also to promote the rule of law, which is the basis for a true democracy, believing that the justice system plays a role in safeguarding the rule of law and that the Community Police has a vital role in this system, we can show, without fear of being wrong, that an important pillar that made possible EU accession and retention is that defined of rethinking and operation of Local Public Administration, and within it of community police service versus which means local autonomy growth.

Most European police services apart from the fact that upholding the law, plays a social role and provides a number of services in society.

Community police activities are mainly undertaken in close relation with the population (community) and their effectiveness depends on the support of the latter.

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People trust (community) in the community police is strictly linked, by police attitude and behavior vis a vis the community and in particular, the rule of law, respect for human dignity, freedom and fundamental human rights, as enshrined particularly in the European Convention of Human Rights[1]

So the police service is circumscribing to the European Community framework operating in content and form

1. Define key terms:

SERVICE, services, n.s. 1. Action, the fact serve, to minister; form of work made for the benefit or interest to someone. ◊ Expression *Being (*or *put) in the service of someone* (or *something*) = to serve, to serve a person or a goal, an idea etc. ♦ (in formation with the verbs " make", " bring") Fact, action that serves, favors someone;
duty, obligation.[2]

BODY, bodies, n.s. 1. Group of people who has a political, social, administrative function, etc.; a political, social, administrative institution, etc. represented by these persoane.[3]

FORCE f.s. I. 1. Power, strength, force.[4]

SOCIETY, societies, f.s. 1.All people who live together, are bound together by certain economic relationships. ♦ Unitary assembly, organized system of historically determined relationships between people based on economic and exchange[5] relations.

2. Community Police a "body" in the society "service"

"Police in community service" (community Policing) is an idea that was born in the United Kingdom, which was to involve the whole community, in particular, to prevent crime, but also in detecting it. This model was taken by many European countries and has gained the widest meanings and with benefits for citizens.[6]

"Assistance" (support) of the population (community) is the main mission of the Community Police.

Including "*service"* function under the objectives of community Police is a little different from what we knew even now, in the sense that changes the

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[1] Committee of Ministries of European Council, the European Code of Police Ethics, Recommendation Rec (2001) 10, 19.9.2001, p. 3 .

[2] Online glossary , http://dexonline.ro.

[3] Online glossary , http://dexonline.ro.

[4] Online glossary , http://dexonline.ro.

[5] Online glossary , http://dexonline.ro .

[6] Committee of Ministries of European Council, the European Code of Police Ethics, Recommendation Rec (2001) 10, 9. 19.2001, p. 24 .

role of the police, which ceased to be a "*force*" used in society, then becomes a "*body*" in the service of its latter.[7]

For several years in Europe, has been a clear trend, integration of police and in civil society and closer to the public.

This aim is achieved by developing community Police in several Member States. One of the principal means used is to give a status of public "*body*" of "*service*" and not simply a "*body*" concerned with law implementation. It wants this transformation to be not purely linguistic, it is necessary to introduce categories of "*services*" within the community Police action, among the objectives of a modern democratic police. The provided assistance by community police, the usually precise situation in which it intervene.

In helping those who are in danger by direct action or combined with other structures in these tasks.

We list below some of the *concrete situations* in which a citizen can directly ask the Community Police support staff, as follows:

- Detection of channel openings and found their coverage through the Administration of Channel Water;
- Eliminating outbreaks of infection, epidemics, murrain, zoonoses, etc.
- Provision of disinfection and vermin derating of buildings with the support of institutions authorized to perform these operations;
- Raising community dogs from the public land to not be bitten or attacked people or owners order them to walk dogs on leash and muzzled them to put;
- Check the ground, inventory and remoteness of the area where there are walls, roofs and abandoned buildings that may collapse over the passers;
- Check water hygiene courses, and their pollution prevention;
- Proper throwing cigarette butts, they are better off not to cause fires;
- Tracking the running trimming and cutting trees on public land;
- Provide street sanitation, access ways, areas, green, gutters, snow and ice removal on the access roads;
- Participation with the road manager to remove the effects of natural phenomena, such as heavy snow, blizzard, strong wind, heavy rain, hail, glazed frost, and other such events on public roads;
- Provide assistance in case of heavy water leaks, floods and fires in homes, residential areas, etc., until the arrival of special intervention teams;
- Isolation of the zone where high voltage wires are detected fallen to the ground and call onside qualified staff to remedy the problem;
- Follow to remedying the holes in the road;

[7] Committee of Ministries of European Council, the European Code of Police Ethics, Recommendation Rec (2001) 10, 9. 19.2001, pp. 24.

- Evacuation of people from natural disasters;
- Prohibition of walking dogs in parks and playgrounds especially designed for children;
- Checking and correction means of road signs and remedy irregularities on the operation of traffic lights, signs and road markings status;

Actually, Community Police solves everyday problems of citizens, the daily, that directly or indirectly are affecting them.

Relationship with other authorities and institutions, through :

- guidance and assistance to persons
- lead persons to the competent institutions in solving claimed problems
- inform citizens
- relation through community police with other structures (Technical Directory of the mayor, chief architect institution, AIO, ASCO, Child Protection, DSP, DSV, RAO,etc)
- authorized provider relationship with the Local Public Administration for street cleaning and waste
- raising dogs by SOS DOGS Foundation
- information on legislative updates, using more leverage (notifications, press releases, interviews, flayers, etc.)
- keeping a close ties with educational institutes
- cooperation with markets managers to ensure public order and security inside and in their perimeter
- removing people who seek public charity and leading them with ASCO to areas where they reside
- raising the homeless from public domain and accompany them to the night shelter
- guard the accident places until the arrival of intervention teams (SMURD, traffic police, firefighters etc.)

Community Police is an extension lever of the mayor's leadership in the field through which the citizen can directly relate with the mayor.

Community Police must not be confused with some administrative tasks entrusted to it (eg: issuing identity cards). Generally speaking, the task of the Community Police, as a public service body, is connected to saving people and the accessibility of police is one of the fundamental and important issues. It's far more important for the Community Police to be in close connection with the population , than to be given new tasks. It's obvious that the Community Police can't take too difficult responsibilities, concerning services rendered to population.[8]

[8] Committee of Ministries of European Council, the European Code of Police Ethics, Recommendation Rec (2001) 10, 9. 19.2001, p. 24.

In conclusion, all states members of the European Council, should establish guide lines applicable for the Community Police and the way they should be carried out.

3.Legal Basis of Community Police

- Community Police is a public body.

Community Police operations must always be fulfilled according to law and international rules accepted by all countries.

Police Community law organization must be accessible to citizens and clear and concise.

Community Police personnel subject to the same laws as ordinary citizens, the only exceptions from this rule can be justified only by the insurance of the proper performance of police in a democratic society.[9]

4.Community Police organization.

Community Police organization is made to such an extent as to respond to its mission : protection of fundamental human rights and freedoms, of public and private property, prevention and detection of crime in the following areas : order and public peace, guarding property, traffic on public roads, building discipline, street display, environmental protection, commercial activity, track people etc.[10]

The Community Police must conduct its activity based on the following principles: of legality, reliability, predictability, proximity and proportionality, openness and transparency, efficiency and effectiveness, responsibility and accountability, impartiality and non-discrimination.[11]

The number of community police in a structure takes into account the European Standard which provides a policeman per 1,000 inhabitants.

Profit entities shall be established according to the priorities of the city that they serve and the specific features and peculiarities.

The diagram is not immutable; it can be reconfigured whenever necessary, depending on the requirements of the operational situation on the ground.

The organization of the community police structures will take into account the following :

- its members to enjoy public respect, as well as law enforcement professionals and service providers;[12]

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[9] Committee of Ministries of European Council, the European Code of Police Ethics, Recommendation Rec (2001) 10, 9. 19.2001, p. 5.

[10] Extract from Local Police Law 155/2010, art.1, 2.

[11] Idem.

[12] Committee of Ministries of European Council, the European Code of Police Ethics, Recommendation Rec (2001) 10, 9. 19.2001, p. 29.

- to have a comprehensive mutual understanding between people and police
- success is ensured by the population agreement
- community police services must be tailored to the needs of the population
- to provide objective information about their activities
- transparency in what they do

5. Staff recruitment.

Recruitment should be done based on personal qualifications and experience, especially from the young people who were formed into a university of higher education and specialization subsuming the community police.

Human social disciplines must be part of the contest theme. The defining qualities of the future cop are played by the set of skills and intellectual and physical skills referring to communication, sociological, linguistic, psychological, and those relating to networking and those related to character issues, medical, legal and professional background and family.

6. Staff training

Staff training should be as open as possible to society. Staff training should be carried out depending on the police objectives and as near to the reality as possible. This should fully integrate the need to combat racism and xenophobia.[13] Continual training to actively and practically applied type at regular intervals is an absolute necessity for the staffs of Community police.[14]

7. Community Police Action

Community Police must respect the right to life of any person.

It should not apply inhuman or degrading treatment.

It cannot use force except in cases of absolute necessity.

It has to systematically verify the legality of the operations they undertake and must be impartial and non-discriminatory.

It has to bear in mind everyone's fundamental rights to freedom of thought, conscience, religion, expression, peaceful assembly, movement and the right over his property.[15]

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[13] Committee of Ministries of European Council, the European Code of Police Ethics, Recommendation Rec (2001) 10, 9. 19.2001, p. 8.

[14] Committee of Ministries of European Council, the European Code of Police Ethics, Recommendation Rec (2001) 10, 9. 19.2001, p.36.

[15] Committee of Ministries of European Council, the European Code of Police Ethics, Recommendation Rec (2001) 10, 9. 19.2001, p. 43.

8. Community Police Responsibility and Control

Community Police must be accountable to the state, citizens and their representatives.

It must be the subject of external scrutiny and effective.[16]

In an open democratic society, the state exercised control over the community police should be completed by the police responsibility for its actions against the population, meaning, to the citizens and their representatives.[17]

Community police responsibility vis-à-vis the public is of paramount importance for the relationship between police and people.

In a general manner, openness and transparency are indispensable conditions for the efficiency of any police system responsibility / control.

For the police community to undertake a more effective control, it should respond to various independent powers of the democratic state, namely the legislative, executive and judicial.[18]

Public authorities must apply effective and impartial procedures for complaints against the police.[19]

Complaints against the police must be subject to an impartial investigation.

"Police investigating the police" is an operation that, in general, raises doubts about its impartiality.

The state must provide systems that are not only impartial, but also seen, able to win confidence of people.[20]

It must encourage the creation of mechanisms to determine police responsibility and community that relies on communication and mutual understanding between people and police.[21]

Transparency and public control in these situations, as the public access to police stations, is an example of beneficial measures for the population as well as for the police, in the sense that it allows people to exercise some supervision and help to combat unfounded accusations to the police.[22]

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[16] Committee of Ministries of European Council, the European Code of Police Ethics, Recommendation Rec (2001) 10, 9. 19.2001, p. 50.

[17] Committee of Ministries of European Council, the European Code of Police Ethics, Recommendation Rec (2001) 10, 9. 19.2001, p. 50.

[18] Idem.

[19] Committee of Ministries of European Council, the European Code of Police Ethics, Recommendation Rec (2001) 10, 9. 19.2001, p.51.

[20] Idem.

[21] Ibidem.

[22] Committee of Ministries of European Council, the European Code of Police Ethics, Recommendation Rec (2001) 10, 9. 19.2001, p.52.

9. International cooperation

International cooperation between police in Europe has to be stimulated both among states and international organizations.[23]

Because of the skills and experience in democratic values, ethics, human rights and rule of law, the Council of Europe may facilitate such cooperation.[24]

Conclusions

In conclusion, we show that by this institution called the Community Police, municipalities, in their entirety, is established as a service in the benefit of the citizens and make order, peace, beauty, usefulness, harmony and good order to be in their home.

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[23] Committee of Ministries of European Council, the European Code of Police Ethics, Recommendation Rec (2001) 10, 9. 19.2001, p. 52.

[24] Committee of Ministries of European Council, the European Code of Police Ethics, Recommendation Rec (2001) 10, 9. 19.2001, p. 53.

LUXURIOUS CRIMINALITY

Delia Magherescu*

Abstract

This paper focuses on the current forms of serious crimes, special regard on the luxurious ones, whose results are the most dangerous for the contemporary society because of the several implications between the criminal organised groups, which are usually working together, making up serious criminal networks and compromising the public services' activity and also affecting their work and the fight against these crimes. Bearing in mind one of the most intensive activity of the European law enforcement agencies in this matter, I will analyse the causes, which produce the phenomenon as well as the mechanisms adopted in order to combat and control it.

Keywords*: luxurious criminality, serious crimes, organized groups*

Introduction

The contemporary society has offered various "surprises" in criminal field. Specialists admit that there are more than such forms of criminality committed in everyday life. Theoretically speaking, the crimes could be divided into two main categories, such as less crimes and serious ones, whose finality is already recognised as being differently.

Criminal doctrine abroad, both from Europe and the United States of America, has been involved in defining and characterizing the organized crime phenomenon having a transnational feature. Based on the strong legislative documentation, the criminologists' referential papers have contributed in defining the classic concept of "organized crime", and then, they diversify it gradually with new elements, such as: the criminal elite, commercial sex, trends in women trafficking, new criminal opportunities and so on. At the same time, doctrine has been involved in looking for the answers for certain questions, which have still concerned criminologists since the beginning of the past century. How crime becomes organized? It is one of these questions, which found its answer gradually. However, it is more and more unknown.

In opposition with its evolution and structure, specific for Europe, contribution to researching of the luxurious organized crime in the United States of America has a particular place in this matter. Even no more times,

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the organized crime origins have presented in narrow sense till to create a new model – typical of that latter on it have to become a special influence in description different types or forms of criminal activity.[1] *However, we can discuss about trafficking in human being or other forms whose serious harm are often caused by transnational criminal activity, for example every forms the construction of that criminal activity as an external threat obscure the origin of them in the area of illicit activities and services within a threatened society.*[2]

Particular features of the luxurious criminality

Specialists often point out the most serious forms of criminality met in the contemporary society. More than ever, criminologists focus their attention upon the serious crimes, including the organised ones and terrorism. Such crimes are usually committed in a particular manner, for this reason, they are more expensive, both from the action techniques and also from the results points of view.

The transnational feature of these offences makes a better understanding of the luxurious criminality issue, as being the main purpose of the present topic. Of course, from the first point of view presented above, I have to emphasize that the crimes' techniques are different from less crimes to serious ones. If less crime is often committed without a particular tactic or action plan, speaking about serious crimes, they have several special features, including the preparation acts, the criminal activity and the multiple results of such crimes. Even if this issue implies more than a criminological approach, I would like to remain within the area of criminology study and point out only the criminal aspects taking into consideration these regards. Thus, a detailed approach of the luxurious criminality, viewed from substantive criminal law point of view will not be taken into account in carrying out this paper, although it is necessary sometimes.

Analysing the special techniques of preparation acts of crimes, it requires a rigorous study upon the means of perpetration, the action plan criminals use in committing serious crimes, including the luxurious ones. The matter of fact has showed us that, when committing a serious crime, criminals are working together within an organised group in order for them to obtain high profit. Thus, the organised manner of such activity is one of the main features of the luxurious criminality.

Per a contrario, working alone, one or two perpetrators cannot perform the same activity and have the results as working in an organised criminal group. Actually, it is impossible for an individual to commit a transnational crime and have the results at high level. An organised group can

[1] E. Adam, P. Gill, *Transnational organized crime. Perspectives on global security*, Routledge, Taylor and Francis Group, 2001.
[2] Ibidem.

be used in the following kinds of organised crimes: any forms of trafficking in arms, drugs, persons and so on and all other forms of transnational criminality. Financial resources are defined very clearly when they start the action plan of committing any form of serious crimes. It is obviously that, much monies produce monies as well. However, usually, criminals are organising their action plan financing a minimum resources, but they are looking always for a high profit. Basically, this criminal strategy is better and preferred by themselves. It consists in obtaining much many with low investment. Nevertheless, the financial resources "invested" by criminals in their activity vary from an offence to another one. For example, in trafficking in human beings, the costs of crimes are higher, because of several pre-criminal procedures, which have to be done. In this kind of offences, falsified passports are needed and cars for the victims' transportation and other means committing transnational serious crimes are necessary. Thus, the costs are expensive. This is the consequence of the fact that, the criminal groups are not working separately. In most of the cases, there are criminal networks linked to the criminal activities. "Helping" each other is the particular feature of these networks.

Luxurious criminality in the American style of approach

Luxurious criminality as a profit is still a preferred topic, which concerns specialists both theorists and practitioners. Referring to the results of this phenomenon, of course that one of the most important issues for perpetrators is how to obtain a high profit in a short period of time. However, the power is not at loose ends because of the fact that, as usually, the luxurious criminality creates premises for its development and much more. Even, this concept is argued by several specialists nevertheless, there is a separated opinion which concludes to the "*myth*" one.[3] Actually, in my opinion, there is no long way from the concepts of "power" and "profit" as the results of the luxurious organized crime to the "myth" one, because of the fact that a link among them already exists.

Nevertheless, everyday life shows us that the perpetrators prefer looking for a profitable result of their activity than to obtain a failure. From this point of view and also in relation with its evolution, the success is relative and it depends of the authorities' ability in their judicial activity performed by law. Historically specking, "*In the beginning was the world*"[4] is emphasized in a paper whose author approaches the phrase that creates a hard confusion on the concept of the luxurious criminality issue, because of the fact that this

[3] C. Viano, J. Magallanes, L. Bridel, *Transnational Organized Crime, Myth, Power, and Profit*, Carolina Academic Press, North Carolina, 2003.

[4] P. van Duyne, *Medieval thinking and organized crime economy*, in E. Viano et al. *Transnational organized crime, Myth, Power, and Profit*, Carolina Academy Press, Durham, North Carolina., 2003.

issue coined in the beginning of the 20th century without any definition.[5] As well as, poor items in that matter convince us that in a suburb of the USA, there was no luxurious criminality. However, there saw a form of this phenomenon, such as: racketeers, bootleggers, but these were not characterized criminal activity. *How does crime become luxurious?* It is one of the current questions, which has already involved penalists a long time ago. Would have been Cosa Nostra or the US Mafia the first of all? Case studies of luxurious criminality in a rural setting in Chicago, illustrate how the activity of organized crime is developed with or without links to established criminal organizations.

Viewed as "*one of the most fascinating forms of criminal behaviour*"[6], having a long history, diverse activities as well as many forms, it continues to draw both public and business interest. By changing opportunities, that arises continuously, the American doctrine recognizes four contemporary issues "*that comprise the forefront of concern about organized crime ... its connection to legitimate business, how groups become organized, the effectiveness of different law enforcement approaches and new criminal opportunities*".[7] Returning to the question, which has been proposed above, a few explanations are necessary in this sense. Taking into consideration the discussions about luxurious criminality in America, these tend to focus exclusively on the urban crime groups activity more then other forms. In spite of this tendency, having an urban feature, it is well-known that the criminal enterprises operate in the rural areas of the USA. Aside from the occasional reference to the "Dixie Mafia", the rural criminal enterprises have escaped serious inquiry.[8] In this matter, the criminal organizations in the county, generally speaking, appears as an organized rural crime, even a correlation among all these activities exist. For example, it tends to be clearly defined, stable, bureaucratic organizations.[9]

For the case study of "*Copperhead County*" is specific that the criminal enterprise can be viewed into two parts. Every these forms of criminal activity include the growing and processing of a high degree of drugs on illicit market. The theory of enterprise was agreed by the European doctrine[10], which recognizes it as a new concept of *illegal enterprise*.[11] It also takes into consideration how the criminal activity becomes organized, without any element referring to its structure. In opposite with the rural form of the

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[5] Ibidem.
[6] H. Albanese Abadinsky, *Organized crime*, IL: Nelson-Hall, Chicago, 1986.
[7] Ibidem.
[8] G. Potter, L. Gaines, *Organizing crime in "Copperhead county": A Ethnographic look at rural crime networks*, Carolina Academic Press, North Carolina, 2003.
[9] Ibidem.
[10] K. von Lampe, *Criminally exploitable ties: a network approach to organized crime*, in vol. *Transnational Organized Crime, Myth, Power, and Profit*, Carolina Academic Press, North Carolina, 2003.
[11] Ibidem.

luxurious criminality, in cases of urban one, a special relevance for the present paper is arisen by the structural organizing of criminal groups. Usually, doctrine refers to the neighbourhood areas, the factors which influence the Italian-American criminal groups, various economic theories and so on.[12] Carving up the Chicago's territory among the criminal groups means effectively a metropolitan habit during the "modern" process of destruction of the local community. At the same time, not less than five groups, which are known in that city refers to the central location of community and its fragmentation into parts of interest. While the frequent luxurious criminality arises as a secret activity, the specific element of these groups is how they make good to coordinate their activity by own rules or laws adopted by themselves and also recognized as even outside of the organization. It is sure the fact that all five groups collaborate together, without any recognition of the adverse part's laws. Perhaps, many people are joined the criminal groups so that nobody knows another law with the exception of them one. This theory shows that the partnership among criminal groups is not a modern trend, but it can facilitate international trafficking in weapons, drugs, human beings and illegal migration and it can also organize or execute terrorist acts.

On the other hand, there is evidence, which convinces that the various crews once specialized in certain types of crime. If certain forms of crimes are in decline (the activity of criminal groups in Chicago Heights), other forms have a relative progress, metaphorically speaking, and refer to automobile theft, and chop-shop operations.[13] Even if the operation is not specific only for the American system of luxurious criminality, the influence of criminal groups in the state's authorities have already happened.[14] It is true the fact that various forms of the luxurious criminality in the USA have concerned doctrine, however, its transnational side comes into the first position. It also appears as a result of newer global economy changing, which is already felt at the international level. Moreover, the transnational feature is an advantage of the increased cross-border for the criminal groups that "*have enlarged their territorial areas of influence and increased their wealth and power vis-à-vis those of the national governments*."[15] First of all, from the point of view of its structure, it presents a new version of this phenomenon that is implemented into the international scene.

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[12] R. M. Lombardo, A. J. Luigio, *Joining the Chicago Outfit: Speculations about the Racket subculture and roving neighbourhoods*, in vol. *Contemporary issues in organized crime*, Monsey, New York, 1995.

[13] Ibidem.

[14] Delia Magherescu, *New aggravated forms of social aggression – realities and threat*, Lex et Scientia, 2008.

[15] C. Viano, J. Magallanes, L. Bridel, *Transnational Organized Crime, Myth, Power, and Profit*, Carolina Academic Press, North Carolina, 2003.

Secondly, the criminal activity having a transnational feature interests the political parties during the process of election.[16] To this theory I can add that it means a challenging target for the police system of nation-states. In the last opinion, the danger is bigger and it produces several consequences, which are not desirable.

What's new and what's happened to luxurious criminality?

First of all, a new criminal opportunity has arisen in the luxurious criminality, as a new concept in this matter.[17] Usually, we try to understand up to where everything is a common item (with other forms of offences) and from which point a new approach both theoretical and practical starts in the matter of this phenomenon. After certain items, which were established in the field of the serious crimes since the mid of 20 century and that has already pointed out above, a new age of their researching is started. For example, it is referring to the following issues: commercial sex, criminal opportunities, illegal enterprise theory, power syndicates (viewed as a "*mafia syndicates*"[18]), nexus "network and organization"[19], organized crime continuum, spatial dispersion trend, complex criminal organizations, monopolization of organized crime and so on. On the other hand, part of doctrine takes a different approach, which focuses on the relation between the criminal groups and society.[20] In this regard, another phenomenon has a particular feature, called the "*institutionalized"* criminality. It also interests luxurious criminality from many points of view, as it could be understood in the current paper. Actually, it is based on the corruption, being a phenomenon more and more dynamic due to the current economic situation, whose crises has aggravated the civil servants' social conditions as well as their everyday life style, which is affected seriously at the moment. Despite the economic crises, which occurs in the contemporary economic field, the criminal phenomenon of the corruption cannot be accepted as a solution for civil servants in performing their work concerning the citizens and their fundamental rights provided by constitution or other normative documents. Even if many cases of corruption have been discovered in the last period of time, this antisocial phenomenon shows as that, a serious drawback occurs in the legal activity of the public services. Moreover, the public administration is really affected by this kind of irregular practices happened intensively, which is very difficult to stop. In this

[16] Ibidem.
[17] J. Albanese, *Contemporary issues in organized crime*, Monsey, New York, 1995.
[18] K. von Lampe, *Criminally exploitable ties: a network approach to organized crime*, in vol. *Transnational Organized Crime*, Myth, Power, and Profit, Carolina Academic Press, North Carolina, 2003.
[19] Ibidem.
[20] Margaret Beare, *Criminal conspiracies: Organized crime in Canada*, Toronto, Nelson Canada, 1996.

way, the law enforcement bodies have made serious efforts in order to control the phenomenon of corruption, but, at present, any legal action develop other similar cases, which is ever impossible to combat in the matter of fact.

Actually, corruption does not have a particular feature, but it is often accepted by the society, generally speaking, due to several means of committing it both by civil servants and individuals or other persons, such as legal entities, the private ones, which could develop their activities performing such forms of illegal activities implying the illegal trades, for example. It means that, both categories of actors "respect" this kind of irregular practices as well as they admit that fraud could produce a bigger profit, as they are looking for.

Providing information on the corruption or other phenomena means to develop a new series of procedure involved in the serious cases as much as I have already emphasized earlier. Even if the authorities both at national and international level have made serious efforts in order to prevent any kind of irregular practices, in the matter of fact, practitioners are still waiting for the results.

From a personal point of view, it is possible that in a number of cases, the actors do not interact simultaneously in one way for catching the same results. At the same time, it is possible that no rules are interpreted by them. In spite of the multiple causes, which occur in the present topic, a negative impact upon the general needs of the society is evident. The danger is bigger and the law enforcement agencies have to analyse better their activity especially in the matter of their interaction with the citizens.

Considering all these, I have to admit that no irregular practices are accepted in practice as well as any kind of these offences would be hardly punished.

Conclusions

Everyday criminality shows us the fact that the "innovator" style of committing and practical approach in the matter of fact is in an alarming progress. Both the national and international law enforcement agencies are always looking for finding newer and efficient standards in order to combat and control this phenomenon, while the criminal organized groups fight more and more tenaciously for creating certain opportunities in order for them to be one step behind the legality. Within an unequal balance of action plans, a common aim is arisen: does regulation provide strategies enough for repressing luxurious criminality? It is only a question, whose answer is not just difficult, but has many ways of approach and can develop ample discussions on this topic.

Moreover, other phenomena have a particular negative feature not only upon the legal activity of the law enforcement agencies, but upon the society too. This argument is quasi-unanimously promoted by law and its upholders, who do not agree with irregular practices, such as corruption.

Taking into consideration this issue, only one question is arisen: why most of the civil servants still agree with this practice and what to do in this field? At the first sight, it is obviously that, in a transitory society, this phenomenon is increased due to many factors both objective and subjective. Unfortunately, in a loose manner, it could be observed that, the law and its provisions are not enough for the civil servants to be responsible for their actions and to do their activity in accordance with the law. In perfecting their activity, a new implementation of the strategies adopted by government is still expected.

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INTERNATIONAL RULE OF LAW, EUROPEAN RULE OF LAW AND THEIR INFLUENCES ON NATIONAL LEGISLATIONS

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Abstract

International law gains a growing importance for any national legislation. Far from being only scattered rules of law, we can talk, at this moment, of an international law system, which though has its limitations, yet succeeds to set up a precise framework on the national legislations, specially in areas such as environmental law, criminal law and human rights. .

Key words: *International law, international criminal law, environmental law, human rights, European law, juridical culture*

Introduction

In the nearly 3300 years of attested international relationships[1], the international rules of law have dramatically changed their role and importance. The signing of international treaties with judicial value has become a regular procedure, necessary for any national state. As a result of the development of the international relations, there has been an unprecedented development of the international law. This evolution has not yet reached, so far, the final step, because of the lack of an entity, with supreme international judicial power, the step of constructing a global government that can ensure unity, coherence and the compulsory force of the international rules of law. Nevertheless, the international law strongly influences the national legislations, reaching in some cases, the point were it is recognized as being superior, event against constitutional rules.

International law offers a framework in which the relationships between national states take place. The international framework, meaning the international situation of a country, its relations with the neighbors, with the regional or international communities, have a strong influence over the law, as there is a tendency to harmonize national regulations with international ones, with the signed treaties and conventions and even in unifying law, in some

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[1] First attested treaty in human history, dates from 1258 B.C., when the egiptian pharaon Ramses II signed a peace treaty with the hititte king Hattusili III.

areas[2]. According to the dualist point of view, each state is sovereign in its own judicial order, and there can not be any control on the acts issued by its empowered organisms. In order for an international treaty to become applicable in an intern legal order, there must be a special procedure of inserting that international rule of law. The monist position tries to accomplish an unity between international and national law, by admitting the priority of the national law against international law, or by subordinating the national law[3]. According to an oppinion[4], there are certain situations of interpenetration between national law and international law. There is such a penetration of national law in international law, due to the fact that national law establishes the organism that is competent to sign international treaties. There can be also a reverse situation, for example in the case of applying international rules of law, directly to the citizens of a state, in the case of the international rules connected with the human rights. We may add that the principles of international law have their origin in the national law. International entities (such as U.N.) can not create general principles of international law, as they can only recognize and promote them. The general principle of democracy for example, has first appeared inside some national law systems, wherefrom they have spread to an international level. The idea of democracy has been transferred to an international level, from were it was transformed, developed into the general principle of international law of self-determination[5]. These ideas are, in a way, reinserted in the national law, after they gained a more or less universal shape[6]. The U.N. has widely diversified its activities lately, including even certain interactions with international non-state actors or with supra-state actors, such as the European Union.

Recognizing and promoting such ideas in international acts, by international organisms, inevitably leads to a strict, categorical limitation of the national law and even of the national constitutions. The U.N. Charter states, in its preamble, as essential values, maintaining the peace, respect of the human rights, equality in rights as well as the equality between nations, big or small, along with the necessity of respecting the international documents, in order to promote social progress development and "better standards of life in larger freedom". The obligations of the member states are clearly stipulated, obligations such as: respecting the equality of the member states, willingly fulfill the assumed obligations, peacefully resolving the divergences, abstention from use of force or from threats with the use of force, but also, the obligation

[2] Romul P. Vonica, *Introducere generală în drept,* Lumina Lex Publishing House, Bucharest, 2000, p. 30.

[3] Sofia Popescu, *Teoria generală a dreptului,* Lumina Lex Publishing House, Bucharest, 2000, p. 175.

[4] *Ibidem*, pp. 175, 176.

[5] Anne Peters, International law meets domestic constitutional law, Vienna Online Journal on International Constitutional law, Vol. 3, 2009, p. 173.

[6] *Ibidem.*

to maintain national sovereignty, through the interdiction, at the U.N. level, to interfere in matters that belong essentially to the national competence of a state, and the obligation of the members to subject such matters, for a solution based on the dispositions of the charter. Membership to the U.N., attracts, *ipso-factu* the membership to the Statute of The International Court of Justice[7] as the main judicial organism of the U.N.[8].

The emergence of transnational rules of European law took place inside a preexistent system of international law rules, which the European Union could not negate. The treaty on European Union, as amended by the Lisbon treaty, recognizes as essential values: the respect of human dignity, freedom, democracy, equality, the state of law, as well as respect of human rights, including the individuals that belong to the minorities[9], and the strict respect and development of the international law, including the respect of the principles stated in the U.N. Charter[10]. The European convention on human rights recognizes in its preamble initial acts related to human rights, such as the Universal Declaration on Human Rights. The E.U. went even further than before in matters related to human rights, by investing eventually, with judicial power, the Charter of fundamental rights of the European Union, document which states third generation human rights (such as the right to a healthy environment) and even fourth generation human rights (rights related to genes engineering and the protection of personal data). National legislation of the member states is strongly influenced by the European law which has direct applicability. Article 2, paragraph (1) of the Treaty on the functioning of the European Union (in consolidated form), states that: "When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts".

There is also a strong extra-communitary influence, on the legal systems of the member states. The most important influence of such kind seems to be the principle of recognizing and ensuring the fundamental human rights. Both at a transnational (in the U.E.) and at a international level, respecting the human rights imposes legislative changes (including at a constitutional level), for the majority of the world`s countries. This tendency can easilly be point out if we look at the newer constitutions (like the Romanian constitution), of the former socialist countries in the Eastern Europe. The framing of these constitutions has been made under the strong influence of recent international ideas. In many of the former socialist countries, the international regulations regarding human rights are of prior application, excepting the cases in which the constitutional

[7] U.N. Charter, art. 93, paragraph (1).
[8] U.N. Charter, art. 92.
[9] Treaty on the European Union, art. 2.
[10] *Ibidem*, art. 3, (5).

provisions or the other national laws contain more favorable provisions[11].

The international organizations responsible with human rights protection are enjoying an increasingly higher recognition, not only at an institutional level but also at the individual level. There is a growing tendency in some states, including România, to invest with a very high amount of confidence international organisms such as the European Court for Human Rights. The confidence in institutions like this Court is in many cases much higher than the one in national institutions. The Court is perceived as the last, the supreme organism to which the citizen can place his hopes of resolving his legal issues, of receiving protection for his fundamental rights. International instruments of protecting human rights impose to the national law system, some judicial standards, by respecting the warranties that the civilized nations are beginning to promote in their national laws and in their national jurisprudence. This way, a common jurisprudential law, as a minimum requirement, is being constructed, which is not only criminal law but of any kind. It is a veritable guide for al the procedures in Europe and the world[12].

The state appears, in many of the contemporary discussions, as an old structure, that can no longer eficiently manage the challenges of the modern world. The disappearance of the structure that now we call state, has been predicted since the beginning of the XX-th century, by authors such as Leon Duguit[13]. Today we must ask ourselves, perhaps more than ever, if the state, as a structure that has been efficient for many millennia, has now ceased or will soon cease to be efficient. We are already facing global problems, far to complex to be solved by one state alone (no matter how developed), such as pollution or other environmental issues. The controversial phenomena of globalization is a certainty in the economic area. A process with such a complexity necessarily affects international law. The main actor of international law is still the state, but as we can speak about a future reorganization of the statal structure, we must inevitably consider an important change of the international law. Any discussion about globalization raises serios questions about the faith of national states. The increasingly higher circulation of money, products and people across the frontiers, lead to a weaken control of the national borders and thus, its ability to appear as an arbiter to a joint political project[14]. The national state has even reduce its attributions to a minimum level, by transferring more and more tasks to the private sector. Some states still try to resist these influences and find means of reinventing themselves, but they all

[11] For example the Romanian Constitution, art. 20, paragraph (2).

[12] Gheorghiţă Mateuţ, *Drept procesual penal, Partea generală, Vol. 1*, C.H.Beck Publishing House, Bucharest 2007, p.10.

[13] Leon Duguit, Le droit social, le droit individual et les transformations de l`Etat", Alcan, 1908, *apud* N. Steinhardt, *Principiile clasice şi noile tendinţe ale dreptului constituţional,* Solstiţiu Publishing House, Satu Mare, 2000.

[14] Frederic Mergret, Globalisation and international law, Max Planck Encyclopedia of International Law, Oxford University Press, 2009, p.3.

eventually become more and more disaggregated[15]. On the other hand, the emergence of the supranational structures, such as E.U., seems to also threat the existence of the state. The appearance of such structures might be interpreted also as a form of resistance to the general process of globalization. The avowed purpose of the E.U. is "unity in diversity". The European Union tries to maintain the states (or at least a minimal national sovereignty) and especially their national specific features. Nevertheless the national sovereignty, although maintained, must suffer some limitations in the unional larger framework, in order to ensure the direct application of the European judicial norms in the member states and the preference of the European law to the national law.

Studies on the europenization of rules of law regarding citizenship, water legislation and environment standards have shown, that the implication of the prescriptive norms of law, comes out of the learning processes and the diffusion into the supranational institutions, as well as through the way these norms are being spread, often with the help of the pression exercised by the support groups[16]. Supranational institutions from Europe exert a powerfull influence beyond the borders of the E.U., even to a global level. This is not a result of the actions of the main institutions, such as the political organisms of the E.U. (Court of Justice, Parliament, Comission), but also the role of other unofficial institutions, with the help of which, values and European social norms enter a certain rutine, contributing thus to the completion of the European structure[17]. The recognition and affirmation of the international rules of law in the national law systems is not only a result of the classical chanells. A multitude of unofficial groups, belonging to certain non-governmental organizations, or even the multinational companies and especially the increasing trust that the citizens put in the international rule of law, contribute togheter to the development of the role that the international and the European rule of law has, by influencing the national law systems.

The national constitutions contain references regarding the international law, explicitly admitting sometimes , the priority of the international regulations to the national ones. In an oppinion[18], there are four factors responsible for the proliferation of the constitutional references to the international law. First, the collapse of the socialist block made it necessary to elaborate new constitutions, by the former communist countries. Secondly, the European integration, due to this process that requires to bring togheter the constitutions of the member states. Thirdly, the creation of more powerfull international institutions, such as the International Court of Justice. Finally, the the international communities, or at least its most powerfull exponents, have surveyed and guided the regime changes and even enacted new national constitutions (Cambodia Constitution in

[15] *Ibidem.*

[16] Armin von Bogdandy, Towards a transational nomos, Jean Monnet Working Paper Nr. 9, Heidelberg, 2003, p.10.

[17] *Ibidem*, p.32.

[18] Anne Peters, *op. cit*., pp. 171-173.

1993, East Timur in 2002, Irak in 2004 or Kosovo in 2008).

States appear as free and sovereign actors in the international law. Although the treaties can sometimes indirectly affect a third party, they still can`t command to states that haven`t signed them. Similar into the autonomy of will in the private law, the states have the freedom to decide if they will sign or not, an international treaty and if they will accept the stipulations of such an act, similar into the signing of a contract. But the situations is not as simple as that, because excepting the consensus international law, we can speak about a non-consensual, customary international law, which has been called general international law[19], that applies to all the states equally. The equal application of these norms is in direct relation with the recognition of the equality between states. Thus we coudn`t have spoken about an international law in the time of maximum development of the Roman Empire (as it was the sole force, with no real competitors). Today one can say that the supremacy of the U.S.A. is quite limited, by other poles of power such as the European or the Asian one, which is in rapid development, so that we can speak about a real, functional, international law. Paradoxical, in the maintining of peacefull international relationships, the nuclear weapons had a very important role. The sheer presence of this powerfull mass destruction weapons lead to an "balance of terror", due to the understanding of the capacity that these weapons have, not only to destroy a certain state, but to raze from the face of the earth all existing life. We must say that this is a very fragile and dangerous balance, which purposes that states that have nuclear weapons, will have the necessary intelligence to never use them. As sane and simple it may seem, let`s just say that most languages have a lot more synonyms for the verb "to destroy" than for "to create" (English for example has about 13 synonyms for "create" and about 50 for "destroy"), and so we rather not have at all nuclear weapons than rely on such an inflammable balance.

It has been shown[20] that when a state becomes a super-power, measures against him are not as easy to take as they are against South Africa for example, but measures may still be taken even against super-powers, as they have investments and citizens all over the world, against which measures of international law can be taken.

The necessity of measure-taking in problems of great interest for the entire humanity, such as the preventions of international terrorism, fiscal frauds made by banks that have worldwide ramifications, the international people trafficking, drugs, weapons or environmentally dangerous materials, made necessary for the possibility to take penal measures at an international level and lead to the appereance of the international criminal law, which is another important factor for the dynamics of the international relationships. Applying

[19] Anthony D`Amato, International law as a unitary sistem, Northwestern Public Law Research Paper No. 08-02, 2008, p.1-23.

[20] Anthony D`Amato, *op. cit*. pp. 12-19.

the international criminal law includes still, the application of some principles that are not originating from the international law, but from the national legislation of every state, to which the criminal belongs to, and for the very serious crimes, the application of the legislation broken by the crime. Although until this moment an international criminal code coudn`t have been adopted[21], there are principles of international criminal law that strongly influence the national criminal regulations, principles like: universal repression; the principle of individual international responsibility; the principle of non-prescription for the crimes against peace which, according with the demands of the legality principle, implies, similar with the national criminal order, the clear setting of which acts are crimes, which punishment can be enacted, the individualization of the punishment and the ban to accept custom and analogy for the judicial framing and the punishment of crimes. The principle of legality in the international criminal law also implies the admittance of the universal repression, in the absence of an international criminal jurisdiction. The efficiency of the international criminal law is essential to ensure a climate of security and peace. No man shoud elude the deserved punishment for commiting a crime, by traversing a border. Also, against trans-border criminality or terrorism that isn`t affected by national borders, there can only be international actions, measure that can not be only national ones.

There would be impossible to apply an identical norm, in an identical manner to all the situations that may arise, although criminal legislation, environment related rules and human rights have a strong influence of transforming and unifying different national law systems. Researching the process of judicial integration is closely related with the concept of "juridical culture"[22]. This concept synthesizes the relations between law and culture, as it is "a system of material and spiritual elements, that rapports itself in human condition and in human conscience"[23]. Such a concept, composed of both elements of juridical sociology, compared law and also legal philosophy, ca be very useful for the study of such a complex phenomena as European and international judicial integration. A question that the European researches must answer is which of the law cultures will prevail and how will this happen, as there are clear differences between the Western European law culture and the Eastern European one, and even inside each one of them. At the same time, the emergence of a strong Asian pole of power raises new questions regarding the

[21] A project for an international criminal code has been elaborated in 1954 by a U.N. comission. The codification failed due to the imposibility of defining the term „agresion". There has been other projects and conventions of the U.N., with a similar content, among which we can note: The convention on the prevention and punishment of the crime of genocide (1948); The convention of the non-prescription of war crimes and crimes against humanity (1969); The convention for the suppression of unlawfull seizure of aircraft (1970), etc.

[22] Sofia Popescu, *Studii de Drept Românesc Revue,* Academia Română Publishing House, July-December 2003, p. 247.

[23] *Ibidem*, p. 248.

evolution of the international law, at the final form that it can take (accepting that the international law system will be able to reach at a certain point, a final stage and that it is not simply a process with continuous evolution). We must also take into account the fact that applying a principle of law into a different law culture, without at least a minimal adaptation, can lead to disastrous effects. For example respect towards human rights must be realized in a different manner, keeping in mind the specific features of each area. Although a principle can be used in more than one legal systems, its contains will be different each time. There are for example certain traditions that, if researched could be considered, at least at a formal level, a discrimination. Traditionally only men are appointed priests. This might be interpreted as a discrimination, but still, because of a powerful tradition, the limited access of women to be appointed as priests, is not perceived as a discriminatory measure, by the majority of the citizens, but as a natural, customary solution. At the foundation of every legal system, there must be a system if, which exists at a certain point, inside a society, system that is strongly influenced by cultural differences and by the social aspirations that the subjects of law have. The unification implies a certain hierarchy of values, at an European or international level. The problem that appears inevitably is who can make such an hierarchy? In an opinion[24], an idea as "universal justice", as a general accepted value, can be achieved only through the existence of universal rules of conduct (at a planetary level), elaborated by an unique authority. Compliance with this rules would be observed by organisms that have global jurisdiction. Accepting that there is still a system of international law, with a role in international politics, that is more than the sum of the interests of the nearly 190 states of the world, that are at the same time the creators, the subjects and at the same time the enforcers of the international law[25], we must admit that at this moment there is no organism, like a form of global government and not even an European one (the Europeanization process is a continuous one at this point, in which the states still maintain, with certain limitations, their sovereignty). Only such an entity would be legitimated to impose universal rules, a hierarchy of universal values and not even such a constraint would not be possible if we were to use same criteria for any place and time. Relationships between states imply, inevitable, a collision between different values. Customs that may appear as barbarian for some communities, are considered traditions, cultural values in other communities. For example the Spanish corrida are at this point the subject of strong controversies. On one side is about traditions, cultural value, an equal, symbolic fight between the bull and the toreador, and on the other side they are being called sadistic, barbarian, a flagrant violation of animal rights that should not be tortured like this in the arena. A too strong external interference in such debates is hardly welcomed, as

[24] George Antoniu, *Reflecţii asupra justiţiei universale*, study published in *In honorem prof. univ. dr. Nicolae Popa*, Sitech Publishing House, Craiova, 2010, p.14.

[25] Anthony D`Amato, *International law as a unitary sistem*, Northwestern Public Law Research Paper No. 08-02, 2008, p.8.

it is probable better to let subjects like this one to be solved through non-legal, unofficial means. Any intervention of European or international organisms, that have such a prerogative, must be made only in order to ensure that some minimal standards are applied, that are crucial for any democratic state. An influence that is to strong on the national legislation, will eventually choke a legal culture, or it may raise a strong opposition, a rejection of the international rule of law. Excepting these minimal criteria, the imposition of an absolute uniformity must be avoided. Conserving the differences, especially in Europe, is an essential condition for the survival of a legal culture. Diversity and democratic polemic debates can certainly be the source of important legal ideas, that can contribute eventually to a natural closeness between different national law systems, while keeping, at the same time, the national specific features and values, and conserving the democratic principles.

Conclusions

The classic role of the international law, that of stopping or preventing armed conflicts between states, has developed into much more, as it often implies new tasks that the international organizations have accepted, tasks that imply an increasingly stronger limitation of nationhood, of state sovereignty, reaching even the point were we can seriously ask ourselves about the future of the structure that we now call a state. On one side the international organizations are imposing more and more limitations to the national legislations, even without a global government. On the other side, national legislations try to find new methods to maintain legislative independence. The specific of each national law culture must however survive to this conflict, as there is no rule, no matter how good it is, that can be applied identically to different situations, in different cultures. The European law is setting a possible way for a future global legal approach, that can be accomplished only by maintaining the diversity.

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NEW GOVERNANCE FOR NEW THREATS: THE TRANSNATIONAL COOPERATION IN SOUTH EASTERN EUROPEAN COUNTRIES

Alina Angela Manolescu*

Abstract

The paper studies the impact of globalization and the challenges for human rights protection in South Eastern European countries. Nowadays challenges and threats imply actions that can be implemented only in a transnational system. Therefore, South Eastern Europe has to begin a cross-border framework of transfrontieer relations.

Key words*: Cross-border cooperation, South Eastern Europe, globalization, governance*

Introduction

The European Union represents a space of stability, peace and welfare that could be estended to the early democracies of Eastern European countries if measures should be taken in order to promote transborder cooperation in the area.

The connections between people and states are transforming and a shift is needed from multicultural to intercultural societies. In this sense transnational cooperation in South Eastern countries seems to be the most adeguate politic, in order to achieve a good governance in a world affected of new threats.

The impact of globalization – challenges for human rights protection

The dynamics of globalization reduce the autonomy of national governments. Globalized norms of human rights and democratic governance penetrate borders, reshaping old concepts of sovereignty and autonomy. Sovereignty is rewired: what happens beyond our borders affects our own well-being and commands cooperative action.

The power of transnational corporations, the limits imposed on government policy by currency markets, the transborder politics of NGOs, the transfiguring power of global media undermine the power of states[1]. But for some reasons globalization strengthens the state and extends its influence, for example in the international protection of human rights. The conflict between

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[1] Ferrarese Maria Rosaria, *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*, Ed. Il mulino, 2000.

international standards and the sovereign state has been carefully observed by Calabrò, "Even human rights can only be submitted to the sovereign power of individual states, and then be swallowed up by political will."[2]

In confounding globalization with governance, the main conflict is that of a parallel integration of societies and their fracture. Nowadays states have new capacities due to the fact that globalization gives them legitimacy for actions beyond national borders. States should use this power to undertake cooperative solutions for the emergent threats.

In this context arises the need to reshape the role and limits of state sovereignty. The contrast between state sovereignty and human rights occurs in various situations: between state sovereignty and territorial integrity the actions of humanitarian aid, including the immunity of states and the right to acces to justice for victims of human rights violations, between the interest of the state's territorial integrity and the principle of self-determination.

A governance that ensures stability, security and effectiveness of human rights protection

Norms of human rights and good governance acquire a new and global authority. Security is nowadays an international issue, and no government can deal with it by itself. A governance based of transnational cooperation should be based on transparency, accountability and popular participation. In this view, transnational cooperation encourages prosperity, security and human well-being.

In this context, the dynamics of globalization argue for decentralized power. A structural prevention is needed, through building peace by building good government, meeting basic human needs and fostering social harmony. Citizens of the global community have to be envolved in policies that promote inclusion, integration and the creation of an active european citizenship based on common values, such as commitment to solidarity, social justice and stronger cohesion.

When human security is guaranteed, individuals feel protected from the threats that emerge at regional and international level. But the role of preventative diplomacy is not only that of preventing conflicts. The main role is that of designing preventive measures for human security threats, by improving the present ways of governance.

A South Eastern Europe point of view

The post-1989 European constitutionalism is defined by the rigid constitutions that allow the development of constitutional justice, hence the

[2] Calabrò Gian Pietro, *Valori supremi e legalità costituzionale. Diritti della persona e democrazia pluralistica*, Giappichelli Editore, Torino, 1999.

tendency of the third wave of countries to codify more and more rights.[3] Together with this growing codification of rights one can notice the weakness of their effective guarantee.

The extreme concentration of events, wars, violence, massacres of centuries past create a negative image in Western Balkans. The term "Balkans" is generally used to refer to the regions occupied by the Ottoman Empire after 1699, together with Bulgaria, Serbia, Macedonia, Albania, Bosnia and Herzegovina, Montenegro and Greece. For some authors, Serbian Vojvodina and Transylvania Romania are also part of the Balkans. In the '90s, following the dismemberment of Yugoslavia, the Balkan term receives a negative connotation, also due to a random use. For this reason, some people like the Slovenians have rejected the label of "Balkan nation." The Western Balkans include Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia. Other countries are included in this wider term - Romania, Moldova and Slovenia - although technically not part of the Balkan Peninsula.

Recently, the general tendency is to use the term Southeastern Europe, instead of Balkans. In fact, on the initiative of the European Union with the Stability Pact for South Eastern Europe in 1999 most of the international organizations adopt this term, by stimulating the overcoming of negative connotations associated with the Balkans. Specifically, the countries which we refer in this context are: Bulgaria, Romania, Croatia, Macedonia, Albania, Bosnia Herzegovina, Moldova, Montenegro and Serbia.

The identity of the Balkans is dominated by its geographical location, the area historically known as the crossroads of various cultures. It was the intersection between the worlds of Greek and Latin, the target of massive flows of pagan Slavs, an area of intersection between the Orthodox and the Catholic world but also Islam. The Balkans are a multi-ethnic and multi-lingual region, being the land of the Slavs and Latins, Turks, Greeks, Albanians. Throughout history among them lived other ethnic groups, such as Thracians, Illyrians, Romans, Uzi, Cumani, Avars, Celts, Germans. Probably the main influence on the region has been the domination of the Ottoman empire. In fact most of the national historical heroes were those who have fought against the Ottoman Empire.[4]

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[3] Huntington P. Samuel, *La terza ondata. I processi di democratizzazione alla fine del XX secolo*, Ed. Il Mulino, 1993.

[4] For the Serbs Miloš Obilic, for Albanians Skanderbeg, for Macedonian Nikola Karev, Husein Gradaščević for Bosnians, for Bulgarians Vasil Levski, for the Romanians Vlad Tepes.

The Balkans has often been defined by a hybrid identity. The reason for this confusion is mainly in the large concentration of nationality, which makes the south-eastern Europe a problem area.[315]

Of course one can not overlook the intersection of many languages, unintelligible one for the other current usage of five alphabets: Cyrillic, Latin, greek, arabic, jew. But it should not be neglected even religious diversity that characterizes the area: Orthodox, Catholics, Muslims, Protestants, Jews.[326]

The collapse of communism and the transition to democracy have accelerated the globalization process, extending the ground of rights. But it is known that the risk of confict is lower in well-established democracies, while it's higher during democratic transitions when state capacity is weak. The developing countries are imperfect democracies with electoral processes which characterise democracy and weak separation of powers especially between the executive and the judiciary[7].

Recent studies have provided a situation of the indicators of states at risks, such as:

- demographic pressures (high infant mortality, rapid changes in population, including massive refugee movements, high population density, insufficient food or access to safe water, ethnic groups sharing land etc)
- the lack of democratic practices and human right violations
- regimes of short duration
- ethnic composition of the ruling elite differing from the population
- deterioration of the public service
- uneven economic development and lack of trade openness

The imperfect nature of governance in the South Eastern European countries characterized by democratic transitions, abuse of human rights, lack of economic growth evidences their risk of instability. The lack of economic

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[5] Romanians (20 millions), greeks (11.5 millions) turks (10 millions) serbs (10 millions) bulgarians (7.3 millions) albanians (7 millions) croatis (4.5 millions) bosniacs (2 millions) slovenians (1.8 millions) macedonians (1.3 millions) montenegrinians (0.3 millions).

[6] The main religions are Christianity in the region (Orthodox and Catholic) and Islam. The main religion is Orthodox, which takes on different characters in each country: Bulgaria - Bulgarian Orthodox Church, Greece - Greek Orthodox Church, Macedonia - Macedonian Orthodox Church, Montenegro - the Serbian Orthodox Church, Romania - Romanian Orthodox Church, Serbia - Serbian Orthodox Church . The main religion is Roman Catholicism in Croatia and Slovenia, while Islam is the religion of base in Albania, Bosnia and Herzegovina and Kosovo. Religious minorities are very numerous, Albania and Bosnia Herzegovina Eastern Orthodox and Catholics, Muslims in Bulgaria, Croatia and Kosovo the Orthodox Serbs, Macedonia and Montenegro, Albanian and Bosnian Muslims, Albanians and Bosnian Muslims in Serbia, Muslims Slavic (Goran), Hungarian and Croatian Catholics and Protestant Slovaks.

[7] Bugajski Janusz, *Nations in Turmoil*, Oxford, England: Westview Press, 1993.

growth and development in low-income countries increases vulnerability to economic shocks and retards institutional development, retards the consolidation of good governance and encreases the risk of conflicts. Violations of human rights constitute another important indicator, as they commonly precede deadly conflict. The democratic transition and the lack of economic growth contribute to long-term confict risk, while the short term risk are economic shocks, political instability and human rights violations.

Cross border cooperation – a pathway to security in Europe

In front of the failures of the global governance to mitigate the inequities of globalization, the European experience is a model of assuring peace, security and stability. In this context, a relevant action is that of the Council of Europe that developed a strategy to build effective local government institutions and to promote cross-border cooperation. The SWOT instrument was used (strenghts, weaknesses, threats and appropriate) in the region of South-Eastern Europe. Through this analysis it was demonstrated that the region has a high potential to create relations of cooperation. The Board identifies 10 dimensions for the countries of which: removal of institutional obstacles, economic, social and cultural factors that reinforce the tradition of language, history and culture.

The cross-border cooperation in the countries of the Stability Pact is based on social and cultural actions, but appropriate structures and training in the field is missing. The Council identified five strategies in this sense for:

1. Croatia - Hungary, Romania - Former Republic of Yugoslavia, Albania - Macedonia
2. Bulgaria - Macedonia, Bulgaria - Romania
3. Albania - Greece, Bulgaria - Former Yugoslavia, Greece - Macedonia, Hungary - Bulgaria
4. Albania - Yugoslavia, Bosnia and Herzegovina - Croatia, Bosnia and Herzegovina - Macedonia, Bulgaria - Turkey, Hungary - Yugoslavia, Macedonia - Yugoslavia, Moldova – Romania
5. Bulgaria - Greece, Hungary - Yugoslavia.

The strategies involve a mix of activities, support the autonomous power of local or regional governments, promote the opening of the central government to cross-border cooperation in the education system, including a greater protection of national minorities. The role of Euro-regions is considered very important, especially that of Dkmt (Danube - Kris - Mures - Tissa), Danube - Drava - Sava and Danubius 21.

The current strategy is to encourage the establishment of new regions by incorporating euro-risk regions[8] - the strategic areas as identified by the SWOT analysis:

[8] An important role for experience in the field is AEBR - Association of European Border Regions.

1. Nis - Skopje - Sofia (including Serbia, Bulgaria, Macedonia)
2. Serbia - Vojvodina (including Croatia, Hungary and Yugoslavia)
3. Trebinje - Dubrovnik - Herceg Novi (Erzevovina between Bosnia, Croatia, Yugoslavia and Montenegro).

Conclusions

The new conflicts of the world are no longer a competition between political classes, they envolve civilizations and great human costs. This new conflicts require new ways of prevention and the achievement of a minimal security standard. The culture of prevention and security can be fostered through actions and policies of cross-border and transnational cooperation of states and regions.

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EUROPEAN DEVELOPMENT COOPERATION AND THE ROLE OF NONSTATE ACTORS

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Abstract

The erosion of the powers of the national state and the lack of recognition of social values in the globalization process show that actions should be implemented not at a international level but at transnational one. In this context, the EU development cooperation is based on freedom, social responsibility, overall growth.

Key-words: *development cooperation, human rights, nonstate actors*

Introduction

Economic growth and human well-being are both prerequisites for full enjoyment of human rights. The link between international trade liberalization of services and goods and protection of human rights can be highlighted in the context of transnational relations, trough the development cooperation. The role of nonstate actors is fundamental because of their transnational dimension while represent instances of public interest on the global stage.

Nonstate actors in transnational relations in the European Union

In a globalized world, with the phenomena of transnationalization of production and capital, standardization of consumer tastes and legitimization of global capitalism, European Member States can only survive by creating a distinctive market ruled by quality. But market-mediated development excludes the poor part of the economy, in a society where profit-making through competitive pricing dictates the rules of citizens lives.[1]

Phenomena like aggressive consumerism, drug trafficking, money laundering, global arms trade, global gambling, endemic currency crises, unequal exchange, growing inequalities in income and wealth and growing poverty can lead to a "clash of civilization". In excluding other cultures from the system of values of the international system of cooperation for development, Huntington's prediction could come true. In a borderless world the European market should be represented by quality, tradition and equity.

Non-state actors are all organizations that are not part of the private sector and that are not states, including NGOs. These actors have multiple roles in

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[1] Ferrarese Maria Rosaria, *Il Diritto Al Presente: Globalizzazione E Tempo Delle Istituzioni*, Il mulino .

the development cooperation, particularly the participation in policy dialogue and project implementation. Although private organizations, the NGO's pursue the public interest in the most different purposes, especially politics and require a transnational action.

The process of transnationalization has been legitimized largely through three international organizations: the IMF, the World Bank and the WTO. This nonstate actors, together with G-7 countries are leading today`s economic governance.

WTO is an organization sui generis since 153 states with different levels of development. The WTO governs the free exchange of services in a stable framework of rules and principles, contained in the GATS agreement. The WTO lacks the balance between free trade and the reasons for the instances of solidarity and equality that underpin a highly competitive market economy like that of Europe[2].

The World Bank composed by the International Bank for Restruction and Development and International Development Association. The World Bank's mission is to improve the living standards of developing countries by channeling resources from industrialized countries. The bank follows an array of development that includes structural, infrastructural and human resources necessary for sustainable development and poverty reduction.

The International Monetary Fund is not an agency for development cooperation, but it has an important role in the system of policies aimed at developing countries.

The above mentioned organizations have been the focus of criticism for insufficient attention to social aspects of development and also for the lack of involvement of local populations in all programs.

The development cooperation – a European approach

The development cooperation is a process of continuous training, consisting of management rules, applied or not by different states of international society. It envolves the continuos consideration of concepts such as sustainable development, human development, social development and participatory development.

The sustainable development is referring to a development that is able to combine economic growth with equity of access to resources and distribution of benefits at all levels. The sustainable human development is the process of expanding people's choices and consequently increase the level of welfare acquired. The social development involves the creation of an economic, political, social, cultural and legal context enabling the elimination of poverty, the full employment, social inclusion, respect for human dignity and the exploitation of less developed countries. The participatory

[2] Spagnuollo Francesca, *Globalizzazione e diritti umani. Il commercio dei servizi nella WTO,* Ed. Plus-Pisa università press, 2008.

development is based on the enhancement of the typical resources of a population through the ownership of the development process, the strong participation in all phases that generate the real protagonist of the people involved (empowerment) and the transformation of design and implementation of policies with the transition from top-down approaches to the adoption of practical bottom-up.[3]

With regard to the United Nations system, the international cooperation is based on agencies and organizations dependent on Economic and Social Council (ECOSOC). It is the principal body that promotes better living standards, social progress and respect for human rights. The programmes and agencies of development cooperation are the United Nations Development Program, the United Nations Conference on Trade and Development Program, the United Nations Industrial Development Organization.

With regard to the European Union, the Maastricht Treaty stipulates that the development cooperation is covered by the policies to integrate the countries in the developed world economy, to reduce poverty, to promote social and economic development, to consolidate democracy, the rule of law and the respect for human rights.

The implementation of the policy of development cooperation is divided into two systems, one based on conventional regional agreements (eg the Cotonou Agreement) and the unilateral actions, such as the Generalized System of Preferences. Unlike other international actors of development cooperation, the EU promotes the active participation of local communities through decentralized cooperation. This is implemented through the policies of political decentralization, promotion of participatory democracy, the policies for the protection of minorities and cultural heritage.

According to the Report nr.4/2009 on how the Commission manages non-state actors involved in development cooperation, the basic element is the participation of civil society. Non-state actors have an essential role as "promoters of democracy, of social justice and human rights." The community funds allocated directly to non-state actors in 2007 were 915 million euros, 10% of the total of the developing countries aid. The EU is committed to support non-state actors in the development process "to promote political, social and economic dialogue."[4]

The systematic involvement of non-state actors in development cooperation is a way to promote principles underlying the Community development policy.

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[3] Frau Aventino, *Il diritti della cooperazione internazionale allo sviluppo*, Ed. Cedam, 2005.
[4] Commission's Report nr.4/2009, www.eur-lex.eu.

EU enlargement – the engine of european development

EU enlargement generated the expantions of exports, investment opportunities, and high living standards. It also contributed to a higher stability among Member States and to a peaceful development of a European internal market that includes more than 100 million consumers with growing purchasing power. The measures taken into consideration while implementing Union`s standards are very strict, in order to achieve a European level of development that ensures growth. As a result of EU's enlargement, the nuclear safety has improved, thanks to the European system of rapid exchange of information in cases of radiological emergency situations.

The enlargement opens the gates to competitiveness that stimulates economic growth, prosperity and the creation of a European level of quality standards. In order to preserve European industry, investements in Eastern Europe are required, as an answer to globalization and international competitiveness.

Conclusions

In order to reach a progress that doesn`t mean exclusion, the instruments to face competitiveness are quality, equity, solidarity and social justice. The participation of the poorest countries at the international market should be promoted by linking aid to trade agreements and strengthening national institutions through institutional building. Another important element is that of foreign investments in the poorest areas, an investment that leads to the improvement of managerial, technological and organizational premises, to the efficiency of financial markets and to the active participation of beneficiaries.

To overcome barriers to transnational exchange and cooperation, awareness of global development has to be promoted to lessen the political pressure of domestic and international issues.

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GENERAL PRINCIPLES OF COMMUNITY LAW

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Abstract

As mentioned in the literature, human rights have been raised in the contemporary century at European level at the rank or cardinal problem of international relations. This problematic was made dynamic by the adoption of the Universal Declaration f Human Rights on December 10th 1948 and, based on that, of a high number of international documents in the area of human rights at the UN level and at regional level – the Council of Europe, OSCE, Latin America, Africa within the Arab League.

Key words*: community law, fundamental human rights, principles of law.*

Introduction

At the European Congress in The Hague on May 1948 the necessity of a European system of protecting human rights was brought in discussion for the first time, as a reaction towards the hesitations and difficulties met in the process of accomplishing the indispensable compromise within the UN to establish the universal system of protecting human rights. The new European system was supposed to comprise a jurisdictional protection system thorough a Court of Justice whose decisions were to be mandatory for the member states of the Council of Europe and whose jurisdiction would be accessed by any citizen of those states. The proposition was received with reticence by the member states of the Council of Europe invocating their sovereignity and for feat that the following obligations would have an abusive character. Therefore, the adoption of a European Convention for defending human rights and fundamental liberties has been proposed.

The community law, as a factor of integration in the Communities, has determined the Court of Justice to use to use also the expression "community of law"[1]. The perfecting of this community of law, the consolidation of its coherence have been searched using the extraction – even from treaties- of some general principles, although not explicitly formulated in the treaties but

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[1] CJEC, 1986, Aff. 294/83, Rec. 1986, p. 1339.

presumed, that would govern the ways of functioning of the judicial relations within the Communities. The Court of Justice, during time, gave expression to such principles. We can state therefore that they have been constituted and have been released in praetorian manner. Different causes that the Court is asked to solve have determined the concretization of these principles. For this, the judicial order of the member states had to be taken into consideration, as well as the international judicial order, but only to the extent in which the specificity of the community law would not be vitiated and would not subordinate to the two abovementioned judicial orders.

The Court extracted therefore numerous general principles of law that were applied with great flexibility. Among these principles, we can mention: the principle of the useful effect in interpreting the treaties, the contradictory character of the instance, the conciliation of good administration of justice and the security of judicial relations, the rules of inter temporary law, conditions of unilateral retreat, enrichment without just cause, the notion of enterprise, general conditions of the right to property etc.[2]

Resorting to such principles is determined by the issues imposed in interpreting the Treaties or in closing the gaps when the Court is forced to statute on an issue which is not present in the treaties in order not to prejudice the justice. The search of general principles of law does not represent the sole activity of judicial construction performed by the Court but also their application as well as those formally mentioned in the treaties.

These principles are listed in a homogenous body of laws in what is named the community of law. Respecting the body of principles constituted is imposed both to the institutions and community organs as well as the member states, the latter in case the national regulations are placed in the frame of the community law[3]. The literature classifies the body of principles according to different criteria that differ according to the name and not the content. One of the classifications which chosen for didactic reason[4], is the following: principles resulted from the nature of the Communities; principles of international law; principles deduced from the law of the member states. According to other specialists (Jean Boulois, quoted) the principles were placed as follows: principles regarding the distribution of competencies, the institutional balance, the choice of legal base; general principles of law are part of the inherent principles of any organized judicial system, principles that are general to the national systems of law of the member states and principles deduced from the nature of the Communities.

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[2] Reuter Paul.

[3] CJCE, 4 October 1991, Aff. C-159/90, Rec. 1991, p. I-4685.

[4] It was considered that comprising the principles governing the community law in one section gives a general view on the entire problematic raised by it. Maintaining the specificity of each principle, general, institutional or of other nature, they all have the same source: were consecrated by the jurisprudence of the Court of Justice (or Tribunal of First Instance).

On another hand, the principles were placed and named by Romanian specialists as follows: principles governing the institutional activity; general principles common to the member states; principles on the nature of the Communities; principles regarding the integration of the community law in the international judicial order; general principles regarding the competencies of the European Communities.[5] Another author[6] classifies the general principles of law integrated in the community law as following: principles inherent to any organized judicial system, that comprise the general classic principles: principle generated by the procedure, the principle of judicial security and the principle of equity; general principles common to all judicial systems of the member states that comprise: principles regarding the revocation of administrative acts that generate subjective rights, the principle of equality towards the economic regulations, the principle of enrichment without just cause, the principle of hierarchy of the norms in the extent in which they substantiate the difference between the rules and the measures of execution, the principle of confidentiality of correspondence between lawyers and clients, the principle of the right of enterprises on the secrecy of their affairs; principle deduced form the nature of the Communities classified in: (a) institutional principles; as the general principle of solidarity of the member states, the general principle of the constitutional balance and (b) principles inherent to the notion of market, such as the principle of non discrimination, equal treatment, proportionality, community preference. Other authors[7] classify them in: general principles of law in protecting the fundamental human rights, respect of the right to defense, authority of judged activity, the principle of judicial certainty, equality, proportionality and loyalty.

The principles resulting from the nature of the communities are named also constitutional principles as they derive from the necessity of interpreting the treaties, their nomination and completion. The principles deriving from the law of the member states represent the most substantial category of general principles on which the law of the member states is based. Also consecrated by the jurisprudence of the Court of Justice and the Tribunal of First Instance, these principles require a more detailed explanation.

Among the first category of principles, the ones resulted from the nature of the communities, the following are comprised: the principle of preeminence of the community law- principle deriving from the nature of the communities- on the national law of the member states means that in a conflict situation, on incompatibility between the community law and the national law, the first prevails; the principle of judicial security- deriving from the law of the member states- is based on the idea that the law is a certainty for all: institutions and community organs, member states and private persons.

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[5] Viorel Marcu, *Drept instituţional comunitar*, Ed. Nora, Bucharest 1994, p. 57-60.
[6] Roxana Munteanu, *Drept european*, Ed. Oscar Print, Bucharest, 1996.
[7] Octavian Manolache, *Drept comunitar*, Ed. All, Bucharest, 1996.

To this end, the norms that compose it have to be clear, precise and predictable for the litigants, effective and efficient. The concretization of this principle appears for example in the non retroactivity of the administrative acts of in the principle of good faith[8]; the principle of legitimate confidence, based on the confidence that the administrated have in the judicial norms, in maintaining a regulation that would affect them if it would be changed.

In practice, these two principles are found most of the times associated. The principle of proportionality[9] requires that proportionality exists between the interventions of the community authorities or the national ones, that has to be limited to the pursuit of the community objectives, in other words, a "just proportion" between the purpose of the community institutions or the member states and the means used to accomplish them has to be kept. A principle that finds its wording in terms very clear presented in the Maastricht Treaty is the principle of subsidiarity[10] (Articles B[1] and 313). According to this principle, the European community acts only in the extent in which the objectives would be better accomplished at community level than at the level of the member states. In other words, only what cannot be done at the level of the member states or cannot be done *better* at this level will be made at community level. The meaning attributed to the principle of subsidiarity was that the decision making would take place at the lowest level possible or in other words, the superior levels would support the lower ones in performing their tasks. In the Maastricht Treaty, this principle was given a major role under material and procedural aspect.

The principle of protecting the fundamental human rights

The Paris and Rome treaties, with value of constitutive treaties of the European Community, do not contain a catalogue of human rights and only make reference to some of these. The term used is not human rights but fundamental right. The explanation of the absence of this type of catalogue would consist in the fact that an economic community perceived as international organization is comprised by sates and, as such, human protection is the resort of each of the states, according to their own constitution as well as the quality of member of the Council of Europe and as signatory of the European Convention of Human Rights. And still the issues of protecting the human rights, the fundamental rights, to remain in the community language, cannot be imposed when the institutions or different community organs, in exerting their attributions, were susceptible of harming the interests of the private individuals.

At the beginning, the Court of Justice refused to examine the validity of some community acts regarding the fundamental rights protected by the Constitution of the Federal Republic of Germany, as request by the petitioners

[8] CJCE, 29 jan. 1985, Aff. 234/83, Rec. 1985, p. 333.
[9] CJCE, 26 nov. 1956, Aff. 8/55, Rec. 1956, p. 199.
[10] The word comes from the Latin *subsidium* , meaning "reserve troops" and later used with the meaning of "support" and "assistance".

(in 1959 and 1960). In time, the manner of approaching the issues of the fundamental rights changed, staring from the consideration that the reference to such rights protected by a national constitution would endanger the community judicial order still in process of development. On the contrary, the elaboration of a system of protection for the fundamental rights at community level would appear as a factor on integration and as an element of legitimacy of the new institutions. This is the reason why the Court of Justice decided that the "respect of fundamental rights is part of the general principles of law whose compliance is ensured by the Court" and that the "protection of these rights, inspired from the constitutional traditions common to the member states has to be ensured in the structure and objectives of the community".

In this way, in praetorian way, the gap in the treaties was filled. Still, the perspectives of considerable developments were opening for the activity of the community institutions and member states, as well as the jurisprudence of the Court.

In time, the Court of Justice itself progressively developed its jurisprudence, establishing a community catalogue of principles and fundamental rights which, even if it doesn't have an exhaustive character, comprises a series of rights such as: the principle of equal opportunities in its different aspects, the liberty of movement of workers, employees and independent individuals, the religious liberty, liberty of expression and information, protection of confidentiality, respect of the right to defense in repressive procedures, non retroactivity of criminal laws, the right to appeal in justice, the right to property and economic initiative, the liberty of association and syndical rights.

Among the principles governing the community law that occupy today an essential role in the jurisprudence of the Court of Justice and Tribunal of First Instance on the European Communities, some of them aim at the respect of the fundamental rights, their protection as well as that of the fundamental liberties.

Such a principle is the one of equality, found in many aspects of the community law and referring to the interdiction of discrimination based on nationality, sex, remuneration between producers and consumers[12], on the origin of the products[13], within community public positions.

The interdiction of discrimination refers to other specific situations such as the free movement of migrating employees, the access to different forms of education, professional training, work, service provision, cultural, sports, touristic organizations, medical care travelling etc.

The equal treatment of the workers, men and women, by the specificity and importance presented, represents another fundamental

[12] EEC TReaty. art. 40, par. 3, al. 2.
[13] *Idem*, art. 95 şi 30.

principle of community law. According to this principle, a female worker has to benefit from the same rights and advantages as a male worker. The equal treatment is applied for remuneration, access to work, training and professional promotion, working conditions, any independent activity etc. The member states can adopt dispositions that derogate from the principle of equal treatment if they refer to the special protection of women such as pregnancy and maternity, vacation for adoption etc.

The rights of the European citizen

The idea of European citizenship was older, raised for the first time in 1974 on the summit in Paris. The idea received its first concretization in 1979, when the European Parliament was chosen by direct and universal voting. It was retaken following a passivity of the population coming from the incomplete information regarding the process of community construction. Faced with this situation, the European Council, gathered at Fountainbleu in June 1984 created an ad-hoc Committee in view of identifying the areas able to accentuate the human dimension of the process of European integration; in other words, this process would be closer to the citizens. The committee, named after its resident, Adonnino drafted two reports presented to the Council in June 1985. In November 1985 the European Commission adopted a Working Program for the accomplishment of the "Europe of the citizens". The program refers to actions in the following areas: adopting measures that would facilitate the free movement of people by suppressing the fiscal formalities for transportation, by introducing the right to vote for local elections for any citizen of the community, by creating an audio-visual community space, by adopting formalities of restitution of expenses for medical care, consolidating the fight against drugs, initiative for teaching foreigner languages, consolidation of university cooperation, introducing an European education dimension, consolidating the image and identity of the community.

The Maastricht treaty instituted the citizenship of the Union at judicial level, granted to all people citizens of a member state. Instituted by article 8, paragraph 1 in the Treaty, the European citizenship does not replace the national one, but is added to it: "it is citizen of the European Union any person with the nationality of a member state".The citizen of the union has rights and obligations provisioned in articles 8A, 8B, 8C and 8D of the treaty, such as: the right to buy goods and services from any country in the community without paying custom taxes or additional taxes, the right to transfer the goods in any member state, the right to contract loans from a financial institution in any member state the right to guarantee products and receive income; the traders have the right to consider all the territory of the Union as their potential market, which means that they and buy and sell without any quantity restriction or import taxes.

The right to free movement- Schengen space

The Council of Europe decided to give an impulse to the Working program for establishing the effective Europe of the citizens aiming at the free movement of the European citizens after the model of free movement of the citizens in their own countries. On June 14th 1985, five community states- since France and Germany signed a bilateral agreement at Sarrebruck in July 1984- signed with Belgium, The Netherlands and Luxemburg, at Schengen (Luxemburg) an agreement on the progressive suppression of border checking at common borders[14].The contracting parties underlined the fact that such measure will not bring prejudice to the sovereignity of the nations or to the individual liberties of the citizens. The objective is mentioned clearly in article 17 of the Agreement: "in the matter of movement of people, the parties will seek to suppress the controls at common borders and transfer them to the external borders. TO this end, they will make efforts to harmonize, if necessary, legislative dispositions and regulations regarding the interdictions and restrictions…". On June 19th 1990, the five states signed the Convention on applying the Schengen agreement from June 1985.[15] The five signatory states were followed by Italy on November 27th 1990, Spain and Portugal on June 25th 1991, Greece in June 1992 with observatory title. Denmark, Ireland and Great Britain remained outside the agreement.

This new system implies an adequate coordination between the controls in the states part of the convention, which requires common and homogenous regulations (article 6) in order that the control are efficient.

The opening of the interior borders accentuates the risk of illegal immigration and a common policy regarding the citizens outside the agreement had to be established. To this end, a common list of visas referring to a number of cc. 100 states was created, which the member states have to respect. Respecting this list is a condition of adhesion for any other state that wants to be part of the agreement.

Among the mechanism institutions for the guarantee of the rights recognized by the Charter of fundamental rights of the European Union we mention: The European ombudsman , The European Parliament, The Court of Justice of the European Union.

The Helsinki system for protecting human rights was materialized by the so called "follow ups of the conference" that have transformed it into an open system allowing the extension of the initial sphere of fundamental rights and liberties recognized and protected, their content as well as the institutionalization of the own mechanisms of protection, until today. The concept of human dimension is not found in the normative content of the Final

[14] Published in JORF on 5 August 1985, p. 9612.
[15] Published in JORF on 1st August 1991, p. 10192.

Act of CSCE in Helsinki. This concept was defined by the follow ups of the Helsinki Conference.

The first document consecrating the concept of human dimension was the "Final Document of the Vienna Reunion in 1986 of the representatives of the participant states at the CSCE", convoked based on the provisions of the Final Act of CSCE on the consequences of the conference. The final document of the Vienna Reunion gives a wide meaning to the concept of human dimension of the CSCE including engagements regarding the respect of fundamental rights and liberties (Principle VII of the Decalogue) as well as those regarding human contacts and other humanitarian issues. Regarding the cooperation in humanitarian and other matters, this vast problematic was structured on four main problems: Human contacts, Cooperation and exchanging information, Cooperation and exchange in cultural matters, Cooperation and exchange in education matters. The concept of human dimension was developed in the following reunions of CSCE, among which we mention the "Conference on the human dimension of CSCE" in Copenhagen in 1990.

Conlusions

The community law, as a factor of integration in the Communities, has determined the Court of Justice to use to use also the expression "community of law"[16]. The perfecting of this community of law, the consolidation of its coherence have been searched using the extraction – even from treaties- of some general principles, although not explicitly formulated in the treaties but presumed, that would govern the ways of functioning of the judicial relations within the Communities.

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[16] CJEC, 1986, Aff. 294/83, Rec. 1986, p. 1339.

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THE FORENSIC TACTICS OF CONDUCTING A SEARCH

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Laura-Roxana Popoviciu[**]

Abstract

The article includes some considerations regarding the search tactics activity, the provisions of the new Romanian Criminal Procedure Code, adopted through Law no. 135/2010, published in The Official Gazette no. 486 of July 15th 2010. I have structured the theme by starting with a classification of searches, followed by the Romanian regulations on criminal procedure, the preparation of a search, the actual unfolding of the various types of searches, and ended by presenting the means of recording the search results.

Key words: *forensic science, search, tactics*

Introduction

Searching is a tactical activity undertaken by the judicial bodies for the purpose of finding and seizing objects, documents or various valuables that are important to the case under investigation, as well as uncovering persons that are trying to elude criminal liability, when the person who was demanded to hand them over denies their existence or ownership[331]*. As a tactical activity, searching is particularly complex and difficult, no other activity involves intrusion into the most intimate details of personal and family life, the rights of ownership of buildings, land.*

Before deciding to conduct the search, the judicial body should have sufficient data on the characteristics of the objects, valuables or documents searched for, the features of the wanted persons, the person who holds them and where they could be. In order to be effective, it must establish the tactical methods for the actual carrying out of the search, the material resources needed, the time limits that must be met, the participants, without losing sight

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[1] I. Mircea, *Forensic Science*, 2nd edition, Publishing House Lumina Lex, Bucharest, 2001, p. 298; S.A. Golunski (editor), *Forensic Science*, Scientific Publishing House, Bucharest, 1961, p. 301; I. Sima and collab., *Dictionary of Forensic Science*, Scientific and Encyclopaedic Publishing House, Bucharest, 1984, p. 148.

of carrying out the entire activity, from beginning to the end, within the limits prescribed by the law[2].

1. Search classification. According to Art. 100 of the Romanian Criminal Procedure Code, the search may be: search of premises and body search.

In the course of time, in the specialty literature there have been many other search classifications These classifications took into account the particularities of the way the search is conducted, as well as various other criteria, such as:

a) by the place searched: body searches, searches of premises, workplace searches, searches of premises open to the public[3];

b) by the time of searching: daytime searches, nighttime searches;

c) by the participating persons: searches involving only the bodies entitled to pursue criminal procedure, searches involving other specialists as well;

d) by the number of persons on whom they are performed: searches performed on one person only, searches performed in the premises of several persons;

e) by their number: unique searches and repeated searches[4].

Other classifications refer to:

- search of the person, that may be: search of the clothing and of the body;

- search of the premises: of buildings and open spaces.

The new Romanian Criminal Procedure Code[5] introduces new rules, providing details in the matter of the evidentiary search procedure, as regards its nature. As a result, according to the provisions of article 154, paragraph (a), of the new Romanian Criminal Procedure Code, searches, according to their nature, are as follows: a) search of premises; b) body search; c) computer search; d) vehicle search.

Regardless of its types, the search must be conducted in observance of the legal provisions and by applying the same tactical principles.

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[2] Elena-Ana Nechita, *Forensic Science. Forensic Technique and Tactics*, 2nd edition, revised and enlarged, Publishing House PRO Universitaria, Bucharest, 2009, p. 208.

[3] C. Aioaniţoaie, I. Botoc, collectively, *Forensic Tactics*, M.I., S.E.C., Bucharest, 1989, p. 175; I. Mircea, *op.cit.*, p. 298; C. Aioaniţoaie, V. Bercheşan, I. Botoc, in *Treatise of Forensic Tactics*, 2nd edition, revised and amended, Publishing House Carpaţi, p. 208.

[4] Are specific to circumstances where the results of the first search were negative or the conditions of performing it were unfit (for example, when weather conditions were unfavourable), Em. Stancu, *Forensic Science Treatise*, 4th edition, revised and enlarged, Publishing House Universul Juridic, Bucharest, 2007, p. 457.

[5] Adopted through Law no. 135/2010, published in The Oficial Gazette no. 486 of 15th July 2010.

Thus, the judicial bodies and the other authorities conducting the search should be careful not to restrict individual rights and freedoms beyond necessity, knowing that even though it constitutes an effective means of detecting the guilt of the suspect, the search is also an interference with the rights of citizens, a restraint of the people searched in exercising their right of possession[6].

In this regard:

- the search must be conducted in observance of the rights to dignity and privacy[7]. This means that measures must be taken to ensure that facts and circumstances regarding the personal life of the person undergoing the search unrelated to the investigated fact do not become public[8];
- the judicial bodies may restrict the freedom of movement for the people present or the admission of other people into the place where the search is performed[9], if necessary;
- the judicial bodies and the other authorities conducting the search are required to avoid causing unnecessary damage[10];
- have a duty to ensure the presence of persons provided by the law at the place being searched;
- the bodies entitled to pursue criminal procedure must take measures to ensure that the search on a computer or information system is performed without allowing facts and circumstances regarding the personal life of the person undergoing the search or the accessing of an information system to become unduly public;
- if the person or objects searched for are handed over, the search shall not be performed, except when it is deemed useful to carry out this search, to look for other objects or traces.

2. Provisions of Romanian criminal procedure in the field of the search. For a *search of premises* to be lawful, it should only be disposed by a judge, through a reasoned conclusion, during the criminal proceeding, at the prosecutor's request or during the trial.

During the criminal proceeding, the search of the premises is disposed by a judge of the court of first instance or a court equivalent to this in whose jurisdiction the prosecution office of the prosecutor conducting or supervising the criminal proceeding is.

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[6] In this regard, see: C. Suciu, *Forensic Science*, Didactic and Pedagogic Publising House, Bucharest, 1972, p. 538; Em. Stancu, op.cit., p.455; M. Udroiu, R. Slăvoiu, O. Predescu, *Special Investigation Techniques in Criminal Justice*, Ed. C. H. Beck, Bucharest, 2009, p. 29.

[7] According to article 154, paragraph 2, the new Criminal Procedure Code.

[8] The judicial body must take measures to enusre the search is conducted in observance of a person's dignity and privacy, article 164, paragraph 1, the new Criminal Procedure Code.

[9] According to article 157, paragraph 4, the new Criminal Procedure Code.

[10] According to article 154, paragraph 3, the new Criminal Procedure Code.

The *body search* ordered during the criminal proceeding is performed by the prosecutor or by the criminal investigation body, accompanied, where appropriate, by operational workers.

The objects and documents may be seized and the search of the premises may be performed between the hours of 6.00 and 20.00, and at other times only in cases of flagrant offense or when the search is to be conducted in a public venue. If the search was started between the hours of 6.00 and 20.00, it may continue during the night.

The new Romanian Criminal Procedure Code provides as follows on:

I. The search of the premises or of the goods within that space (article 155). It may be ordered if there is reasonable suspicion of an offense committed by a person and it is assumed that the search may lead to the finding and collection of evidence about this crime, to preserving the traces of the crime or catching the suspect or accused.

II. The procedure for issuance of a search warrant (article 156). It may be ordered:

- *during the criminal proceeding*, at the prosecutor's request, by the judge for rights and freedoms of the court of first instance or a court equivalent to this in whose jurisdiction the prosecution office of the prosecutor conducting or supervising the criminal proceeding is;

- *during the trial*, a search is ordered, ex officio or at the prosecutor's request, by the court vested with authority over the matter.

The prosecutor's request must include:

a) a description of the place where the search is to be performed;

b) a statement on the evidence or data which show reasonable suspicion of an offense;

c) a statement of the offense, of evidence or data showing that the suspect or defendant, evidence of the crime or traces of the crime are to be found on the premises to be searched;

d) the surname, first name and, if necessary, the description of the suspect or defendant who is believed to be on the premises to be searched, an indication of traces of the crime or other objects supposedly present in the place to be searched.

After the prosecutor submits the request with the court case file to the judge for rights and freedoms, it is dealt with in closed session, without summoning the parties with mandatory participation of the prosecutor.

The judge may order the rejection or acceptance of the request. The court ruling and the search warrant must include:

a) the name of the court;

b) the date, time and place of issue;

c) the name and status of the person who issued the search warrant;

d) the period for which the warrant was issued, which may not exceed 15 days;

e) the purpose for which it was issued;

f) a description of the place to be searched;

g) the name of the person whose domicile, residence or premises are to be searched;

h) the name of the suspect or defendant;

i) the surname, first name and, if necessary, the description of the suspect or defendant who is believed to be on the premises to be searched, an indication of traces of the crime or other objects supposedly present in the place to be searched;

j) an indication that the search warrant can be used only once;

k) the judge's signature and the seal of the court.

- *the circumstances and conditions of performing a body search (article 163, paragraph 2).* It may be ordered when there is reasonable suspicion that by performing a body search, traces of the crime, corpora delicti, or other objects important to ascertaining the truth in the matter will be found; the judicial bodies or other authority with the power to ensure public order and security shall conduct it.

- *conducting a search for other purposes*. Namely, when remanding a defendant into custody, and when there is reasonable suspicion that at the place to be searched there are pieces of material evidence connected with the crime in question. This search can be ordered by the court during the trial, ex officio or at the prosecutor's request;

- *conducting a computer search and accessing an information system (article 166).* Judges for rights and freedoms may order a computer search, at the prosecutor's request, when for the finding and collection of evidence it is necessary to investigate an information system or a computer data storagore medium.

3. Preparation of the search. In general, a successful search requires documentation and preparation. Lack of preparation or superficiality in carrying it out has harmful consequences on the case, such as the loss of sample material necessary in finding out the truth or even the impossibility to perform the search.

The possibilities of concealing, the places to be examined, the specific search methods and the appropriate technical means for performing these activities are determined depending on the data obtained with regard to the person searched, the search site, search type, the goods, valuables and documents subject to search.

The exact purpose of the search is determined depending on the offense, which means that the judicial body should have a sufficiently clear representation[34] of the nature of the objects or documents sought. This way, it can ensure compliance with the obligation to ask the person whose domicile is to be searched to voluntarily hand over the person or objects sought.

[34] Em. Stancu, op.cit., p. 457.

Knowing the search site is especially necessary when searching premises because the representation of the topography of the place, knowing its purpose, the characteristics of nearby buildings, etc. are useful for the action to succeed.

Documentation regarding the specific site will be done carefully and discreetly, in order not to compromise the tactical activity.

Persons to be searched (whether we refer to searches of premises, the body, vehicles or information systems) can develop different behaviors during the search. Thus, *knowing the persons* in terms of their bio - psycho-social coordinates, and the persons residing with them or in the places to be searched, contributes to the success of the tactical activity.

The moment for performing the search, the composition of the team participating in the search, what specialists from different fields to include in the team and how to equip the team will be decided depending on the type of offense and the goal established.

4. The carrying out of searches. *I. The carrying out of premises searches.* The search is carried out by the prosecutor or the criminal investigation body, accompanied, where appropriate, by operational workers[35].

Before starting the search, the judicial body shall:

a) announce its identity and present a copy of the warrant issued by the judge:

- to the person whose home will be searched, its representative, or a family member and, in the absence of the above, to any other person of full age, and, if needed, to the custodian;
- to the representative of the company or, in his absence, to any other person of full age, if the search is conducted on the premises of a legal entity;

b) ask the person on whose premises the activity is to be performed to voluntarily hand over the person or objects sought. If the person or objects sought are handed over, the search shall be called off, except when deemed useful to carry it out, looking for other objects and traces;

c) inform the person whose home is to be searched that he/she has the right to contact an attorney who can participate in the search. If the person requests the presence of an attorney, the search does not start until his arrival, but no later than 2 hours from the time at which this right was communicated. In exceptional cases, requiring emergency searches or if the attorney cannot be reached, the search can begin before the expiration of 2 hours;

d) allow the person being searched to be assisted or represented by a trustworthy person;

e) limit itself to seizing objects and documents related to the offense for which prosecution is made, as indicated in the warrant. The objects or documents whose circulation or possession is prohibited or for which there

[35] Article 157, paragraph 2, the new Criminal Procedure Code.

is a suspicion that they may have a connection with a crime for which criminal proceedings are initiated ex officio, are always seized.

Notwithstanding the foregoing, the search can proceed without handing over the copy of the search warrant, without prior request to hand over the person or objects, and without any prior information on the possible presence of an attorney or of a trustworthy person, in the following cases:

a) when it is clear that preparations are made to cover up or destroy evidence or elements that are important to the case;
b) if there is suspicion that in the area where the search is to be performed there is a person whose life or physical integrity is endangered;
c) nobody resides in the space where the search is to be performed.

Its carrying out involves several successive stages: deployment, block up, entry into the premises to be searched and the actual performance.

The manner of deployment is conditioned by the specific features of the act, and it is done by a means of transport, which will stop in a place where it cannot be seen from the house to be searched.

Entering the premises represents the beginning of the search and takes place by amking use of various favourable circumstances aimed at preventing the destruction by the person being searched of compromising objects, documents or valuables.

The judicial bodies performing a search may use force appropriately to enter premises if:

a) there are reasonable grounds to anticipate armed resistance or other types of violence;

b) in case of refusal or if no response was received to repeated requests by the judicial bodies to be allowed entry into the premises[36].

The judicial body conducting the search has the right to open, by use of force, the rooms, the premises, the pieces of furniture and other objects where the items, documents, traces of the crime or wanted persons may be hidden, if their owner is not present or does not want to open them voluntarily. When opening them, the judicial bodies performing a search should avoid unnecessary damage.

The criminal investigation body will seek clarification from the person searched on the space it occupies, exclusively and jointly[37], and where changes were made to the building, it will be determined by measurements whether the outer dimensions correspond to the interior ones, including whether the wall thickness is uniform.

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[36] Article 157, paragraph 11, the new Criminal Procedure Code.

[37] C. Aioanițoaie, V. Bercheşan, I. Botoc, in *Treatise of Forensic Tactics*, 2nd edition, revised and enlarged, Publishing House Carpați, p. 226.

II. The carrying out of the body search. The body search involves external examination of a person's body, which may include the examination of the mouth, nose, ears, hair, clothing, objects that a person has on him or under his control, at the time of the search.

This search is carried out by searching the clothing and / or the person's body, in order to discover traces of the crime committed, objects, documents or valuables which can serve as evidence, injuries received in the clash with the victim, objects held illegally.

Typically, the body search is done on a person caught in flagrante when ascertaining the crime committed, on the person caught after being chased, on the person whose premises are searched and on the person to be taken into custody.

This search is performed only by persons of the same sex as the searched person and in the presence of witnesses.

After the person to be searched was immobilized and traces or substances that could constitute legal proof were collected, the judicial body proceeds to a detailed examination of the person's clothing.

Next, each piece of clothing is carefully examined, such as seams, linings, shoulder pads, buttons, buttons, collars of coats and shirts, cuffs and turn-ups and belongings.

III. The carrying out of vehicle searches. The search of a vehicle involves examining the exterior or interior of a vehicle or of other means of transport or of their components.

IV. The carrying out of a computer search and accessing an information system (article 166). Accessing an information system means entering an information system or computer data storage device either directly or remotely, through special programs or through a network, in order to identify evidence[38].

"Information system" means any device or group of inter-connected devices or related devices, one or more of which, pursuant to a program, performs automatic processing of computer data[39].

"Computer data" means any representation of facts, information or concepts in a form suitable for processing in an information system, including a program suitable for causing an information system to perform a function[40].

The court ruling must include:

a) the name of the court;
b) the date, time and place of issue;
c) the surname, first name and status of the person who issued the warrant;
d) the period for which the warrant was issued;

[38] Provisions of article 16, paragraph 2, the new Criminal Procedure Code.
[39] Provisions of article 16, paragraph 3, the new Criminal Procedure Code.
[40] Provisions of article 16, paragraph 4, the new Criminal Procedure Code.

e) the purpose for which it was issued;
f) the surname and first name of the suspect or accused, if known;
g) an indication that the warrant may be used only once;
h) the judge's signature and seal of the court.

The prosecutor may order:

- the making of copies, to preserve the integrity of the computer data stored on the objects collected or if collecting the objects would seriously hinder the activity of the holders of these objects;

- as regards the identified computer data:

a) the making and preservation of a copy of these computer data;

b) the denial of access to or removal of these computer data from the information system.

The prosecutor immediately orders:

- the preservation, copying of the computer data identified and will request the urgent completion of the initial authorization, if, during the search of an information system or of a computer data storage medium, it is found that the computer data sought are contained in another information system or computer data storage medium and are accessible from the initial system or medium.

V. The carrying out of other types of searches.

a) searches for persons and bodies.

In the case of people search, whether sequestered or trying to escape prosecution, the focus will be on verifying the possibilities of setting up hiding places in buildings, warehouses, underground. In these cases the use of tracking dogs is of great help;

b) the search for certain objects, such as: search for drugs, art objects, weapons and explosives, secret documents.

In such cases, the searches are performed by qualified personnel, who must watch the border crossing points. For the uncovering of narcotics, in addition to the existing chemicals used in special forensic kits, dogs trained for this purpose are used;

c) a search performed on a group of people requires appropriate measures of surveillance and for the prevention of violent actions;

d) a repeated search[41] is performed if the first or the previous search gave no results. The search is repeated when the judicial body has reliable information that the objects or documents sought are in the investigated area, but also if the previous search was performed superficially or in a haste.

5. Psychological particularities in the carrying out of searches. In achieving the purpose of the search, of great importance are observation, the judicial body's ability to orient itself in relation to the diversity of

[41] E. Stancu, op. cit., p. 525 - 526.

situations in which it is forced to act, to notice, select and assign the true meaning to the smallest emotional reactions of the searched person.

The criminal investigation body should exhibit forbearance, patience, persistence, mobility of thought, awareness in order to achieve the tactical purpose.

It is important to focus one's attention on grasping psycho-behavioural symptoms, such as trembling body and hands, agitated breathing, changes in voice and speech, facial expressions and colour.

It's also necessary to differentiate between reactions that occur in connection with the search activity and reactions due to other causes, the affectogenic element that may explain feelings of anxiety, unrest, discontent or indignation, concern about some items of value or of an emotional value, but which are of no interest to the case.

6. Recording the search results. The activities performed during the search are recorded in *a record of proceedings*[42]. The record of proceedings must include:

a) the surname, first name and status of the person drawing it up;
b) the number and date of the search warrant;
c) the place of drafting the record of proceedings;
d) the date and time of beginning and ending the search, with a mentioning of any disruption occurred;
e) the surname, first name, occupation and address of witnesses, when they exist, or of those that were present when conducting the search, with a mentioning of their status;
f) the record of having informed the person whose premises are to be searched on the right to contact an attorney who can participate in the search;
g) a detailed description of the location and conditions under which the documents, objects or traces of the crime were uncovered and collected, a detailed listing and description of the items found, to allow their recognition, mentionings regarding the place and conditions under which the suspect or the accused was caught;
h) the objections and explanations of people who participated in the search;
i) mentionings about the objects that were not collected but were left in storage;
j) provisions by law for special cases.

The record of proceedings drawn up on the occasion of a computer search or accessing of an information system must include:

[42] Article 159, the new Criminal Procedure Code.

a) the name of the person whose information system or computer data storage media was seized or the name of the person whose information system was accessed under paragraph (2);

b) the name of the person who conducted the search;

c) the names of the persons present during the search;

d) a description and enumeration of the information systems or computer data storage media for which the search order was issued;

e) a description and enumeration of the activities performed;

f) a description and enumeration of the computer data found during the search or through accessing computer data.

It will be signed on each page and at the end by the person who drafted it, the person on whom the search was performed, by that person's attorney if he was present, as well as by those shown in item (d). If any of these persons is unable or refuses to sign, a mention is made of this and of the reasons for this inability or unwillingness to sign.

The search can be *audio-visually recorded,* throughout its carrying out special attention being paid to the places in which persons or objects were found. The audio-video recording is attached to the minutes of the search and is considered part of it.

The place of the search and parts thereof, as well as the persons or objects found during the search *can be photographed*.

Conclusions

The new Romanian Criminal Procedure Code contains novelties as regards the search. Among these, we may mention the following:

- detailed criminal procedure rules for conducting searches depending on their type ;

- categories of searches are listed separately under the Criminal Procedure Code, namely: search of premises, body search, search of a vehicle, computer search and accessing an information system;

- expressly states the meaning of the concepts of: premises, accessing an information system, information system, computer data;

- highlights the distinction between: body search and physical examination, between premises search and vehicle search;

- expressly states the content of the prosecutor's request to search and of the search warrant.

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*** The new Romanian Criminal Procedure Code adopted through Law no. 135/2010, published in the Official Gazette no. 486 of 15 July 2010.

A CRITICAL VIEW OVER THE LEGAL TERMINOLOGY OF THE NEW CIVIL CODE

Sache Neculaescu[*]

Abstract

*A new Civil Code in Romania is an event long-expected by theorists and practitioners of law. The current Civil Code inspired by the Napoleon Code from 1804, which entered into force on 1 January 1865, has undergone major changes and succesive additions during the 45 years of communist regime. The Revolution of 1989, initiated the process of building the rule of law and powed the way to the adaption of the Romanian legi*slation to European requirements especially after Romania's accession to EU.

Key words: *Civil Code, European private law, subjects of Civil Law, human rights.*

Introduction

All the previous projects of a new Civil Code had to be subordinated to the new overall European design of fundamental human rights and to the general trends of European private law in particular to those relating to contract law, where there have been developed a number of major European projects of codification. The principle of autonomy, as outlined in the Napoleon Code which was under the influence of French Revolution ideals of 1789, is today increasingly gnawed and in the process of replacement with a new vision, solidarism. A set of European initiatives such as Lando Principles, the German vision of a European Civil Code, developed by Professor Christian von Bar, the proposal launched by the Italian Professor Giuseppe Gandolfi, and the French law reform draft and prescription requirements developed by the academic group led by Professor Pierre Catala, envisaged a series of new and modern solutions, which our new Civil Code had to take into account. Influenced by effervescent offers of European private law codification, the new Civil Code authors have reformulated a number of provisions of the first draft of a new Civil Code, approved by the Romanian Senate in 2004, taking over new normative solutions as well as a number of terms used both by new projects and the Civil Codes in the province of Quebec and in Italy. Grafted on the classical "tale quale" terminology of Romanian civil law, a number of new terms, borrowings from other codes affect the accuracy of legal acts. The purpose of this paper is to examine the

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impact of some new legal terms used in the new Civil Code, on the national law system on the one hand and on the other hand in a series of important materials for the study of civil rights.

I. Towards a common terminology of European Private Law

The common market of the European Union requires common rules and principles applicable to cross-border contracts, a fact that strongly raises the problem of a European contract law and even the unification of all European private law. By the time a future European Civil Code can be designed, requiring unique regulations in various fields such as civil law, commercial law, labour and social security law, private international law and civil procedural law - an audacious project, looked at by Eurosceptics with reservation[43] - European Union's objective is the similarity of laws in European countries. In order to achieve this goal, a series of directives have been issued in specific areas and transposed into national law, affecting contract law[44]. Simultaneously, there have been developed several coding projects in this area, starting with UNIDROIT Principles applicable to international commercial contracts (UP), followed by "Principles of European contract law (PECL) elaborated by a team of academics led by Professor Ole Lando and by the proposals of the group of Private Law Academy of Pavia led by Italian Professor Giuseppe Gandolfi entitled "European Code of Contracts". As a response to these projects, an academic team led by Professor Pierre Catala developed the "preliminary draft law reform obligations and the right prescription", also known as Catala preliminary project.

A major difficulty for European contract law codification is the rivalry between the two main competitors on the market of European law, the continental law system and common law, each of these exporters of legal solutions being interested in imposing their own traditions. [45] As the first version of common reference framework was established in an attempt to impose Anglo-Saxon view on April 26th, 2010, by Decision 2010/233 / / EU, European Commission established an expert group aiming at improving the initial structure important to the future European contract law, currently in the process of doctrinal debate. Although there is a convergence of principles and an approximation of the two systems of law - continental and insular – there

[43] An opponent of the draft European codification of civil law, G. Cornu, openly states that "the obsession for fusion is a cultural aberration" [43] ("Un Code civil n'est pas un instrument communautaire", D, 2002, p. 351).

[44] One must distinguish between European contract law and European contract law, the latter being made up of rules of law applicable to border contracts only.

[45] www. Cairn.info, Yv. Lequette, *Vers un Code civil européen*?, Sous la direction de G. Wicker, *Droit européen du contrat et droit du contrat en Europe. Quelles perspectives pour quel équilibre*? (Actes du colloque organisé par le Centre d'etude et de recherche en droit des affaires et des contrats (CERDAC), 19 septembre 2007, Éd. Litec, Paris, 2008.

is a lack of neutral language that can convey a more uniform legal thinking, in a multilingual context in which the language of each EU member states is equal to the others. Unfortunately, Latin, both expressive and concise which was used to impose *ius commune* in Europe, is strictly related to the history of law and the principles established in Roman law under the form of adages that add colour and concision to legal discourse, are too rarely used, while English language has been invading European legal space, driven, among other things, by the generalisation of information on the Internet which has created its language of communication faster than ever. The circulation of terms from a legal system to another, from one civil code to another, faces major difficulties of translation and leads to the appearance of neologisms in translation[4], a kind of "Esperanto" in law.

II. Imported legal terms in the Romanian New Civil Code

Appeared in this period of ferment of proposals for codification of European contract law and of search for common legal terminology in a confrontation of the two great systems of law, Roman-Germanic system and common law, our new Civil Code fully but sequentially imports both legal regulations of other codes such as Code of Quebec, the Italian Civil Code, the Swiss Civil Code and the solutions adopted by the UNIDROIT Principles, Principles of European contract law. As a result of the hard work of several university teams, new regulatory provisions have been subject to successive interventions on certain institutions and legal norms, being given up a series of statements of the first variant of the new Civil Code Project published in 2004. Others have been reformulated by simply using new terms downloaded from different versions of codes or coding projects and overlapping traditional terminology – a fact that has affected both the original meaning of loan terminology and homogeneity of the new encodings. [5] Our intention is to focus on only some aspects which, although are related to legal language chosen by the authors of the new Civil Code normative texts in several important matters, require certain rigurous points of view on some controversial domains of civil law.

1. "The subjects of civil law." Rule in Art. 25 of the new Civil Code has the marginal name of "subjects of civil law" about which paragraph.1 states that they are ... "natural persons and legal persons. The point of discussion is the difference between the issues of law and law subjects, because the former expression suggests by the name itself the idea that law

[4] I. Busuioc, *Romanian terminologies dynamics under the impact of translating the acquis of the Community* , http://ebooks.unibuc.ro

[5] For other critics of the new Civil Code, see M. Uliescu, *Civil Code adopted by Law 287/2009. A viable prospect in the area of European law?*, in the book" Perspectives of Romanian Law in Europe after the Treaty of Lisbon", Ed Hamangiu, Bucharest, 2010, p 24-30.

does not deal simply with a human being but with one endowed with the quality of a person, an actor on the legal stage, a real or virtual bearer of rights and obligations[6]. However, the individualistic ideology that animates the fundamental human rights institution makes civil law get closer to the existential problems of the human beings in their whole status[7], protecting their "human body, organs and tissues detached from it and even physicalor mintal pain"[8], values that are not always the same as no human sensitivity is equal to another and cannot be standardized as in the case of economic rights. *Infans conceptus…* rule tells us that man may be a matter of law only if it is born alive and viable. It might seem that the new Civil Code envisages that this trend as it relates to " respect for the human being" and not to "respect for the natural person". But it is a fortuitous option, which highlights the lack of consistent terminology because only the title of Chapter II of Title II, Legal Person, refers to the rights of the human being while subsequent sections of the same chapter are considering individual rights: the right to life, integrity, privacy, dignity, the right to be respected and the other sections are concerned with the right to life, health and integrity of the individual. Romanian civil law doctrine largely agree to the phrase "matters of law."[9] Still, there are authors who, analysing the structure of civil legal relationship, take into consideration its subjects. Thus, in 2003, Professor Ovidiu Ungureanu, who was mainly focused on the individual rights referred in his manual to the "subjects of civil law"[10], but later, in 2007, in the course of

[6] The word "person" draws its origins from Etruscan word *phersu*. (See Fr. Létoublon *La personne et ses masques: remarques sur le Développement of the notion of personne et sur l'histoire dans son étymologie from langue grecque*, Faits de langues, 1994 - persee.fr). The author advances the interesting thesis that, in fact, the idea of linking the meaning of the word *person* to a mask belongs to the Greeks and their passion for theatre and not to the Romans who simply borrowed and widely used it. Originally, the term signified appearance - the human figure - then, the Latin word *persona* referred to the mask an actor put on before entering the stage, which, by its grimace announced either the tragic destiny of the embodied character or comic accents of the part that was to be acted. Only later, the word began to signify the character embodied by an actor. The perverse effect of this development is that the term *personne* acquired a bipolar meaning in French, denoting either everything (the person) or nothing (an absolutely negative answer to the question of whom you saw).

[7] D. Alland, S. Rials, *Dictionnaire de la culture juridique*, Ed. Presses Universitaires de France, Paris, 2003, p 1152-1153 .

[8] O. Ungureanu in O. Ungureanu, C. Jugastru, C*ivil law. Persons* , Ed Rosetti, Bucharest, 2003, p.18.

[9] Gh Beleiu, *Romanian Civil Law. Introduction to civil law. Subjects of civil law*, Eleventh Edition revised and enlarged by M. Nicholas, P. Trusca, Ed Legal Universe, Bucharest, 2007, L. Pop, *Civil Law Treaty. Obligations. Vol I. The general legal regime* C.H.Beck Publishing House, Bucharest, 2006, p. 19, G. Boroi, *Civil Law. General part. People*, Third edition, revised and enlarged, Ed Hamangiu, Bucharest, 2009, p. 58, E. Lupan, Sabau I. Pop, *Civil Law Treaty*. Vol I. General part, Ed CHBeck, Bucharest, 2006, p. 93, Fl Baias, *Simulation. Study of doctrine and jurisprudence*, Ed Rosetti, Bucharest, 2003, p. 129.

[10] O. Ungureanu, C. Jugastru, *Civil Law. People*, Ed Rosetti, Bucharest, 2003, p. 17.

Introduction to civil law, he speaks of "subjects' juridical relationship"[11] in a formula that he finds it desirable. One can assume that the distinguished author has considered the same reality, noting that the meaning of the term "civil law matters" is totally in disagreement with its usual topics according to which civil law matters can be just legal issues. We may accept the fact that a number of terms in everyday speech can get technical meaning in legal language but we believe the loan of legal terms should not alter the regular meaning to a large extent, especially where there are alternative expressions in national language. Moreover, an argument of authority is given by the Romanian Language Dictionary of Pronounciation, Spelling and Morphology elaborated by "Iorgu Iordan" Linguistic Institute of Romanian Academy according to which the plural of the word *subject*, meaning the person, is *subjects* and *not subject matters* because there is an individual represented by the person, who is subject to all civil rights and obligations. Therefore, the agreement must be made between man and matter and not between the person or party and subject. *Per a contrario*, if every time we related to the quality of various participants in legal relations, we would get to talk about "contract issues", "procedural matters", "payment issues". Last of the phrases is exactly the name that the new Civil Code gives the Section 2 of Chapter I of Title V, "Execution of obligations." The expression is utterly wrong because this time, the phrase "Those who can pay", the marginal name of art. 1472 NCC, refers not to the individual as subject to law, since payment can be made "even by a third party in relation to that obligation," as expressed by the rule.This choice of terminology in the new Civil Code is unique, because the other code, the Code of Criminal Procedure, provides in art. 32 that "the parties are subject to proceedings ...", This are small errors that can have serious consequences,a reason for which we militate for the generalization of the phrase "subjects of civil law" and, on a larger scale, "subjects of legal relationship", both in law and in doctrine. Even though the discussion may seem frivolous, we believe that a legal system, especially one which we claim to have been reformed, must be recommended by the consistency of terminology, mainly when it comes to terms that constitute the primary tools of normative or doctrinal legal discourse.

2. "Respect for human beings and their inherent rights."

This is the title of Chapter II of Title II dedicated to the natural person in the new Civil Code, that contains the most severe interventions on the proposed texts in the first variant of the new Civil Code Project, published in 2004, as far as both the terminology and systematic rules are concerne – aspects that require our attention:

-In addition to the lack of correlation of terminology in which the rights are subject to systematic regulation, the idea of "respect" is a formula

[11] O. Ungureanu, *Civil. Law. Introduction*, 8th Edition, Ed C.H.Beck, Bucharest, 2007, p. 71.

imported from the Civil Code of Quebec. In order to get to the respect for individual rights and values, this code taken as a model of regulations, is based on some general statements regarding the usage and function of such rights. But the logical sequence of statements should not begin with „respect" for something that is not firstly defined. Then, the very idea of relying on "respect" in the title of Chapter II, Title II and Sections 3 and 4 in the new Civil Code is questionable. Legally, respect for a person's inherent rights is equivalent to the obligation imposed on those that are binding. It finds its place within the framework of the rule and not in the name of material subject to regulation. Then, supposing that such a formula were more desirable for imperatively advancing respect for the above mentioned rights as stated in the section name under which rules are arranged, then the consistency of terminology would have imposed the repetition of the same expression in all other essential rights of the person. Yet, the authors of the normative texts only partially conformed themselves to the necessary self-imposed requirements, because, while Section 3 is called "respect for privacy and human dignity" and Section 4 "respect due to a human person after its death ", Section 2 is no longer aligned to the idea of respect, being entitled only as " the rights to life, health and integrity of the individual " as the entire chapter ought to have been called.Such designation of Section 2 is also bold because announcing, for example, the right to life as an object of regulation, it leaves room for expected legislation to be conceived, if not exhaustive, at least significant, on a number of current aspects which were subject to interesting debates in law theory and jurisprudence and regulated in various ways by different European civil law, such as the right to life of an unborn child, the right to die, etc.. No article is devoted to the right to life, *inter alia* included in the phrase "inherent human rights," about which Art. 61 states that "are equally guaranteed and protected by law." Thus the attention to the new legislature is unevenly distributed to inherent human rights, being focused on disturbing privacy in complete disagreement with the order of preference of the Code of Quebec which has inspired the new regulations. Privacy that has proven to be a subject of great media impact, being much debated in the press, often with emotional and partisan accents, should not have led to the unequal treatment of other fundamental rights pertaining to individual existence;

- the simple translation of phrases used by the Code of Quebec leads to incorrect expressions in terms of Romanian grammar. Instead of expressing the need for due respect for the human person, the current text induces the contrary idea, that human being would be the one that owes respect to someone else[12]. The meaning would have been completely different if the text had referred to "respect for human beings and their inherent rights" or to the

[12] Title of the Civil Code of Quebec. For accurate translation of the expression into Romanian would not have the same meaning, the new Civil Code reads Section 4 of Chapter II, "the respect due a person and after death".

phrase" "respect due to human beings and their inherent rights" as it is stated in Section 4 which is called, correctly this time, "the respect due to a person and after death. For the same reasons, the correct expression of Section 3 was "respect of privacy and dignity of a person" and not "respect privacy and (!) human dignity, thus avoiding a contorted expression;

- by a failure in systemising the rights pertaining to individual existence, the new Civil Code introduces a number of questionable distinctions in this matter. Although the entire Chapter II in Title II is dedicated to inherent human rights, in art. 61 para.1, called *inherent human rights guarantee*, there are considered only life, health as well as physical and mental integrity. Then, even though in art. 58 in the new Civil Code there is an inventory of the rights of the person, which includes the right to life, health, physical and mental integrity, the right to privacy and the right to self-image, when referring to protection of human personality, through a general and imprecise expression, Art. 252, New Civil Code, says, this time, that the individual is entitled to protection of the "values closely attached to human being such as life, health, physical integrity, dignity, intimacy of private life, scientific, artistic, literary and technical creation and any other non-property rights." Such statements add more smoke in a fog already existing in the field, especially after being included in the rights of every human being closely linked to creative works and any other non-property rights ... Furthermore, the claim for an exhaustive approach to personality rights, a matter so delicate and nuanced, is excessive, even beyond the legislation that has inspired the new Civil Code. Title II of the first book of the Civil Code of Quebec, is more cautiously known as "Certain rights of personality" and not "The rights of personality". Let us not forget that the term "personality" is polysemantic. First, it denotes a person's ability of having rights and obligations, on the other hand the term refers to the inherent natural rights, equal among them selves. A third meaning of the concept of personality, usually less in the view of civil law and more in that of criminal law, aims at individual particularities, i.e. everything that makes the person different from all others, the physical, moral, intellectual status within an incomparable, distinctive and unrepeatable individuality. This distinction is found in moral damage issues, the ones that involve harm of strictly personal moral values, areas where sensitivity is always different in people, making legal treatment different in accordance to particular features;

- referring to the right to dignity, normative texts have a different approach: while the art. 58, the new Civil Code includes among the individual rights the right to "honour and reputation" , in art. 72 the same right is called the "right to dignity" and according to par. 2, it refers to ... honour and reputation;

- freedom of expression, although not included among the rights inherent in human nature, as it ought to, is nevertheless included in art. 70, Section 3 of the new Civil Code as "respect for privacy and dignity of human

person", without showing the link between freedom of expression and the right to privacy. Such a relationship is to be found in standard art. 30 point 6 of the Romanian Constitution, stating that "freedom of expression can not harm the dignity, honour, privacy of a person and the right to self image." In the absence of limits of free speech, its inclusion in Section 3 of the new Civil Code and its omission in the previous listings are difficult to explain.

3. Infringement by "prejudice", "harm", "damage".

The traditional generic term "infringement" is often replaced by the new Civil Code with expressions such as "encroachment" upon somebody s right or interest or "lesion" of the rights, terms that are sometimes synonymous with "breach" and sometimes with "violation" of personal right. A variety of such formulas can introduce legal terminology distinctions which are either artificial or inaccurate, affecting the accuracy of some regulatory propositions. "Encroachment" / *Atingere (Ro)* is a term that can be encountered in the field of rights to life, health and integrity of the individual, in art. 62 para.1 according to which "no one can encroach upon human species "[13], in art. 64 on "encroachment upon human integrity"[14], in art. 72 in relation to any "encroachment upon honor and reputation", and in art. 74 focused on more "encroachments" upon privacy. In our opinion, the term "encroachment"/ *atingere (Ro*) used by the new Civil Code is inadequate for several reasons:

-firstly, this word designates both facts of violation of rights to privacy and human dignity and their consequences, contrary to requirements imposed by rules of legislative technique that legal terms must be used with the same meaning;

-this term in French is different from the Romanian counterpart. According to the Explanatory Dictionary of Romanian Language, the word "encroachment"/ *atingere* means, first, the action of "taking direct (but shallow) contact, slightly or in passing, with one thing or area, unlike the ordinary meaning of the word French *"atteinte"* which has a more offensive meaning[15]. Here it means action that leads to injury, harm, damage and the harmful result, a meaning which the Romanian equivalent term can acquire only by a metaphorical expression. In the definition given by a French legal dictionary, frequently used by civil law doctrine[16], the term "atteinte" means "action directed against something or someone by direct means, action that

[13] The text is taken from Art. 16-4 , French Civil Code stating that "nobody can harm the integrity of the human species".

[14] gjfjfjfjfj

[15] In French, crimes such as espionage, assassination, conspiracy to are grouped under the title *des atteintes aux intéréts fondamentaux de la nation* and phrases such as *atteinte à la Constitution, atteinte à la pudeur, atteinte sexuelle, atteinte mortelle*, have no counterpart in Romanian language.

[16] G. Cornu, *Vocabulaire juridique,* Presses Universitaires de France, Paris, 2007, p. 88-89.

may be" material (degradation), immaterial (offence), injury (lesion), legal (robbing) as well as the injurious result of these actions, damage, prejudice."[17] As it is polysemantic, this term should have been avoided, or if it had been considered preferable to the traditional terms of "violation" or, as appropriate, "harm" it would bave been necessary a preliminary definition of the term as required by the legislative technique according to which "if a concept or a term is not established or may have different meanings, its significance in the context is established by legislative act which put them in the general provisions or in an annex for that vocabulary, thus becoming binding regulations of the same material"[18];

- the new Civil Code uses only sequentially the ambiguous term "encroachment"/ *atingere* avoiding it in the above mentioned related materials, which, again, is questioning the homogeneity of legal language, contrary to the provision of art. Art. 35 para. 1 of Law no. 24/2000 on the rules of legislative technique normative acts according to which "in legislative language the same concept is expressed only by the same terms." Thus, art. 253 of the new Civil Code refers to "the individual whose non- patrimonial rights have been violated or threatened..." and not encroached or upon which encroachment have been made and the same situation is in Art. 255 para. 6 that refers to "... defence against violation of patrimonial right " and not to the encroachment upon this right. The evidence is clear that these texts belong to different authors and that they were not linked;

-the inclusion among other "encroachments"/ *atingeri* upon privacy in art. 74. a, "taking any object from it (*n.*dwelling) without the consent of the person who lawfully occupies it" [19] after the model of art. 36 Section 1 of the Civil Code of Quebec, is questionable, given that such a deed is called theft, about which it could hardly be said to be directed towards and against privacy. The right to privacy is infringed upon since the momemt of entrance or entry or of refusal to leave the dwelling, so that subsequent actions merely duplicate the interference;

- "encroachments"/ *atingeri* can be both harmful to the interests of victims, as in the case provided by art. 1359 of the new Civil Code and independent of any prejudice, such as those in art. 74 making the newly introduced term ambiguous and thus affecting the accuracy of expression in regulations;

- before listing them in Art. 74 n.C.c., it would have been preferable a statement of principle to define such "encroachments"/ *atingeri*, stating their illicit nature and avoiding the repetition of the phrases "no right" or "without consent" in all ten inventoried situations . The option is in disagreement with

[17] Ibid.

[18] Article 35. 2 of Law no. 24/2000 on the rules of legislative technique normative acts .

[19] It is a less elaborated text that also lacks good grammar. In order to make sense, the text could have referred to "taking any object from the housing without the consent of the legally responsible person.

the provision of Art. 69 n.C.C., which this time considers "unlawful encroachment", which can by itself entitle the court to take measures to end it. Because this rule establishes a principle regarding not only the rights to the integrity of the human body but also all non-property personal rights, it should have been included in the "common provisions" for personality rights. The same consistency was supposed to determine the name of art. 74 n.C.C.as "unlawful encroachments"and not to any detriment to the rights, an expression that is too general and ambiguous;

- another objection concerns the elliptical character of the marginal title, "Limits." in art. 75 n.C.c. Does the point of discussion regard the limits to the rights provided in this section as one might be inclined to consider when reading paragraph 1 of the norm or the limits of the rule violation of these rights, resulting from the provision of paragraph 2? The question could have been avoided if the stext had adopted the solution under the provision of art. 8 paragraph 2 of the European Convention on Human Rights, which uses the term "interference"[19]. In Romanian, the term "interference" has, this time, the same meaning and is in present use of the new Civil Code in art. 71, regarding privacy, para. 2, that "No one shall be subjected to an interference in private, personal or family life ...". In this regulatory context, it is not clear why art. 75, instead of some generic reference to "limits" has no reference to lawful or legitimate interferences. Provided that the text authors had wanted to *tale quale* take the terminology of Quebec Code, they could have used the syntagm lawful or legitimate encroachment. Therefore, in order to be considered as encroachment to privacy, interference must be unlawful, or, if one prefers a more general formula, illegitimate, while its opposite, the legitimate interference, although violation of privacy, is not penalized. If we accept that, in the case of interception of conversations, we are faced with a breach of privacy simply because the law allows interference, we will accredit the idea that human rights are to be left to the discretion of the authority, when in fact they are natural rights, binding authority. Any limits or conditioning concerns the exercise of law and not its existence as appropriate, as stated in paragraph 2 of Art. 8 in European Convention on Human Rights;

- in other situations, "encroachment"/ *atingere* is equated with injury. The preference of the authors of the new texts for this term is also present in the field of liability in tort. Under provision in art. 1359 n.C.C., which has as marginal name "compensation for prejudice consisting of violation of a personal interest," the author of the illegal act is obliged to compensate for

[19] The official version of the translation of the Convention, takes the term "interference" (ingénce), while Professor C. Bîrsan in the paper The European Convention on human rights work. Comments on articles. Vol I. The Rights and Liberties, Ed All Beck, Bucharest, 2005, p. 591, uses the Romanian term "mixture" and the new Civil Code uses the term "interference" (Article 71 para. 2). It is a happy example when Romanian terms have approximately the same meaning as those in French, which is not the case of "to encroach"(atteinte).

the caused injury even when this is a result of "encroachment"/ *atingere* upon an interest of another.[20] Not even here the word "encroachment"/ *atingere* does not give more precision to the normative expression. On the contrary. What else would the "encroachment"/ *atingere* upon an interest consist of if not in its violation? Consistency of legal language requires the use of the same legal terms, even with the risk of recurrence, as it happens with another legislative text, the one in art. 1360 n.C.c. on self-defense, when the designating syntagm appears both in name of regulation and in the case described by the rule;

- another regrettable distinction introduced by the new Civil Code is that between and to damage." The legal definition of abuse as in art. 15 n.C.C. is that "No right can be exercised in order to harm or injure another person, or in an excessive and unreasonable manner, contrary to good faith." It is hardly understandable the fact that the meaning of the term "harm" in Romanian has been ignored. According to the Explanatory Dictionary of Romanian language, "to harm" means to inflict upon personal health and body integrity or to cause damage, to injure[21]. Probably the intention of the authors of the text to distinguish between moral and material damage is not supported by the terms used, because to harm means to cause not only moral lesion but also material damage. Furthermore, the wording itself is not beyond all criticism. The expression in the text related to the exercise of the right "in order to harm or damage another person or in an excessive and unreasonable manner, contrary to good faith" does not communicate clearly enough the solid distinction between two ways of exercising the right so that a superficial reading of the text could induce the idea that both forms of exercise of the right "to harm or damage" and "excessive and unreasonable .." would be subsumed to the aim in view of the holder, when in fact, the authors intention was to combine two conceptions of abuse as well as to distinguish between them: the subjective concept, which seeks evil intention of the holder and the objective conception, which is focused on abuse in any exercise unreasonable, excessive exercise of right. In order for this distinction to be as clear as it is necessary, both concepts should have related to the exercise of this right, even at the risk of repeating this phrase;

- in the new Civil Code, a substitute term for "harm" is "lesion". Rule in Art. 253 n.C.C. entitled, "Defence measures" in para. 1 refers to "the

[20] Because the standard regards "damage repair ..." , its natural place was in the 6th section of the same chapter, called "compensation for tort liability" .

[21] The current regulation has been conceived as different from the version of the Project draft published in 2004 that used together the words "loss" and "injury" without providing a criterion of distinction. Thus, in civil liability the new Civil Code exclusively envisages injury. Under these conditions, the term "damage" in the definition of abuse is an unusual presence in the general legal language of the new Civil Code. To distinguish between the two concepts, see S. Neculaescu, *Critical remarks about the moral damage compensation legislation in the new Romanian Civil Code*, Law no. 5 / 2010, p. 42-43.

individual whose non- property rights have suffered lesion or have been threatened, can any time ask the court..." the consequent measures. The same term is used in par. 2 of this rule, at art. 254 para. 2 n.C.c.

Even if the term "lesion" seems more appropriate in matters of personal non-property rights because it mainly suggests moral consequences of their violation, it remains subordinate to the generic idea of "harm", which means, among other things, "lesion". Another term " infringement" is sometimes used with the same meaning as "encroachment/ *atingere* upon the right", sometimes with a different meaning.
The same meaning of the two term is found in art. 253 para. 3 n.C.c. that ".. the one who has suffered an infringement of such rights (in art. 252) may petition the court to force the author of the crime to perform any action deemed necessary by the court in order to restore the encroached right.. "[22]. Although it was not necessary, the authors of the text doubled the term " infringement" with "encroached right.. " without any rational explanation. In a logical expression, restoring refers to the infringed right, the one envisaged by rule and not to the . "encroached right". The concern for avoiding a possible repetition of the phrase " infringed right" cannot be persuasive, given the fact that in the same text, another word "court", is repeatedly used, although it could have easily been avoided.

Similarly, Art. 69 n.C.c. uses the phrase "unlawful encroachment upon" with the same meaning as "infringement of the right". Otherwise, art. 75 of the new Civil Code provides that "encroachments permitted by law or international conventions and pacts regarding human rights to which Romania is a party do not constitute an infringement of the rights provided in this section."[23] The elliptical nature of the marginal name of art. 75 n.C.c., "Limits." is worth being highlighted. Does it refer to the limits to the rights provided in this section as one would be inclined to believe reading paragraph 1 of rule or to the penalty limits of infringement of those rights, resulting from the provision of paragraph 2? The question could have been avoided if the text had adopted the solution under art. 8 paragraph 2 of the European Convention on Human Rights, which uses the term "interference" [24] which is translated into Romanian language as "interference" with the same meaning this time. It can also be found using the new Civil Code art. 71, regarding privacy, para. 2,

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[22] The text could have been more carefully conceived, avoiding the repetition of the word 'court'.

[23] gfnnvbnvb.

[24] The official version of the translation of the Convention uses the term "interference" ("ingénce"), while Professor C. Bîrsan in his work *The European Convention on Human Rights. Comments on articles. Vol I. The Rights and Liberties*, Ed All Beck, Bucharest, 2005, p. 591, uses the Romanian term "intrusion" and the new Civil Code uses the term "interference" (Article 71 para. 2). It is a happy example of an instance where the Romanian words have approximately the same meaning as those in French, which is not the case of "encroachment/ *atingere*" (atteinte).

that "No one shall be subjected to an interference in private, personal or family life...". In this regulatory context, it is difficult to understand why art. 75 n.C.C., instead of referring rather generically to some "limits" has no focus on lawful or legitimate interferences. And if the authors of the text had insisted on *tale quale* taking the terminology from Quebec Code, they could have used the syntagm lawful or legitimate encroachments, as in the Swiss Civil Code art. 28 index 1, par. 1 which states that "the one who suffered an illicit encroachment upon his/her personality may sue any person who participated." Paragraph. 2 of the same text states that " encroachment is unlawful when it is not justified by the victim consent, by a predominantly private or public interest or by law." Once the encroachments upon privacy had been listed in Art. 74, part of the art. 75 n.C.C., establishing the exceptions, harmonizing the two statutory provisions required clarifying of the ones which "do not constitute encroachment upon privacy" and not " infringement of the rights provided in this section ...". Another questionable expression in the new Civil Code is the one in art. 253 para. 3 that "... the one who has suffered an infringement of such rights may require ..." This time, the violation stems from the fact, and the idea that the owner would "suffer" infringement is inappropriate. The distinction made by the authors of the texts between "encroachment" and "infringement" is counterproductive. The assertion that " encroachments which are permitted by law or international conventions regarding human rights to which Romania is a party do not constitute an infringement of the rights, is in my view, partly true. On a careful examination of the facts of art. 74 new Civil Code, one can see that a majority of them relate to offenses that violate the rights the holder may have, where the rule *Volenti non fit iniuria* is verified. Thus, entering, staying in a house, with the consent of a legal representative, capturing the image or voice of a person with their consent and all the other acts which are committed with the consent of the holder cannot be considered encroachment upon privacy. But when it comes to the interception without consent of a private conversation, referred to in Art. 74 letter *b*, the new Civil Code or keeping privacy under observation by any means, provided in letter *e* of the same text, facts that require the approval of competent organs other than the holder of the right, they are infringement of privacy, even though the law broadly accepts such an interference with this right. In our view, any interference, whether justified or not, means a violation of privacy, so that the idea of opposing encroachment upon the right to infringement of the right, unnecessarily complicates the legal terminology in this field.

4. "Guilt of the debtor."

The new CivilCode introduced in civil legal terminology the concept of "guilt", defining it in art. 16, after the model of the Criminal Code but the responses to it followed very soon. The lady author of a recent study rightly writes that "borrowing the definitions of criminal law matters does nothing

else but reopens "Pandora's box "of already existing controversies over the content of this concept."[25] The only clear effect of this "innovation" is making traditional legal terminology confusing. The prospect of a principle of "liability for guilt", as it would be named in the newly established order of terminology, is in disagreement with the general development of civil liability, which is more and more objective and therefore less interested in investigating the subjective side of the act, with all the nuances supposedly associated with it to determine whether or not the offender has foreseen, intended, accepted the injurious outcome. Liability remains oriented to the interests of the victim to be repositioned *status quo ante*, while criminal liability is concerned with the most appropriate punishment of the perpetrator.

The new regulation is different from all projects of coding European law of obligations, even from the main envisaged, the Civil Code of Quebec. Thus, European law principles of liability (Principles of European Tort Law - PETL) preserve the traditional concept of "fault" ("faute ")/ mistake, in the wording of art. 4:102 that "any person who violates, intentionally or negligently the required standard is liable to fault ", while Art. Article 1457. 2 CcQ considers as responsible the person who defying the custom or law, causes another person bodily, moral or material injury by mistake.

Imposing *guilt* in civil legal language seems to have the same effect of rejecting a graft failure by the body. The effect seems to be felt also by the authors of the new Civil Code, who simply introduced a new concept, without integrating it into the general economy of the new legal texts . How could their position be otherwise interpreted when, after establishing liability for fault, which would have required reformulation of all tort liability rules, they continue to refer to *fault* and not to *guilt* ? Thus, art. Article 1357. 2 n.C.c. states that "The author of the prejudice is liable to the slightest fault" by updating the famous adage "*In Lege Aquilia et culpa levissima venit*"? Even more evidence for our prior assertion is in art. 1358 n.C.c. that sets forth " particular criteria for assessing fault." Why should such criteria be needed as long as the author is liable to the slightest fault?

Moreover, the formal aspect requires that bringing forth a new matter and introducing new "particular" criteria should have been worth mentioning. On the contrary, reading the rule, one can learn that the discourse "circumstances under which the prejudice took place, unrelated to the person who is the author of the act..." , being too general and imprecise, cannot be considered satisfactory. In fact, the relevance of such circumstances unrelated to the author, called "external circumstances"[26] in the French doctrine, such as legal provision, superior orders, victim's consent, concerns in fact, the extent of compensation and not "the assessment of fault". If in the criminal law such an

[25] L.R. Boilă, *Guilt - "the eternal lady" of tort liability*, Romanian Private Law Journal, no. 2 / 2010, p. 38.

[26] *Fr. Terré, Ph. Simler, Y. Lequette*, op. cit., p. 657-661 .

investigation is important for the individualization of punishment, in civil law rule, the extent of compensation is usually given by the extent of damage suffered by the victim, not to mention contractual liability, which, according to art. 1548 n.C.c. 'Fault of the debtor of a contractual obligation is assumed by the mere fact of non-performance." Our doctrine tends to use a single terminology in the field of liability, borrowing solutions and terms of criminal law seem to be inappropriate with regard to the different goals of both kinds of liability. A more powerful example for the lack of consistency of the new texts, which are uncorrelated, is art. 1371 n.C.c. regarding common fault and fault competition with other causes exemption. Examining the two paragraphsit is obvious that they actually require establishing compensation criteria in relation to the causal contribution of the victim, the author and the grounds of exemption. The text is inspired by French law where the errorincorporates the deed. And in order for this idea to be fairly evident, paragraph 1 of the above mentioned rule, referring to "common fault, describes the situation in which "the victim intentionally or negligently contributed to cause or increase damage ..", which is a non sense, not to mention that placing fault with "other cases exempting" , the text focuses on the deed of the author and not on the actual fault, as this time, it is explicitly mentioned in the text.

Conclusions

In the field of contractual liability, "the guilt of the debtor" is treated separately, together with injury, suggesting that it would be only one of its conditions, while Art. 1547 n.C.C. states that "the debtor is obliged to repair damage caused by his/her fault", and then we learn from reading the following rule, art. 1548 of the same Code that, in fact, the guilt is presumed.

The last sample of terminological inconsistency in a wide range of unfit expressions, is the collision of two important civil law rules: although in art. 16 n.C.C. *guilt* is defined by a statement in Chapter III, called "Interpretation and effects of civil law", therefore a choice of principle that should have been followed by all subsequent rules, Art. 1457 in the same code has as a marginal name"the guilt of the debtor" and the statement is "The debtor is bound to repair damage caused by his/her fault ."

These are just some of the reasons why we consider that the new Romanian Civil Code has to undergo a certain process of revising, even avant la letter.

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EUROPEAN CITIZENSHIP VERSUS NATIONAL CITIZENSHIP

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Abstract

European citizenship is a unique creation of an organization that isn't in the classical patterns. It's the first citizenship interdependent of other nationalities. Created for developing a European identity among 12 nations, the concept of citizenship must adapt to the new reality. In the presence of 27 state members and millions of immigrants, that wish to accede to this citizenship, the European organization asks itself about the future of the citizenship.

Key words: *Citizen, national citizenship, European citizenship, state, sovereignty.*

Introduction

If the notion of citizenship finds a resort in the internal right, the same affirmation cannot be made for European citizenship. The notion of European citizenship should evolve around the rights and obligations of the European citizens. We could consider that this involves, for European citizens, resembling rights, if not identical, with those traditionally admitted for the nationals in the internal juridical order. These rights correspond, in a certain manner, with the special rights acknowledged between 1975 – 1985 for the inhabitants of the states members of the European Community.

The term citizenship comes from Greek, being taken from the European modern languages through Latin, knowing thus a new development, especially related to the association with civic virtue. In the classical tradition of civic virtues different thinkers and politicians have meditated during history upon the concept of citizenship… Thus, Machiavelli understood by citizenship the love for freedom but also the citizen's permanent obligation to acquit themselves of their responsibilities, obligation imposed by education, religion, or by consequent sanctions, Montesquieu saw in the civic virtues of the citizens a source of stability of the state, Rousseau considered that liberty assumes civic virtues, but also the involvement in the public issues and taking political decisions – the citizens were seen as such as long as they took part in the sovereign power., Aristotle in his work The Politics, stresses that a person

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is not a citizen only by his residence, because also the foreign and the slaves have residences. Neither is it a consequence of the right to be in justice as a plaintiff or culprit, the residence and juridical actions can belong to people who are not citizens.[1]

The term of citizenship has reaffirmed with the French Revolution through The Universal Declaration of the Citizen and Human Rights in which are reaffirmed the natural, inalienable and sacred rights of humans.

The notion of citizenship, in a wide sense, has its origins in the internal rights of each state, its evolution being undisputed, having as a start point the Greek fortresses or the Roman ones, to which they continue to relate. It is affirmable that the societies and their manner of governing, have defined related to the sense given to citizenship (Heater – 1990). In the present, the term of citizenship places the citizen in the centre of any life or social activity.

Juridical speaking, the constitutional right defines the citizen as being the titular of rights according to the state he belongs to, while the international right tends to understand by citizen any inhabitant.

Such a connection isn't by coincidence; it has formed by itself, through a long process in which both the population and the public force were aware of their reciprocal and inter conditioning relations. Living on a certain territory, and, later, politically organizing themselves on it, the population identifies with both the territory and the political manner of organization, meaning, the state. During this process of reciprocal connections, the population develops self awareness (national conscious), which includes the conscious of membership to a determinant territory, solidarity with a certain public force, to which, by vote, they offer legitimation.

The intimate bond between the state and the entire population that lives on its territory - no matter the nationality – is at the base of the fundamental rights and liberties of citizens, but also at the base of the obligations towards the state.

Thus, the citizenship related to the internal right defines the juridical quality that allows a person to take part in the in the state's life, enjoying the civic and political rights and being submitted in the same time to certain obligations, such as the mandatory vote and military service, citizenship being a cultural and historical construction, it is learned by each person and every generation of citizens.

It is appropriate to mention first that the term of citizenship has multiple connotations according to the nature of the juridical references in which it manifests: international rights references, references of constitutional rights, administrative rights references, and references of family rights. So, the juridical term of citizenship has a complex character, generated by the variety and the nature of rights that confers a certain juridical coat. Professor Ion

[1] Aristotle, Poilitics, Antet Publishing, 1996, page 72, edition that renews the work Politics, from National Culture Editure in 1924.

Deleanu appreciates the citizenship as a complex institution, integrating specific elements of diverse rights domains.

The concept of European citizenship introduces the citizen in the social, economical, political life of another state member, different than that to which the citizen belongs to. The constitutive treaties of the European Union had in consideration the citizen of a state member only as an economical agent.

European citizenship represents a challenge of the concept of citizenship as it was juridical consecrated in the system of values of each sate, as well as in constitutions; it targets a supranational citizenship which, for the first time refers to a set of values and institutions, instead of the mandatory membership to a territory, to a culture and a national state., it refers to the juridical status of the citizens of the member countries of the European Union. This status was introduced in the Treatise from Maastricht and developed by the Charta of fundamental rights of the Union, as a set of supranational rights. More precisely, article 17 of the Treatise of construction of European communities, stipulates that a citizen of the European Union is any person that benefits firstly of the nationality of a state member.

The most asked question related to this issue is whether or not a European citizenship is an extension of the national rights, or must a new form of collective identity be built, based on the idea of liability rights, respective, conditional guaranteed rights, as long as certain perquisite demands have been solved (certain obligations and rights) .[2] European citizenship is distinct than the national one, which, according to the Treatise from Amsterdam, completes it, …..it doesn't replace it (CE Treatise, art.17 new, alignment 1), this supranational status is guaranteed by the exertion of a limited number of rights on the territory of another state member, another than the own country. His extension of nationality is not reversible: the citizens of a member country cannot achieve the citizenship of the other member countries. The Constitutional Court of Denmark made the following specifications (von Beyne, 2001, page 72): the citizenship of the Union is a political and juridical concept which is completely different then the concept of citizenship, from the constitution of Denmark and the Danish juridical system. The citizenship of the Union doesn't confer the right of a member country citizen to achieve Danish citizenship or any rights, obligations, privileges or inherent advantages of Danish citizenship.

If we were to analyze the international jurisprudence in this matter, we would realize that the opposability of nationality of a citizen towards third parts states is subordinated to the existence of an "effective relation to the state" (Nottebohm affair from the International Court of Justice from 6th of April 1955). At the opposite side, the court of Justice of the European

[2] Cezar Birzea, European Citizenship, Politea Publishing, SNSPA, p. 87, 2005.

Communities has removed this requirement in the Michelleti affair from the 7th of July 1992.

Difficulties can be encountered in practice, especially in considering that different states of the Union have notable differences in the manner of according and retracting the nationality (some acknowledge the ius soli or ius sanguinius). The states that limit granting citizenship accept with reticence opening the frontiers, the work market or according the same civil and political rights to the inhabitants of other states.

Although both types of citizenship refer both to rights as well as to obligations, they are different by the regulations in which they find their origins. Thus, European citizenship is regulated by the Union's rights, while national citizenship is regulated by the national right, so, European citizenship doesn't suppress any inherent right of the national citizenship, it just offers supplementary rights which will be exerted either at the Union's level (the right to vote, the right to choose in the European Parliament), or at the level of the national states.

In other words, the European citizenship isn't separated from the national citizenship, the status of citizen of the European Union has been introduced by the Treatise from Maastricht, through four rights, and they are as follows:

- The right of movement and residence in any of the Union's member countries;
- The right to choose and be chosen in the European Parliament;
- The right of diplomatic protection in a third party country in which the own country doesn't have a consular representative;
- The right to petition in the European Parliament, as well as the right to address the ombudsman – for examining the cases of deficient administration in what concerns the organisms and the community's institution;

So, the Treatise reaffirms, on one hand, European citizens' rights which were already acknowledged, such as the right to free movement and residence, and on the other hand, it consecrates new rights, such as political rights, the right to petition, diplomatic and consular protection, the complaint addressed to the mediator or the right to communicate with the institutions. The Treatise doesn't proclaim only rights for the rights for the Union's citizens, but also complementary obligations, because the condition of European citizen is based on a contractual relation between people and the European Union. Thus, the Union acknowledges the individual's fundamental rights but claims in exchange civic obligations. Commenting these rights, we must specify that that their exertion is made respecting certain rules, commonly agreed upon between the member states, with the strict obedience of the law. We mustn't imagine that once accepted in the European Union, the Romanians will be able to do anything at their own will, no matter on which of the countries' territory they are on. As in the case of Romanian citizenship,

the European one assures the exertion of the rights specified in the law, but only in certain conditions and by respecting rules which ensure national security and prevents the other member's rights violations.

The Treatises from Maastricht and Amsterdam consecrate a pile of rights which are closer to its traditional meaning than that of European citizens. The notion of citizenship is presented as being progressive and most of the time, inconsequent, susceptible of achieving new bonds through the renewal of the constitutive treatises of the European Union. European citizenship is another type of collective identity, it is a complex concept having its base on the common principles of the states member included in the Treatise from Amsterdam: the principle of liberty, the principle of democracy, the principle of respecting human rights and the fundamental liberties of human and specifically rights given to the European citizen (the right of free movement and civil rights, described in the Treatise). It doesn't relate to a certain state, territory or nationality, it has its roots in the funding idea of European construction, that of guaranteeing peace in Europe and from the attachment towards communitarian values, no matter the language, history or traditions, the citizens express their loyalty towards the institutions of the European Union and take part at a trans frontier governing. The creation of the two institutions, of European citizenship and European citizen, had the purpose of cohabitation among nations in the virtue of certain common rules and organisms, for which they gave their consent in the moment of adherence.

European citizenship cannot be understood through the four supranational rights introduced in the Treatise from Maastricht. It consists of the civic action developed by individual actors and collective, in the new public space instituted by Europeanizing. The European citizenship is an extended form of constitutional patriotism which is applied to the whole process of construction of supranational democracy, involving rights, obligations, as well as participation in the public life, it gives a real sense of belonging to the European Union, as well as a more profound involvement of the citizen in the process of European integration; it demands certain civic and political competences, a wide process of social learning, a system of collective identification, but also certain social actions, specific to any form of democratic citizenship – political involvement, public responsibility, the exertion of citizen rights and obligations, human solidarity, supporting cultural diversity and political pluralism, promoting equality and social justice, all of these being considered constitutive elements of European citizenship[3].

European citizenship is one of the most important aspects of the process of European integration, representing one of the conditions of achieving a space integrated of security, liberty and justice.

[3] Cezar Birzea, European Citizenship, Politea Publishing, SNSPA, p. 48, 2005.

Conclusions

European citizenship is a complex concept. First of all, it reunites the local, national and supranational elements. Secondly, it is an incomplete citizenship, because it contains an elaborate catalogue of rights, but only one obligation, that of having achieved already the citizenship of a state member of the Union. And finally, as any syncretic construction, it is in a permanent evolution and transformation, which makes it difficult to define and theoretically frame. There should be created a real European society to which individuals can relate. More important than the theoretical aspects, is the final purpose of this body of juridical regulations: the creation of a European identity more profound than that given by geographical and historical membership, referring to a true civic European culture.

Although Europeans benefit from the juridical regime of citizenship, yet, there is no European identity strong enough to mobilize them. For stimulating interest and a more active participation the means and strategies of communication must be empowered and the access to European information must be simplified.

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THE IMPORTANCE OF PERSONS ASSESSING AND EXPLOITING THE SPECIFIC BEHAIVOURAL MANIFESTATIONS OF PERSONS QUESTIONED DURING JURIDICAL HEARINGS

Gabriel Olteanu[*]

Abstract

The author's intention is to discuss the tactics used in the hearing proceedings carried out during criminal investigations. The purpose is to enrich knowledge in the field of legal hearing of persons, aiming at significant modifications for the improvement and better results of criminal investigations. Interview and interrogation are described. No significant reform of the judicial system can be achieved without an improvement of inquiry. It is known that the investigative activity is not a constant one, there are no practical directions to guide the investigating officers' behaviour or the evaluations made by civil servants.

Key words: *juridical hearings, persons behaivoural, investigations, justice.e*

Introduction

It is very important to develop collaboration between investigators, experts in graphoscopy and experts in graphology in order to interpret written statements as well as other behaviours that may communicate important clues.

Investigative activities are a major concern for society, given their importance, and in many criminal cases they are the main source of useful information. The fact that all the efforts of the investigators are directed towards obtaining a concrete result is comforting, but negligence in the carrying out of investigative activities often leads to errors and mistakes or different kinds of abuse. Even the scientific discourse meant as an information support is dominated by a kind of formalism and does not focus enough on practical aspects, most of which the doctrine avoids dealing with – it is known that often the educational curricula and university courses dedicate a limited amount of time to scientific speeches and debates.

There is a lot to say about the importance of hearing people in the course of a criminal investigation, but I only find it necessary to point out here that hearing people is the work most frequently performed by the judicial

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bodies and is the approach expected to provide most of the information needed to carry out an investigation. As nobody has ever been only interested in quantity – and the judiciary, quite possibly, less than anyone else – the quality of the information obtained is essential for a just resolution of the case. Therefore, the question is, in this context, to establish the truth in the case, both overall and separately, in the hearing of each person, where possible.

By resorting to logical reasoning, we will admit that we may obtain the information needed to carry out the investigation from a person[1] in two ways: orally or in writing. How to proceed, if and how to obtain the truth, how can lying be detected, whether to start with getting a written statement and continue with the oral testimony or vice versa, or to alternate the two methods, all these are topics of meditation for which no generally valid answer has been provided yet[2].

I will begin by giving my opinion on specific behavioural manifestations of the person who writes[3], whether it has already given a narrative sample to the investigator or not. I am placing this scientific approach at the boundary between what is currently accepted as the research area specific to graphoscopy and that specific to graphology. The interest of the investigator is directed towards the entire range of behaviours, following a simple scheme, that unfolds in two stages:

- identification of "the specific normal behaviour" – that concurrence of exterior manifestations specific to the person who does something particular, in this case, write a statement, without being influenced by elements of emotional stress caused by lying;
- identification and evaluation of any element that occurs beyond the specific normal behaviour and which could be linked to lying.

To conclude: what is normal is equivalent to the truth, what exceeds the normal range may have to do with lying. It is very important to accept that we should not propose ourselves to give simplistic verdicts of the "truth – lie" type, but to interpret any manifestation that could be related to lying. More specifically, to explain any deviation from normality through the proximity of lying.

First of all, there is a distinction to be made between "normal behaviour" and "specific normal behaviour". Considering the complexity of human behaviour, we must accept the premise that the term ***"normal behavior"*** is related to the theoretical approach, it is a model –only at a

[1] A/N – Regardless of the locus standi that one or another of the persons heard have or may acquire during the course of the trial.

[2] See, for example, Gisli H. Gudjonsson – The Psychology of Interrogations and Confessions: A Handbook, 2003, John Wiley & Sons, Ltd, The Atrium, Southern Gate, Chichester, West Sussex PO19 8SQ, England, p. 42; Amato Fargnoli, Sonia Moretti – L 'incredible testimonia, UTET Libreria – Torino, 2005, Instituto Geografico De Agostini SpA, Novarra, p. 128.

[3] A/N – I have in view the handwritten statement.

theoretical level – that presupposes an individual's response to a complex of external stimuli that are perceived and assumed ideally. ***Specific normal behaviour*** presupposes a person's behaviour in specific situations under the action of specific stimuli and can be investigated at two levels:

- ***at a general level*** – the specific normal behaviour of people who are in a certain situation – in this case, the specific behaviour of people who are in front of the investigator, in a position to write a statement about the actions, persons or events of interest to the unfolding of a criminal investigation.
- ***at an individual level*** – the specific normal behaviour of the particular person whom the investigator is dealing with.

Personally, I consider as relevant to investigators both the general and individual specific behaviours, as long as we accept that the general specific behaviour consists of elements common to the behaviour of persons in the respective situation and the individual specific behaviour is the behaviour that can encompass all, most or only very few of the generic elements, but which necessarily contains specific items related at an essential level to the person being inquired.

From a methodological point of view, the investigators should:

- have a clear representation of the general specific behavior, obtained through documentation from the doctrine, personal experience or even the profession's myths;
- identify the characteristic elements of individual specific behaviour;
- identify deviating behavioural elements, that exceed the normal individual specific behaviour;
- interpret the nature, time of occurrence, extent, consequences of each behavioural element identified as a deviation from the individual specific behaviour;
- examine the possible connection between each deviation and lying.

Let's take, for example, the beginning of the meeting between the investigator and the person who will be inquired in the interrogation room – the greeting, "the person's photography", "the look straight in the eye", the invitation to sit at the table and the chair prepared in advance, "the initial silence". We accept as a hypothesis the situation where the investigator considered it useful to start by requiring a written statement, that was continued by the spoken part of the hearing, then a break that he uses to evaluate the results and continue the hearing according to the new goals he has set. I will not refer to the strategy that the investigator intends to use in connection with the person who is presented to him.

Along with the introduction of the person by another official, and its penetration into the interrogation room:

- ***the investigator*** – may stand up from his seat or remain seated, may greet from a standing or sitting position, may "keep silent", may look at the person he's about to hear, may look busy and not look at it at all, may invite it to its seat, may just show it the seat, may continue to be silent or lead it to the

prepared seat, may continue be silent, formulate a thematic question and invite the person to make a written statement in answer to the question, initiate a dialogue with the person to be inquired and request the written recording of one or another of the aspects discussed.

- ***the person being heard*** – may greet or wait to be greeted, may proceed to the place apparently intended for it or continue waiting in silence, may announce the intentions with which it agreed to undergo the investigation, make certain requests, express surprise, frustration or anger about its involvement in a criminal investigation, about the investigator's person or behaviour, may inquire what it it supposed to do.

The moments to which I made reference – the greeting, "photographing the person", "the look straight in the eye", the invitation to sit at the table and the chair prepared in advance, "the initial silence" – are performed by each of the two partners with the obvious aim of gaining advantage over the other, each wants to dominate their partner, to use their position in order to impress, to destroy or, at least, to destabilize the plan prepared by the partner[4] and, for this, the element of surprise[5] is very important –something that the partner did not expect, did not expect at a given time or did not expect in the form it was presented.

There are hardly any rules here, but this does not mean there are no limits.

Greeting involves a question of status – the inferior greets the superior, as a matter of personal respect – the one who enjoys the respect receives the greeting of the one who respects him; it is also a matter of morality and respect for the general social rules – men greet women, the young greet the elderly, etc.

"Photographing the person" presupposes a short and condensed review of the person's appearance and first gestures and / or words. This is the occasion for a comprehensive examination, during which it is best to retain as many details as possible. The speed and depth of observing details are essential – the more and faster they are noticed, the better, this way you can move on to the next moment. Whoever finishes first compels the other to end the examination as well, because "the look straight in the eye" involves identifying any reaction of the examiner about the detail observed, so that each of the partners is reluctant to be seen and examined by the other, as regards his own reaction generated by every detail observed. More explicitly,

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[4] A/N – the investigator and the person being heard have prepared in advance, each of them has a certain plan in mind, a specific service that would allow the achievement of the professional goals (for the investigator) or of individual goals (in the case of the person heard).

[5] The element of surprise is discussed in almost all Romanian and foreign specialty works – see, for example, the works published by E. Stancu, C. Aioniţoaie, T. Butoi, C. Pletea, A. Ciopraga, or Baldwin, J. Gudjonsson, GH Ekman, P Reid, J. Inbau, F.E. Kassin, S.M.

it is not advisable to look at the legs, lips, trousers, tie, breasts, hands of someone when it is able to notice what you do. You may do in the interrogation room what you are not allowed to do in society, but not ostentatiously.

Looking the partner in the eyes or, more exactly, looking at the partner's eyes, is a controversial issue. Professional investigatorsoften show that the reason they believe that the person they are hearing is lying is the fact that it avoids eye contact with the investigator, that it refuses to look and be looked "in the eyes". During the hearing, we may find that person we are investigating stops, at one point, keeping normal eye contact even when being asked questions that do not contain any element that could be perceived as provocative or judgmental, simple introductory questions, to establish dialogue, when the hearing covers an area of reality that is not likely to harm or affect in any way the position of the person being heard. The reasons for avoiding eye contact should not be treated lightly and, especially, should not be reduced to being considered a clear symptom of lying. It could be about a person's shyness, a humble person, a submissive personality or the manifestation of certain neurological problems. It is also possible that person heard might be scared or at least timorous about appearing before an investigator. It is important for the investigator not to consider that the person inquired manifests bad faith when refusing to look into the investigator's eyes, when saying their name or answering questions about their identity, address or other neutral items routinely used to initiate dialogue, or to consider, beforehand, that the person is trying to hide their involvement in the illegal activity being investigated.

As a working hypothesis, it is preferable that the investigator should look into the eyes of the person he's hearing, immediately after examination. This is the right time for him to almost control the other person's movements. He will be able to perform an analysis of the state of the person to be heard, who is in a delicate position – if it gazes too persistently, this can be considered as a provocative act, generated by a confrontational attitude, if it ignores the look of the investigator, it is very possible that the person entered the interrogation room thinking about how to reproduce "the story" prepared in advance without making any mistakes, being focused on self-control and not letting anything be externalized unwillingly. It is very hard to keep balance and this can only be done by a person who has nothing to hide, who comes before the investigator concerned, but with the desire to cooperate in order to achieve the purpose of the criminal proceedings.

The invitation to the seat prepared in advance is an opportunity for the investigator to test the reaction of the person he is going to hear when the person's personal space is being attacked – from 0.46 to 1.22 meters[6].

[6] See Allan Pease – *Body language – How to Read Others' Thoughts by Their Gestures*, Sheldon Press, London, 1992. 18th Edition, p. 23: *The intimate area* – between 15 and 46 cm.

Emotions can cause sweating, a certain pallor, a high reactivity to the gestures made in the immediate proximity and the investigator should not miss the opportunity to check if "everything is all right", especially since his interlocutor might stumble, to take a curve too fast and hit the table or the chair it should sit on, rush and drop its bag, glasses or other objects on the floor, try to explain its emotions by saying this is the first time it has ever been in an interrogation room, that it is going through a difficult period, that it is experiencing a malaise, that nothing like this has ever happened to them before.

The initial silence – the first, because there may follow other periods of silence provoked by the investigator – should be used by the investigator to complete the assessment of the person in front of him. There is the possibility of skipping this stage, but this decision must only be taken when the investigator has provided a direct question, as part of a direct approach, when the person is prepared and ready to have studied reactions to anything the investigator might produce – usually, with people who have been through other investigations and have dealt with other "tough" investigators. During the "silence", the investigator will examine more thoroughly what is happening to the person in front of him and may notice changes in its behaviour as compared to the state of the person when entering the interrogation room.

Not necessarily in this order, the investigator must assess: the position of the seated person, the way it holds its head, hands, legs, the pallor of the face, the eyes, eyebrows, lips, corner orientation, the chin.

Fundamental to understanding the body language is, above all, to observe the position of the body of the person being heard while sitting. The posture of the sitting person often determines the movements of hands and legs and sometimes the gaze direction, the eye contact. By analyzing the posture of the person being heard, information can be obtained on the interest that the person being heard has for:

- the hearing, the way it is conducted and the results of the activity;
- emotional involvement;
- the confidence it has in the investigator and the ongoing activity in which they participate.

Of all regional distances, this is by far the most important, man defends this area as his property. Only those emotionally close are allowed to enter it. That category includes lovers, parents, spouse, children, friends and relatives. There is a sub-area which extends up to 15 cm from the body, which can be entered only during physical contact. This is the restricted private area. *The personal area* – between 46 cm and 1.22 m. This is the distance you keep from others in official meetings, social ceremonies and friendly meetings. *The social area* – between 1.22 m and 3.60 m. This is the distance we keep from unknown people, the prospective plumbers or carpenters who fix something in the house, the post factor, vendors in the nearby shops, our new employee and all those whom we do not know very well. *The public area* – over 3.60 m. This is the correct distance every time we address a large group of people.

Unlike in the oral or narrative unfolding of a hearing, when writing a statement there is no question of a dynamic, static and intermediate position. This is about observing the person's normal sitting position, which facilitates the transmission of information through writing. To interpret this position, the investigator will need to consider the changes in position while the person writes, for a period of 20-40 minutes. For various reasons, a person in good faith will change posture several times during the writing of the statement, sitting in different positions. Each position adopted, the way of making the transition from one position to another, the moment when the person changes its position, are closely related to the content of the information transmitted in writing, the emotional states generated by it, the attitude towards the investigator, the possible interventions of the latter (even if indirectly).

A person who is prepared and knows that it will lie will also prepare a certain position to adopt during the hearing and will not give it up but exceptionally. For reasons of the person's balance, we can say that such a person consumes so much energy to give credibility to its reports, whether verbal or written, that non-verbal communication is reduced or, at least, must be lowered close to zero. A static position obviously denotes a tension, a lack of trust in the person of the investigator[7].

Analyzing what happens to the person who writes, we see that there are changes at the level of the upper body's position – it bends, returns to the original position, rises, lowers .... When a person who is heard leans forward while sitting as it discusses an important issue, the body language will transmit confidence – this can be, often, observed on a person who tells the truth, regardless of its position on the chair, when talking of issues that are very important to the investigation. As a rule, the person who writes, as it moves away from the truth, takes a position increasingly remote from the sheet of paper it is writing on, unconsciously indicating its wish to distance itself from the statement.

Basically, as a person writes, it seeks instinctively, whatever position it adopted when sitting down, positions as relaxed and as comfortable as possible. A preoccupied person will lean forward on the chair, will have a less natural position, and certainly less comfortable, for the whole or nearly the whole period of writing the statement. Such a situation is similar to that of a person who – and the typical example is the child who is staring at his scolding parent, begging for forgiveness – feeling guilty, seeks a position by which it feels it punishes itself throughout the hearing or the confession, if it goes to church.

The withdrawing position on the chair determines a restriction of the movements of legs, hands, of the entire body of the writing person, it

[7] A/N – We could take as an example the situation of a student who, in a written examination, if he has learned mechanically, will be blocked in a position that he will try to preserve as much as possible, so as to reproduce, without any self-inflicted complications, as much as possible of what he has tried to memorize.

withdraws, detaches itself from the lies it is writing while maintaining a forced, unnatural connection of the entire body with the place and the false action. Moreover, you may notice a forced forward movement of one leg, together with the hip, so as to block any possibility of bending towards the table in order to strengthen, to emphasize the commitment to what the person is writing.

A liar will keep the hand not used for writing tense, the fist will be most often closed or the palm will put pressure unnaturally on the board or sheet of paper, and sweating can occur, too. The hand that writes will be tense too, the elbow will not have its normal mobility, the angle formed between the arm and forearm will be forced to remain rigid and the fingers will put excessive pressure on the writing instrument, blood being due to leave, mostly, the contact zone. All this stiffness in the posture of the liar who writes is intended to block any expressivity, gesture or reaction that might indicate whether, when and what it is lying about. More or less instinctively, the writing prson wants to make sure that no one, preferably, not even itself must know whether one or another of the pieces of information provided in writing enjoys the person's consideration, whether it believes in what it is writing about or, on the contrary, it is something forced and artificial.

As a rule, a person in good faith has an interest and not only tries, but succeeds in showing their interest, concentration and emotional involvement throughout the encounter with the investigator. In practice, investigators may easily detect the fundamental difference between the belief that the written text is trying to convey through systematic conclusions, arguments provided to support each conclusion separately and the overall message that the person writing the statement wants to convey, and the rest of its behaviour, what happens to the body of the person who writes. There is often a struggle between the way in which the person who writes forces the rest of its being to assimilate, to accept what it is writing and the way in which the dishonest behaviour is rejected, the biological nature of man opposes the lie.

In terms of writing, as a technical operation, an educated person would write fluently and ... of course, there will be stops. As a rule, there is a significant difference between the pauses of a person who tells the truth and those of someone who lies. Whoever says the truth will stop before treating important issues, trying to formulate the message as clearly and as expressively as possible so as to be understandable and useful to the investigation. A liar will usually stop when he cannot remember the exact wording prepared in advance, being not very interested in the clarity of the text, he just has a message to transmit, does that and nothing more.

A controversial issue is the existence and manifestation of communication barriers in written declarations. Let's take, for example, the act of staring at the sheet of paper and limiting the universe to the area around the seat and table on which the statement is written. This, like any immobility

or lack of flexibility, inspires mistrust. The person in good faith has no reason – and the investigator should strive not to give such reasons – to filter or block communication with the outside so that, generally, it will assess the impact of its behaviour on the environment, in the interrogation room, in the present case. If the investigator has an encouraging attitude, does not transmit tension, shows respect for the person in front of him and what that person does, everything will be all right, the answer will reflect increased transparency, greater and more valuable detail in the content of the declaration; we all feel the need to "have a glimpse", to see if what we do is well received. A person who decides to lie does not need anything that could decrease its concentration level, everything must be mobilized to prevent any loss of energy that could affect the reproduction of the "pre-prepared story". It does not need to evaluate what is happening around them because nothing or nothing significant might happen there. In that room, it is an important person in the given context, who must write the statement and if something should happen, that "something" must happen after it has finished writing the statement.

What can happen if the investigator finds it necessary to have a minimal intervention, such as: "Sir / madam, can I help you?"

Usually, people in good faith accept the natural meaning of the message, finish the word, phrase or idea, relate and respond to the investigator on a natural tone, "No, thank you", or "Yes, I need ... " People in bad faith tend to give different meanings to the message, give credit to duplicity, reply very promptly, "No, I'll be done in a minute" or, "No, I'll ask, if I need anything". They must return to what they were writing as soon as possible lest they should lose anything of what they had prepared to say, the message of the reply is actually, "Don't you see I have something to do? I'll see what you want after I've finished".

An important aspect in this context is represented by the changes in the person's position on the chair, while writing the statement. Here, two possibilities must be considered:

- the person is "giving an account" in writing;
- the person answers in writing the questions asked by the investigator.

In the first case, the person in good faith is expected to change their position at irregular intervals, to seek a more comfortable position. A person who is sitting for a period of time not quite short should change its position, instinctively, searching for the best position, which they will never find, because a certain fatigue occurs – as fatigue amplifies, the changes of the sitting position will be more frequent, remaining, however, within ordinary limits, because that person in question is not simply sitting, but is writing a statement while sitting on a chair, and the body will reflect the effects of fatigue on everything it perceives as a cause. We may expect to observe other behaviours as well, such as crossing one's legs, spreading them, forehead frowning, thinned lips, chin lift, arching the eyebrows, changing the position

of the mouth corners, etc., depending on the nature of the things mentioned, personal involvement in the reported things, the nature of the emotions felt, evaluation of the consequences – on a personal level or in connection with other people involved – the judicial body to the disclosure of information held in writing, etc.

What should happen to people who came in the interrogation room with the intent to defend their own interests at any cost, including lying? First, we will notice a certain stillness, a posture of the body at the writing table, where at least a part of the body is made to suffer, there is a self-flagellation ─ the body must suffer in order to repress any inclination to communicate the truth. We will see that these people change their position too ─ they cross / re-cross their legs or adjust their position by "rubbing" against the chair, often using their hands to get up and sit again more comfortably. The investigator should be alert to the changes in position, as they usually occur under the following conditions:

─ before the person being heard describes an important aspect or answers a question asked by the investigator which might have important consequences ─ for example: "Did you leave your home on that night?" ─ The person changes its position on the chair and writes ─ "No, there was bad weather, so I stayed home, I had nowhere to go, I went to bed early because I was tired, I wasn't feeling very well and the next day I had a lot of work to do at the office".

─ while the person being heard is answering a question in writing[8] ─ "In the past two months, have you noticed any difference in the behaviour of your brother?" "Nothing", ─ the person changes its position and continues to write ─ "I do not remember anything particular, last week he celebrated his birthday and seemingly tried to flirt with a colleague, what I know for certain is that his wife, my sister-in-law, was upset".

What matters is the fact that the position of the inquired person while sitting on the chair, if and when it changes its position, are factors particularly important to the investigator, and are influenced by the emotions generated by the way the hearing is conducted; therefore, everything must be interpreted in the general context of the interrogated person's behaviour during the hearing.

We may notice the other external manifestations mentioned above as well, but there will be fundamental differences in terms of when they occur. More specifically, if with people of good faith manifestations such as those already mentioned arise in connection with the things reported and the expected consequences, with persons of bad faith, such events occur in connection with how able or unable they were to reproduce what they prepared, there are usually signs indicating the tension, at best, a duplicitous satisfaction related to the perfection of the lie, the mechanism of deception set in motion.

[8] A/N ─ Things are similar when the person makes a verbal statement.

I began by referring to manifestations that occur in the behaviour of people who give written statements, due to a certain difficulty in observing and interpreting such acts. In oral discourse, most of the events to which I referred occur and develop within a very short interval of time ─ in the doctrine, the notion of microexpression is commonly used[9] ─ unlike the written text, in which case the gestures, the facial expression, a particular position last a longer period of time, comparable to the time necessary to write the text because of which they manifest themselves.

It is accepted in most scientific papers addressing the theme that man is a bio-psycho-social being, a balanced being with a brutal, instinctive, impulsive, sensual side, that harmonizes or drifts apart, at the whim of biology, and a second side that is educated, refined, conditioned in its expression by self-control. It is relevant to the theme of this paper to say that man thinks one thing and says another ─ he says something, and eventually does something else. What he says, at least in principle, is a social message, while what he manifests through his body cannot be censored. Man, caught between desire and reality, agrees to disguise himself, to distort reality ─ in order to be accepted and / or admired in society ─ seeking justification even for his smallest mistakes or mismatches. Every time he rejects the context, man feels the need to replace reality with the truth that he creates. We may state that man[10] is the only species ... to integrate the filter of lies in its daily needs and able to lie "naturally" whenever he finds it necessary.

An honest person, who comes to the hearing wanting "justice to be done", instinctively strives to communicate with the investigator as well as possible, facing him, if possible, even while writing ─ with head, shoulders and chest directed towards the investigator. Someone who wants to hide something, to lie, will turn his legs and shoulders "away from the investigator", will sit diagonally, offering just a shoulder. Such a position expresses rather a lack of interest and emotional detachment.

Conclusions

In the end, I believe that the observation, evaluation and interpretation of the behaviour of individuals during the hearing, whether expressed in writing or orally, are fundamental to the success of the hearing, to finding the truth in the case investigated. Very important for the investigators is to analyze individual behaviours in the context of the entire conduct of the person being heard and in conjunction with what is determined as the normal behaviour of a person while it is inquired. We will never state, nor accept the issuing of verdicts or findings establishing that a person is lying or telling the

[9] See, for example P. Ekman, W.F. Friesen – Unmasking the Face, Malor Books, Cambridge, 2003.

[10] Philippe Turchet – Sinergology, from Body Language to the Art of Reading Another Person's Thoughts, Polirom Publishing House, 2005, p. 22.

truth depending on how it manifests itself in a single circumstance. What can be done, and I think this is the really important matter, is to observe behaviours that exceed normal behaviour, that indicate a certain level of emotional stress ─ which can be done in conditions at least satisfactory, and through technological means such as "the polygraph" or other variations, more or less sophisticated, which aim to identify changes in "various operating parameters of the human body" (writing, voice, the activity of ketone bodies, the reactivity of the cortical areas) ─ and the causal interpretation of their occurrence and way of manifesting. I do not consider it appropriate to initiate a possible dispute about what should be most important: the analysis and interpretation of the information content of statements or the analysis and interpretation of the manifestations of people while being inquired. In my opinion, the essential thing is for the investigator to carry out his activity in a professional manner, so as to obtain as much truth as possible from what the inquired person is communicating and, on the basis of the results of the hearing, to conduct the investigation so as to clarify all issues of interest.

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IS LEGISLATIVE INTERVENTION REQUIRED IN THE JURISDICTION OF THE ROMANIAN LEGAL LABOR SYSTEM?

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Abstract

The paper aims to answer the question whether legislative intervention is needed in the jurisdiction of the current work of Romanian law system and how it should be understood by reference to the views of experts, directly involved in the implementation in practice of law analyzed in the field, collected using sociological methods, namely focus group.

Keywords: *labor jurisdiction, focus groups, legislative changes, experts.*

Introduction

The jurisdiction is the entire labor settlement activity by certain organs of labor conflicts and other applications for labor relations and related reports, including regulations relating to the competent authorities to resolve such disputes and claims, and the procedural rules applicable[1]*. The jurisdiction of courts and attribute the work is just exceptional, labor disputes and other claims on related labor relations and their relations can be handled by other bodies as provided by law, after a special procedure (eg conflicts of interest arbitration).*

1. The Jurisdiction of Labor in the Current Romanian Legal System

The issue of the creation a specialized labor jurisdiction on the grounds of a specified legal relationship of employment generated by contract work and activities taking place in the world of work, reflected on plan regulations was put in the general trend of specialization within the jurisdiction of the Romanian legal system[2].

Labor law rules on jurisdiction are those contained in Law no. 168/1999 on the settlement of labor disputes[3] and the Labor Code[4], art. 248,

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[1] Ţiclea, Al., Popescu, A., Tufan, C., Ţichindelean, Măriaora, Ţinca, O., *The Labor Law,* Rosetti Publishing House, Bucharest, 2004, p.798.

[2] Athanasiu, Al., Dima, Luminiţa, *The Labor Law. Univerty Course*, Universul Juridic Publishing House, Bucarest, 2005, p. 31.

[3] *Law no. 168/1999 on the settlement of labor disputes*, published in the Official Gazette of Romania, Part I, nr.582 of 29 November 1999, entered into force on January 1, 2000.

249, art. 281-291. They also have an impact in resolving conflicts of rights legislation, Law no. 304/2004 on the judicial system[5], particularly those relating to judicial assistants, the Code of Civil Procedure on the material competence of courts in resolving conflicts of rights and courts of appeals jurisdiction to hear appeals against decisions of first instance, and other provisions Code of Civil Procedure, which according to article 291 of the Labor Code and Article 82 of Law no. 168/1999 regarding conflict resolution work, are common law matters.

Art. 281 Labor Code that the court expressly determined work is to resolve labor disputes on the conclusion, performance, amendment, suspension and termination of individual contracts, as appropriate, collective work under the Code and the application of legal relations between social partners.

The doctrine[6] thus formulates a set of principles applicable to the jurisdiction of work, highlighting its specificity. This category includes:

- Referral jurisdiction bodies of work, usually by the person concerned and not by default
- Close to trial to resolve the conflict within the meaning of work, but closer to where the conduct of the legal work
- Accessibility - by removing or reducing the costs involved in dealing with cases[7]
- The composition of the panel of judges at first instance (the court) with the participation of legal aid,
- Settling differences between the parties, if possible, through better understanding, that through dialogue, including the courts, not just the first day of hearings, but later, during trial,
- Rapidity of solving the cases of employment and implementation of decisions on labor disputes.

2. **The Necessity to Amend the Current Legal Regime of Labor Jurisdiction**. **The Specialists in the Domain Perspective**

In order to complement the legislative and judicial practice perspective with evidence gathered from those who actually work in practice with this procedure we analyzed the labor jurisdiction with sociologic methods, namely focus group.

The focus-group method is a complex type of qualitative investigation, which involves the presence of factors able to enhance the group value, social

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[4] *The new Labour Code - Law no. 53/2003*, published in the Official Gazette, Part I, no. 72 of 05.02.

[5] *Law no. 304/2004 on judicial organization*, republished in the Official Gazette of Romania, Part I, no. 827 of September 13, 2005.

[6] Ștefănescu, I., T., *Treaty of Labor Law*, Wolters Kluwer Publishing House, Bucharest, 2007, p. 724-725.

[7] Țop, D., *Treaty of Labor Law*, Wolters Kluwer Publishing House, Bucharest, 2007, p. 534.

relevance and validity of data obtained and based on an interview guide, almost always and only semi-structured way exceptionally unstructured type[8].

An important step in using this method of investigation is the construction of sampling and discussion group or groups. Sampling the process of selecting a limited number of subjects - a population in order to investigate them using different research methods is shown in surveys and focus-group type. Theoretical sampling type used focus groups require a theoretical model that the selection is to be made, concerning both the issues investigated and selection methodology.

In fact the choice of subjects to organize focus group is in terms of relevant information that they can offer and not only from the point of view of status characteristics that they may hold.

In the analysis that we performed we considered appropriate to use a sample of experts, a sample of individuals specially trained in performing concrete work jurisdiction, as participants in one form or another, the procedure for resolving conflicts rights. Thus we established three study groups composed of legal advisers, another group of lawyers who specialize in conflicts of rights and a group of judges, participants in the panels which decide such cases. Selection of subjects in the three focus groups was based on technology "snowball" more research used in sociology, where there are no databases, lists the population in a given category. In our case can not be identified list of legal advisers, lawyers, judges to be active participants only or mostly in conflicts of rights, because there is no specialized labor jurisdiction courts. Following subjects were identified from information provided by experts contacted. In this way we succeeded in three focus groups are as follows: a focus group comprising 12 legal advisers from companies in Oradea, a focus group comprising 14 lawyers from the Bar of Bihor County, a focus group comprising 11 judges from the Court of Bihor Court of Appeal respectively.

Another complex task is to express the researcher who conducted a focus group survey is to develop guidelines (grid) is achieved after moderation. In doing so a few are considered important aspects, namely: defining thematic horizon, the setting items that are used and the main deck and possibly the formation of AS.

In the analysis we developed the interview guide in compliance with the rigors of scientific technique using inverted funnel which is based on the general issue, introducing the topic (What do you think is your experience with d, the total weight of conflicts of rights in employment disputes ?) to finally arrive at particular topics (what do you think should be changed with respect to labor legislation jurisdiction?), generally using open questions, allowing subjects presenting specific aspects derived from practice.

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[8] Bulai, A., *Methods in Qualitative Research. The Focus-grupul in the Social, Investigation* Paideia Publishing House, Bucarest, 2000, p. 24.

The Analysis of Data

The information provided through discussions within the four focus groups in the proposed topic, have been systematized in the following groups of subjects:

• *An estimate of conflicts of rights cases decided*

The first was an introductory question to create an atmosphere of trust, sociological doctrine called "ice-breaking"[9]questions. It was phrased as: What is the weight of conflicts of rights in all cases to which you have participated (which they have settled)? The answers were different, the percentages given in all cases of labor disputes ranging from 5% -50%. Thus, the lowest percentage of lawyers are expected to range from 5-10%, indicating that an important role in resolving disputes arising out of mediation is carried out at the employer, the relationship between the two sides work, replies such as:

"If the parties discussed means to sharpen each other and does not lead to labor disputes" (VM)

"I very quickly reach labor disputes simply because the majority of employers and employees hear only when the situation is resolved to go to court"(BL)

Another explanation is that employees avoid misunderstandings arising settlement by recourse to judicial proceedings, knowing that such an option would damage their relationship with the employer and practical, in fact, the impossibility of continuing them. In that regard, discussions have emphasized the idea that, in practice, if the employee is addressed to the court challenging the legality and validity of a decision to dismiss, even if the court has with his employment compensation and resettlement, the concerned will choose not to restore the working relationship with the employer, aware of the impossibility of that decision. However two situations are the exception to the rule mentioned, were raised in the discussions, namely female employees of a public institution in Oradea, which have appealed against the dismissal decision issued by the employer, have been reintegrated in work and relationships is normal work with it. The perception expressed by the subjects suggests that different treatment of employees in public institutions compared to private sector employers are more demanding in relation to staff with broader opportunities for informal sanctioning of those concerned, which would lead them to take themselves. In addition, employees in public institutions the opportunity to collaborate with potential return to the institution, with another management team is higher, given that their appointment on political grounds in recent years has been a consistent practice.

The percentage of judges estimates are higher, ranging between 15-20%, depending on the number of cases covering conflicts of rights which they were assigned randomly by computer. Concerning this practice, used in

[9] Bulai, A., *op.cit.*, p. 29.

the Bihor courts that idea was expressed, its use is that judges can not specialize in labor disputes, as always faced with the need to address other types of litigation.

• *The working relationship most frequently located in the position of plaintiff*

The second question makes express reference to who has (had) the overall quality of the applicant in cases where the subject attended by focus group. Responses, regardless of conflict of rights that the respondent indicates that the employee or former employee unions, their members, as complainants in this type of conflict. The employer stated that the complainant, in a few cases and generally, when it initiated the procedure for recovery of damages caused by employees.

• *The subject of conflicts of rights*

The third question asked as "What is the predominant subject of conflict of rights?" The replies of respondents can be grouped into two broad categories namely: wage claims, a category that raises were given, failure to pay, the bonuses, the leave allowance and compensation in case of collective redundancies and that objections to the decision to dismiss, especially as a disciplinary measure. In cases where a plaintiff employer, subject to conflicts of rights is generally related to the payment of compensation for damages caused by the employee for failure or improper performance of obligations under the employment contract (eg, deficiencies in management if employee management).

Focus-group proposal made up of lawyers on the need during the crisis currently faced by society to become more flexible labor laws so as to allow the parties to the employment relationship easier to negotiate a possible extension payment period or performing activities that are necessary but can not be paid deserves attention.

• *Opinions on the principle of speed in resolving conflicts of rights*

The answer to the question "The speed in resolving conflicts with the principle of rights. Why? "Provide different perspectives on this part of the special procedure for resolving conflicts of rights, depending on the position of respondents in the process.

Thus, judges consider that the principle is to respect speed in resolving conflicts of rights, because of evidence is more easily, rarely heard witnesses, or have particular expertise using the documentary evidence, to be submitted by the employer. It is probably a tendency to defend the system, the perpetuation of routine practice. There are also judges, placed in positions of responsibility in the hierarchical structure of the system that expresses views similar to those made by lawyers, legal advisors, respectively. From their point of view, although efforts are made to respect this principle, in practice it is not done, the timeframe is sometimes longer than 30 days, up almost 2 months. Explanations for this phenomenon relates, on the one hand, the increasing number of cases relating to pensions and other social insurance rights handled by the same panels and labor disputes on the other hand, the

effects generated by the magistrates' protest which resulted in the reprogramming of a large number of cases, including the area to which we refer.

"The panels are specialized for labor disputes and social insurance, and 80% from the list of sessions, over 100 cases per day are social insurance. This is why they are so long term." (M.C.)

Another explanation for the failure of the principle of speed refers to the fact that, although there is a special procedure, expressly regulated in respected jurisdictions it does not always work, so the procedure for the summoning of the parties and witnesses, requests for deferment shall be governed by the rules common law and the employer, to whom the burden of proof incubation in labor disputes not submitted evidence to defend the first look within.

There have been identified and possible solutions to correct this shortcoming, the solutions will be presented in the final part of our analysis.

• *Difficulties encountered in resolving conflicts of rights*

To the question "What difficulties have you encountered in the procedure for resolving conflicts of rights?" Judges was a standard response:

"I have encountered difficulties that can be characterized as special"

Reasons for this type of response is relatively simple, that they attempt to find truth and to give a legal ruling and thorough, judges are not affected either directly or indirectly, any shortcomings of the labor jurisdiction, as it is regulated this time. I would expect that the difficulty raised by the subjects relate to the large number of files of cases that have settled, which is typical of the judiciary in Romania explanatory discourse today. Surely this is not only about the scope of conflicts of rights and covers all types of cases, already become a normal phenomenon and a very subjective perception.

Lawyers, which are a part of the employment relationship but claimed they face many difficulties in the procedure for resolving conflicts of rights, the difficulties arising in particular the effects of legal and economic subordination of the employee to the employer, such as delaying case by the employer, who by constant delays, does not submit the necessary documents; difficulty of evidence, particularly evidence of witnesses who are intimidated to testify in the proceedings by suggesting possible repercussion the employer or his colleagues , the inequality between the employer, who is usually represented by legal counsel and / or lawyer, that employee or former employee who can not afford to hire a lawyer to represent him in the process, intention biased employers to prove that there is no legal relationship employment, a prerequisite for the birth of a labor dispute in the case of rights.

"*There are employers who seek to prove that employees were only working sample or visit to the only, motivation sometimes even hilarious. Moreover, a purported employees or employees are called as witnesses and support these hypotheses.” (M.L.)*

The difficulties facing lawyers say, representatives of employers, particularly in facing the current procedure, considered "heavy" and "non-flexible, it allows permanent postponement of court deadlines, sometimes for years,*" for example asset liability cases, when necessary accounting expertise at the request of either party, may prolong the dispute for years "(BV).*

Last question asked participants in the focus groups mentioned had the following wording: "What do you think should be amended to legislate in relation to resolving conflicts of rights? (Including proposals for specialized labor jurisdiction). "

The responses made by subjects, which we consider very interesting and useful were varied, but mostly do not allow that the other answers, classifications, depending on the category of respondents: judges, lawyers, legal advisers, the mere listing is sufficiently suggestive. Such proposals have been formulated following amending legislation considered: changes in the plenitude of jurisdiction first instance court in respect of conflicts of rights and awarding her back, court; creation of fund formation of a single judge; creation of specialized courts in labor disputes, made up of representatives of employers and unions, with the participation of exceptional only in cases of dispute or appeal, judges and career; creation of specialized courts in labor disputes, in line with historical experience of the Romanian legal system; expressing the view of legal aid in the courtroom before the parties present; the appeal court panels should include judicial assistants; specific rules by special rules of procedure, the admissibility of the appeal and use of other evidence outside the pleadings, so long as the principle solution cassation appeal with restraint, cracking the reference is only possible as an exception in cases expressly covered by the provisions Law no. 168/1999 on the settlement of labor disputes (articles 81, paragraph 2); need for a demarcation between labor disputes and social security within the meaning of their separate judges, in order to relieve the specialized excessive number of cases; assigning roles deliberative complete legal aid work, to justify their presence, if not as actually existing governing laws, judicial assistants have only an advisory role and may even be absent from court.

3. **Conclusions**

Analyzing labor jurisdiction from an interdisciplinary perspective, legal and sociological (qualitative focus group method used to identify the opinions of specialists in the field), The work aims to provide suggestions for legislative intervention in the matter under review. At first we present the characteristics of the jurisdiction of current labor law system that formed the support structure of some questions to experts.

They share relevant information regarding labor disputes in all conflicts, their most common objects, the difficulties encountered in actual practice and the proposals to improve the procedure for resolving conflicts of rights. The main idea that evolved from the views expressed was that it

required further specialization of labor jurisdiction even if those types of subjects to achieve it are diverse.

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THE RIGHT TO MIGRATION. IMPACT OF MIGRATION IN THE LEGAL AND FAMILY SYSTEMS

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Abstract

In this study we will analyze people's possibility of migration regarded as a world-wide phenomenon. The territorial movement of people is related with the economic development and with the rapports between different countries from around the world. Generally, the people migrate from poorest regions towards the richer ones, where they can enjoy a better life. In Europe, people's migration has multiple causes: precarious living conditions, familial and personal insecurity, the overcrowding of some demographical areas, certain natural calamities, political and religious persecutions. The last part from this study analyzes the main aspects regarding Romania's Strategy concerning the main development policies taken into consideration by our Government for migration.

Keywords*: human rights, expansion, migration, migratory strategy, policy*

Introduction

The process of economic development of the Western Europe's countries favored an ample territorial movement of the population from different countries. This mass movement was, on one side, from the poor societies towards the flourishing ones, and, on the other side from the Europe's rich countries to the other areas and places of the world. Thus, the geographical mass movement, in the world, has become an international phenomenon. This couldn't have been possible without the economic, political, social and technological changes that embraced the European population during the 16th to 20th century. The fluxes of the international migration are closely related with the evolution of the relations between the different societies, with the agitation of the social-political life from different countries, with the activity of the technical-economic factors and with the people's desire of living in better and safer conditions.

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1. Short history regarding the European expansion

Of course the movement of the masses on large distances was very much influenced by the evolution of transportation (regarding the travelers' volume, the accessible routes for traveling and the moving speed). The perfecting and the permanent diversification of the means of conveyance have favored the continuous growth of the contacts frequency between different human communities and, implicitly, the migration phenomenon on the continental and intercontinental level.

The population's spatial repartition in the world has been influenced, during the humanity history, by numerous changes produced by the evolution of the natural, political, military, economic etc. factors. For example, in the period of The Roman Empire had been deliberately made huge transfers of human masses. The discovery of America (the end of the 15th century) entailed a massive migration towards the new world, especially from Europe. The need of cheap labor on the south-American plantations encouraged the slave trade, being bought from Africa about 12 million black people. During the 19th and 20th century the migratory fluxes were amplified. Thus, from Europe, especially the western one, 30 million people moved towards USA, 2 million towards Canada, 12 million towards Latin America. In less than a decade, from Romania alone emigrated in USA, between 1997 and 2002, 14.070 persons[1].

2. The world-wide migrants fluxes

The migration is a phenomenon in the same way as "the events of death and birth, as an example, through aggregation are defining the phenomena of mortality and fertility"[2].

The population of America and Oceania is mostly made from immigrants. Almost the entire population of USA and Canada has a foreign provenience (it is thought that the descendants of the native Americans would constitute only 4% from the nowadays USA population and the aboriginal population from Australia represents 8% from the total of the actual population, the other 92% being the descendants of the European immigrants). USA has a total of 19.6 million immigrants, being followed by India (8.6 million), Pakistan (7.2 million), France (5.8 million), Germany (5 million), Canada (4.2 million). In an over 90% from the natural extreme environment we can still find tribes of nomad shepherds, forced to continually move from one place to another, in order to provide food for their flocks. The tribal societies from the desert have no dominant central leadership, but only a tribe chief, with limited authority. Among them, the most known is the *tuareg society* (the name of *tuaregs* was given by the Arabians and means

[1] As it results after the totalizing of the statistical data, published in *The Romania's Statistics Annual*, the National Institute of Statistics, Bucharest, 2003, p. 89.

[2] Dumitru Sandu, *Fluxurile de migraţie în România,* Academia Publishing House, Bucharest, 1984, p. 20.

"abandoned by the divinity") that is spread across five countries (Algeria, Libya, Nigeria, Mali and Burkina Faso). Until the 20th century, the tuareg caravans have represented, from the commercial point of view, a bridge between the Mediterranean world and Africa. *The tribe* is the basis element of the tuareg society, its members (which's number varies between few dozens and few thousands) having a common origin or that from a common ancestor. The United Emirates' population is constituted from immigrants. During 1990-1998, the immigrants constituted over 79% from the population of Andorra, almost 72% from Kuwait's and 67% from Monaco's etc[3].

In a short analysis on the Mexican immigration from USA, the writer Richard Rodriguez, didn't dissimulate that America, the country that was totally build and sustained by immigrants, have suddenly become intolerant with them. Actually, his reaction is directed towards the law 187, voted by the inhabitants of California in 1994 that forbade the medial assistance and education to the children of the illegal immigrants from the territory of that American state. Starting from the disavowing of this hard legislative measure the author offers a sincere pleading for understanding the immigrant condition and a suggestive definition from the sentimental point of view and in the common believe: "The notion of <<illegal immigrant>> allow us to forget that all the immigrants are outlaws. The immigrants ignore the customs, overlook the conventions. Being immigrant means to abandon your father and your village, to desert your mother in tears. The immigrant starts a violent conflict both in his mountain village and Los Angeles"[4].

3. The attitude of Romania regarding the migration

The Romania's national strategy regarding the migration[5], approved by the Government's Decision nr. 616/2004 establishes the general background for developing the policies regarding the migration and the asylum. Implementing them, the Romanian authorities that have competences in this field wish for the harmonization of the internal legislative background with the international law and the acquis of the European Union, the development and the modernization of the institutional background necessary for the implementation of this field policies, the adopting of a modern management in the domain of the human, material, financial resources together with the unitary coordination of the institutions that are competent in this field.

In November 2005, the member institutions of the inter-ministry Group for coordinating *The national strategy regarding the migration*

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[3] George Erdeli, Liana Dumitrache, *Geografia populaţiei,* 2nd edition, Corint Publishing House, Bucharest, 2004.

[4] Nathan Gardels, *Schimbarea ordinii globale. Văzută de marii lideri ai lumii*, translated by Marius Conceatu, Antet Publishing House, Bucharest, p. 177.

[5] www.gov.ro.

finalized the project of *The acting plan for 2006*[6]. The plan contains actions and concrete deadlines, took upon oneselves by the authorities with competences in the field of migration and asylum, concerning the established targets:

- the development of the legislative background for migration and asylum and its harmonization with the European acqius;
- the intensifying of the prevention actions and combating the illegal living and work;
- the growth of the coordination level on the institutions with competences in the field of the foreign people social integration;
- the development of the logistics capacity and of the human resources of the institutions with attributions in managing the migration phenomenon and the asylum;
- the increasing of the professional training level of the staff from the institutions with attributions in the field of migration and asylum.

Therefore, in Romania, *The national strategy regarding the migration* doesn't aim the policies regarding the migration of their own citizens. This governmental document expresses the general principles and the guiding lines for establishing the Romanian state policy regarding the admission, the living, the leaving of the territory by foreign people, the immigration of the labor, the providing of the protection forms and the combating of illegal immigration.

The coordination of all activities related with the bringing into operation of *The Romanian's national strategy regarding the migration* is devolved upon The Administration and Internal Ministry, through The Foreign People Administration and The National Office for Refugees. The bringing into operation of the Strategy requires an inter-institutional cooperation between the mentioned Ministry and the other public central and local authorities, non-governmental and international organizations.

4. Policies

1) *The policy regarding the controlled immigration* has a primary objective the promoting of the admission of the foreign people legal staying in Romania, by applying some measures in line with the European Union standards and with those existing on the international level, without affecting the persons' right to free circulation.

2) *The policy regarding the prevention and the combating of the illegal immigration* takes into consideration, first of all, the prevention of wide scale immigration of the persons from world's disadvantaged regions, from areas affected by internal and international conflicts, by humanitarian crises etc. The existing legal and institutional background allows a monitoring of illegal immigrants fluxes that affects our country territory.

[6] The bill for the present normative act received the favorable notification of The Legislative Council through the note nr. 578/19.04.2006.

3) *The policy regarding the asylum* has as main objectives the ensuring of the access to the asylum procedure and the respecting of the non-returning principle, conformingly with the international standards that Romania took upon itself; the development of the asylum system and, in the same time, the prevention, the discouraging and the sanction of the abuses when using the asylum procedure; the assuming of a role by our country during the regional and international cooperation in the asylum field, including the contribution to the development of some asylum systems that are functional in eastern and south-eastern Europe.

4) *The policy regarding the social integration of foreign people* has as major objective the maintaining of their active participation to the economic, social and cultural life, respecting, in the same time, the cultural identity of the foreign people that live or have the legal residence on the Romanian territory. The responsibility of coordinating the integration programs for refugees and other persons to whom was given any form of protection is devolved upon The National Office for Refugees (N.O.R.), institution that has the responsibility of the Romanian Government policies concerning the asylum. In exchange, the practicing of the programs of the refugees' social integration is made due to the collaboration of N.O.R. with the central and local authorities and the non-governmental organizations.

5) *The policy regarding the returning of the foreign people/the voluntary repatriation* has as general objective the growth of the state's acting level for combating the illegal immigration. As a matter of fact, the efficient policy of sending back people is a main component of the immigration management. The Romanian state promotes the voluntary repatriation as a preferred alternative for the forced returning, offering to the interested foreign people services of counseling and efficient programs of assisted voluntary returning.

5. Conclusions

The present paper is an attempt at trying to examine the degree of use of the migration right and knowing the manifestations of this phenomenon at national level. According to dedicated studies, it is known, up to now, that over 3 million of Romanians left the country to work abroad or settled permanently in the territory of other states. Most of them left beginning with 1990, and are now in such countries as Italy, Spain, France, Germany, Greece, and so on.

The largest Romanian communities abroad, in Europe, are those in Italy and Spain. These, as well as those settled in other countries of our continent, face a series of difficulties regarding their rights (especially their labour rights), their cultural and educational inclusion in the respective societies.

Acknowledgment

"This work was supported by the strategic grant POSDRU/89/1.5/61968, Project ID 61968(2009), co-financed by the European Social Fund within the Sectorial Program Human Resources Development 2007-2013".

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THE RELATION ESTABLISHED BETWEEN THE EUROPEAN LAW AND THE ADMINISTRATIVE CONTENCIOUS LEGAL PROVISIONS

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Abstract

In its jurisprudence, the Court failed to consider the conditions under which a member state has introduced the treaty in its national law, taking into account that the receiving hadn't had the effect of transforming the treaties and that they must be applied by domestic courts to the extent that they belong to the European law and not the national one.

Key words*: european law, administrative contencious legal, autonomy, principles, jurisprudence.*

Introduction

Romania's accession to the European Union (EU), determined the European law to become mandatory and enforceable under the conditions set by the original treaties and the Act of Accession (art. 2 of the Act of Accession to the EU).

Autonomy and principles of the European law

EU's treaties and regulations created an autonomous legal order that is directly imposed to member states and natural persons or legal entities within the European Union.

Thus, in the court case Costa / Enel, the European Court (former Court of Justice of the European Union-Court) has pronounced upon *the autonomy of the European law (Community law) in relation to the national law* of the member states, stating that the EEC Treaty has set its own legal order, integrated in the legal system of the member states, which is imposed to the national judicial bodies, without the member states' ability to take a subsequently unilateral action against this legal order.

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The Case is based on the innovative nature of the European Communities that do not create classical interstate relationships, but a limitation of powers and a transfer of competences to the Community.

In theory it was shown that there is no contradiction in presenting the Community order as being both different from national orders and forming an integral part thereof as well[46].

In this context, it should be noted that the Community provisions' integration in national systems is done automatically, without the interference or intervention of national authorities, however, the national judge applies the European law in its quality as legal autonomous order, and not as a national one.

In its jurisprudence, the Court failed to consider the conditions under which a member state has introduced the treaty in its national law, taking into account that the receiving hadn't had the effect of transforming the treaties and that they must be applied by domestic courts to the extent that they belong to the European law and not the national one[47].

In our opinion, the provisions of art. 4 par. 3 of the Treaty on European Union -Lisbon Treaty (former art. 10 par. 2 T.E.C.), which regulates the principle of loyal cooperation, introduces into the member states's duty an obligation "of not doing" in the sense of not taking measures that would jeopardize the application of Community provisions.

The rule instituted by the provisions of art. 267 Treaty on European Union (former art. 234 T.E.C.) establishes the cooperation procedure between national courts and the Court in Luxembourg for a uniform interpretation and in order to ascertain the validity of European rules, making the national judge the judge of the European common law, which is maintained by the Court's interpretation.

The European court case law has established the link between the principle of cooperation and the principle of direct effect of the Community law's dispositions[48].

The direct effect of the European law, as a basic principle, is that the Community provisions - clear, precise and unconditioned (are not subordinated to any further action that contains a discretionary power either of the European institutions or the member states) - may be invoked by individuals, natural persons and legal entities, directly before the national judge, when rights in their favor are created, in the absence or disregarding the contrary national rule and stating that authorities do not have

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[46] See Guy Isaac, Marc Blanquet, *Droit general de l'Union Europeene*, Publishing House *Sirey 2006*, p. 262.

[47] Ibidem, p. 265.

[48] Ovidiu Tinca, J*urisprudenţa Curţii de Justiţie a Comunităţilor Europene referitoare la principiul cooperării loiale între statele membre şi instituţiile comunitare*, *R.R.D.C. no. 3/2007,* p. 51.

discretionary power regarding the implementation of the European provisions.

The fundamental elements of the principle have been established for the first time in *Van Gend & Loos decision* (covering the direct effect of the treaty's provisions) *where the European Court has pronounced upon the autonomy of the European law against the national law*, and the fact that is biased when generating rights in favor of individuals within their legal jurisprudence, which must be protected by national courts.

We state, same as Pierre Mathijsen[4], that the direct effect of the European law has been recognized since the beginning by almost all national courts, which, by submitting "prejudicial issues" to the European court, agreed that European provisions should apply to their judicial system and confer rights which they must support.

Just by analyzing the criteria that have to be met by a European provision in order for its direct effect to be recognized (clarity, precision and unaffectedness of conditions), we note the following:

a) the *regulation* has a direct effect in accordance with art. 288 par. 2 EU Treaty (former art. 249 par. 2 T.E.C.) which states that "it is binding in its entirety and directly applicable in all member states" and consequently, the direct effect can not be opposed to a legislative provision of a national law which should compromise its essential character *(cause Orsalina Sconisio/ Ministero de l'Agricultura e Foreste)*[5].

In theory, it was shown that the regulation has a completely direct effect - vertical and horizontal, operating in the relationships between states and individuals, as well as in the relationships between individuals[6], claim which seems fair and is supported by the European court case.

b) the *directive* is mandatory for each member state regarding the result that has to be achieved, but gives the authorities in the process of transposition competence relating to form and means.

The directive does not confer in the first phase any rights or obligations for individuals, however, if properly implemented, its effects reach individuals through implementing measures taken by the state.

By analyzing the practice of the Court of Justice it ensues the fact that it has a direct effect only on condition that the member state has not adopted measures of transposition within the prescribed period or made an inconsistent transposition, the directive establishing rights that individuals and legal entities may use against the state (*Becker decision C8/81*)[7].

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[4] See Pierre Mathijsen, *Compendiu de drept european, VII edition*, Publishing house Club Europa 2002, p. 48.

[5] Indicated by Ovidiu Tinca in *Efectul direct al dreptului comunitar*, Dreptul no. 11/2007 p. 69

[6] See Jean-Caude Gautron, *Droit europeene*, Publishing house Dalloz 2006, p. 181

[7] Decision from 19.01.1982 in C.J.E.U. Jurisprudence, vol. I, p. 52

Therefore, the direct vertical effect of the directive can not be resisted unless its provisions are clear, precise and unconditioned against any further action or subject to a certain term.

In the French doctrine[8] it was stated that the lack of enforcement of the directive (not being transposed or its incorrect transposition) is the one that substantiates the power and the national judge's duty to directly apply it, and is a necessary condition added to the unconditional and sufficiently precise character of its terms.

As for us, we agree with this view and add that the two conditions - failure to transpose the directive and its unconditional nature - must be met simultaneously, and where, for lack of transposition or inconsistent transposition, harm has been done to individuals, the European law requires member states to compensate for damages, the national court being competent in deploying the state's willingness to assume responsability.

This will be initiated only if all three conditions are simultaneously met:

a) directive to recognize rights in favor of individuals,

b) the rights' content should be identified by means of the directive's provisions,

c) existence of a causal connection between the breach of the obligation incumbent on the state and the harm suffered by the injured party *(Francavich and Bonifaci decision C/ Italia C6/90 and C9/90)*[9].

In court case *Ratti*[10], the Court reiterated the reasons set out in the *Van Duyn case*, regarding the purpose of adopting directives and the possibility of their direct effect, stating in par. 22 that "a member state that has not adopted the implementing measures required by a directive within the prescribed period can not oppose individuals to the failure of fulfilling its obligations under the directive."

From the above, it results that the theory developed by the Court in case of directives reflects the principle *nemo auditur propriam turpitudinem suam allegans.*

In conclusion, it has to be shown as well that, although member states have an estimation margin (discretionary power) when implementing a directive, an individual can, through the national court, determine whether authorities have overstepped the bounds of evaluation.

c) decision under art. 288 Treaty on European Union (former art. 249 par. 4 T.E.C.) is binding in its entirety for its recipients, who may be individuals or member states.

As the Court had pronounced in the *case Franz Grand*[11], decisions addressed to individuals who qualify for the purposes of clarity, precision and

[8] See Guy Isaac and Marc Blanquet, op.cit., p. 277.
[9] C.J.E.U. Jurisprudence, vol.II p. 411.
[10] Quoted by Tudorel Ştefan and Beatrice Andreşan-Grigoriu, op.cit., p. 219.
[11] Cause 9/70 Franz Grand quoted in op.cit., p. 214.

unaffectedness by circumstances, have a direct vertical effect.

We conclude by arguing that if a Community disposition has a direct effect, the national judge is obliged to protect the subjective rights created for individuals, letting the national contrary rule utterly unenforceable.

For the purposes of the above, our supreme court has pronounced a decision[12] in which the provisions of Directive no. 2004/38/EC of the Council and European Parliament (on the free movement of EU citizens), came into conflict with the provisions of art. 38 of Law no. 248/2005 which restricted the exercise of this right; on conditions of the directive not being transposed on time, the national court applied the European law, protecting the individuals' rights confered by the Directive.

Besides its direct effect principle, the principle of priority of the European law is also a consequence of the obligation of loyal cooperation between member states.

Affirming the principle of priority was firstly made by the European court during the famous *case Costa / Enel* which resolved the conflict between the Treaty and an Italian law [13].

It was thus stated that the supremacy of the European law is confirmed by the provisions of the art. 288 Treaty on European Union (former art. 249 T.E.C.), according to which regulations are binding and directly applicable in all member states.

Based on these considerations, the Court stated that "the legal system of the Treaty can not be surpassed because of its special and original nature, by national legal rules, whatever their legal force, without being deprived of its character as Community law and without the legal foundation of the Community itself being called into question."

In the court case *Interntionale Handelsgesellschaft,* the Court reiterated arguments because of *Costa / Enel*, stating in paragraph 3 that "the validity of a European measure or its effect on a member state's territory can not be affected by allegations that the measure would be contrary to fundamental rights, such as those formulated by the Constitution of that member state or the principles of national constitutional structure".

From the above, and the doctrine's analysis[14], one can conclude that the principle of Community law has an inclusive effect against national constitutions and consequently any national legislation incompatible with the Community law constitutes a bar, and the national judge is the one that has to apply the Community law's dispositions.

In this respect, in the court case *C-106/77 Simmenthal*[15], seeking a preliminary ruling, former ECJ decided that the national judge should ensure

[12] I.C.C.J., Decision no. 5982/2007 published in P.R. no. 1/2008.

[13] C.J.E.U. Jurisprudence, vol.I pag. 115-Decision C6/64.

[14] See Octavian Manolache, op.cit., p. 72; Tudorel Ştefan and Beatrice Andreşan-Grigoriu, op.cit., pag. 192; Jean Claude Gautron, op.cit., p. 185.

[15] C.J.EU. Jurisprudence., vol.I, p. 115.

the full effect of the provisions of the European law against any contrary provisions of national law, even later ones, without seeking or expecting its prior removal by legislative means or constitutional court.

In this context, it should be noted that in another case, former ECJ went further, requiring the British judge, for the case where national law forbids them to take interim measures, with the purpose of ensuring the existence of the rights invoked in virtue of the European law, to remove the application of national rules incompatible with the Community law *(C213/89 Factartome LTD/ and others)*[16].

As for us, we reject the priority thesis of the European law against national constitutions, reaching for the limited superiority of the European law, its supra-legislative value, but infra-constitutional in the same time, so that in case of a conflict with the national law, it prevails, but not in case of a normative conflict with the constitution. We argue our position with the approach adopted by the Romanian Constitution as well, which, in art. 11's provisions imposes a priority principle of all international treaties against any national laws, these having therefore a supra-legislative position in the hierarchy of legal norms, but an infra-constitutional one at the same time, meaning that if a treaty contains provisions contrary to the Constitution, it will only be ratified after reviewing the Constitution.[17]

The national judge asked to rule on the compatibility of a national legislation with the European law, can refer to the Court with an "appeal of interpretation" in order to be able to settle this issue of compatibility.

This action regulated by the provisions of art. 267 Treaty on European Union (former art. 234 T.E.C.) is also a judicial cooperation mechanism which establishes the participation of the Court of Justice to the national courts' regulation, due to the dialogue from judge to judge.

In the occidental doctrine[18] it was considered that the appeal of interpretation regulated by the provisions of art. 267 Treaty on European Union (former art. 234 T.E.C.) has three functions:

a) to ensure the unity of the Community law by avoiding differing interpretations of national jurisdictions;

b) to fill infringement appeals when finding about the state not fulfilling its obligations to which individuals have access, if a conflict between a provision of national law and a Community disposition;

c) to complete the action of cancellation (as to the validity of a secondary legislation act), to which individuals have limited access.

Being in agreement with the doctrinal statements, we can afford to supplement them by saying that the mechanism of prejudicial issues causes the accessibility of the European law to litigants and the national judge who

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[16] Jurisprudence of the C.J.E.U., Vol.II, p. 403.

[17] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *Teoria Generală a dreptului,* Publishing house CH Beck 2008, p. 200-201

[18] See Jean-Claude Gautron, *Droit europeen,* Publishing house Dalloz 2006, op.cit.,p. *175.*

in the future is no longer obliged to notify the Court of Justice of the European Union with an appeal of interpretation.

Regarding the obligation to notify, the Court of Justice in *case C 283/81 SRL Clif and Lanificio di Gavore SpA C / Ministry of Health*, stated that a national judicial body whose decisions are not subject to appeal under the national law is obliged, when before it it is formulated a question about the European law, to notify the Court of Justice unless it finds the question irrelevant or the European disposition was interpreted by the Court or the right way of implementing or the European law is so obvious, that it leaves no room for reasonable doubt.

When reasoning the decision stated above, the theory of "clear act" and "clarified act" from the French law is being applied.

Conclusions

In terms of assessing the validity of the European law, the notification is required when the judge has a serious doubt on the validity of the European act contested by way of exception.

In our specialist literature it was appreciated that in case of an appeal of interpretation, we have a judge a quo who has to, and if necessary, has the possibility to suspend proceedings and send the competent judge ad quem a controversial legal issue and who the case's settlement depends on.[20]

In this context, it is clear that the European court does not replace national jurisdiction, it gives an abstract decision that affects the attitude of national judges when adjudicating a concrete solution, but does not apply the law in its place.

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THE EFFECTS OF THE COMMUNITY LAW ON THE LAW SUITS DEALING WITH THE "POLLUTION TAX"

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Abstract

Being part of the European Union, the member states including our country, have to make serious efforts in order to bring the national law to the demands of the Community law. That is why the national judges have a more difficult job in giving a good and legal decision in trials. One of the best examples in this respect are the trials regarding the "pollution tax". There are serious reasons why this tax is illegal and it violates the Community law, but even though not all the Courts from Romania have managed to reach a uniform decision in this respect.

Key words: *"pollution tax", European Community Treaty, OUG 50/2008, judge,*

Introduction

Once Romania became member of European Union, all the institutions of the state had started the process of solving the requests of the European Community. More than the others, the juridical system was and continues to be in a continuous process of adjustment to the community law. Even though each state has its own juridical system and "packet of legislation", when it has to deal with a conflict between the community law and the national one, the community law wins.

According to the provisions of the Treaties, The European Court of Justice is a jurisprudence which has the duty to ensure the observance of the community law on interpreting and applying the treaties. Within the institutional system of Community, the European Court of Justice has a sovereign power.

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Analyzing the treaties, the Court's decisions cannot be discussed neither by the member states nor by the other community institutions. That's why, it's recognized that the jurisprudence of the European Court of Justice is source of community law with the primary and secondary legislation.

Unlike the most of the international treaties, the community law doesn't oblige the member states in relation to each other, but it offers to the individuals the certain rights which may be referred to in front of the national Courts against the public institutions or other individuals. This is called the *direct effect of the community law*. The European Court of Justice had mentioned about this principle, for the first time, in Van Gend en Loos Decision from 05.02.1963. In that case, was discussed the direct applicability of art. 12 (now art.25) of the Treaty, according to which, the import and export duties and the taxes having equivalent effect are forbidden between member states; interdiction which is applied also to the fiscal duties. Upon this text, the European Court of Justice mentioned also, that not only the regulations but also the other community rules are likely to be applied, if they are unconditioned and sufficiently precise. As an argument, it was referred to, the objective of the CEE Treaty, regarding the established of a common market whose operation involves directly the litigants of the Community.

Because the Community Treaties don't mention anywhere that they have to prevail upon the national law of the member states, we may say that each state may decide upon the level on which the community law is applied. Some of the national Courts decided that in case of conflict between a community rule and a national one, the most recent one should prevail.

This kind of analyze have given to the states the possibility to annihilate the effects of the community law, giving national rules with superior juridical value or even equal to the community rules. That's why, the European Court of Justice issued the *principle of supremacy of the community law over the national law of the member states*, by another famous decision (Costa vs. Enel from 15.07.1964).

For the European Court of Justice, the integration objective, pursued by the Community, cannot be accomplished unless the community law is respected and uniformly interpreted in all member states. It has been decided that the supremacy of the community law over the national law is a "sine qua non" condition of the integration. That is why, the community rules precedence over all the national rules, no matter the nature and the level of the national text (constitution, law, decision, decree) or of the community text (treaty, regulation, directive, decision).

As a consequence, the role of the national judge is to take all necessary measures for applying the community law, measures that are not attached strictly to the principle of supremacy and of direct effect, but rather art.10 of the Treaty.

There is a large jurisprudence especially on the application of the Directives, as juridical instruments of the community law (which don't have a direct effect), which underlines the role of the national judge as a judge of common law in Community matters. The role of the Directives being to ensure the harmonization of the national legislations as required for the Single Market, it's absolutely necessary their disposals to be applied with equal importance, force and at the same time across the European Union. These three exigencies must also be put into practice, according to the principle of the institutional and procedural autonomy, by the national judges, charged to apply the Community Law.

As a consequence, the national jurisdictions, using the procedural means, have to ensure the entire efficiency of the Directives. But, because of the inconsistency between the national laws, it seems quite difficult to realize the procedural harmonization by judicial. Therefore they must fix the minimum rules, consisting in, assuring the efficiency of the judicial review and also in intensification of this review.

The CEJ jurisprudence has gradually increased the exigencies on the national judge, who must at least pronounce the unenforceability of national rules contrary to Community Law. To this obligation (foreclosure effect) another one is added in charge of the national judge, that is the positive obligation of application, with immediate effect, of the community rule instead of the opposite national one (substitution effect). Thereby, *if the disposals of a Directive accomplish the technical conditions of the direct effect, meaning, they are intelligible, unconditional and legal perfect, they are liable to be applied by the national judge* in a trial, opposing a litigant who invokes those rules to the member state which hasn't accomplished its duties. So, the national judge has a *quasi normative* role, according to the art. 3 Romanian Civil Code "*The judge who refuses to hear and determine a case because the law is unclear or insufficient may be accused of denial of justice"* [49].

We may notice that when it is about a conflict between the Community Law and the national one, The European Court of Justice is preoccupied of immediate application and of superiority of the Community Law. But this

[49] Codul civil si 15 legi uzuale, Ed. Hamangiu, Bucuresti, 2009, art.3, p. 13.

severe jurisprudence of the ECJ encounters serious resistance from the national jurisdictions, mainly on the argument of the hierarchy of the legal rules and of the insufficiency of the internal means of procedural law.

For example, in the Benelux Countries, the principle of the primacy of the Community Law is highly respected. In the Constitution of the Benelux Countries by the revisions accorded after signing the Treaties, the problem was exhaustive and thoroughly analyzed, stipulating that, if the development of the international order requires, an international Treaty may depart from the constitutional rules. The same procedure is applied also in Luxemburg and Belgium and the jurisdictions of these countries established the primacy of the international law generally and then, expressly of the Community Law.

But in Germany and Italy, which distinguish from the others by a strong system of constitutionality control, the application of the principle of primacy of the Community Law has encounter some obstacles.

The states, which later joined the Community, not being founding members, as the case of Romania, were generally marked by the preparation for adhering. Here an important role had the modification of the constitutions or, at least, the insert of some rules into the national laws in order to assure the efficiency of the primacy principle.

It is known that, by the Association Agreement of Romania to European Community approved by Law no. 20/1993, our country took the obligation of assuring the gradual compatibility of its legislation with the Community one (art.69).

Heading our attention on one of the current problems of the Romanian Courts, regarding the trials for the redeeming the "pollution tax", we may notice that, the Courts tend to apply the Community law and to establish the violation of the European standard. Thus, a new opinion was formed, this time a fare, consistent and relevant one, regarding the solving of these cases.

The main and significant aspect that the majority of the Courts had in view was the discriminatory nature of the O.U.G. no. 50/2008 for establishing the pollution tax for vehicles, modified by OUG 218/2008 and by OUG no. 7/2009 in flagrant contradiction with art.90 of the European Community Treaty.

This tax is discriminatory and illegal according to art.90 of EUT which says that: *None of the member states applies directly or indirectly, to the products of other member states, internal taxes of any kind bigger than those applied for the similar national products. None of the member state applies to the products of other member states internal tax in order to protect other*

manufacturing sector. Also, according to Law no. 157/2005 and to art. 148 it.2 of the Constitution which says that: *Following the adhering, the rules of the Treaties of the UE and also the other compulsory community rules have priority to the contrary rules of the internal laws, respecting the rules of the adhering act*[2].

It should be noted that, this "pollution tax" is not required for the vehicles which are already registered in Romania, but only for those registered in other community countries and re-registered in Romania, after bringing them into the country. For the vehicles which are already registered into the country, the tax is not required once the vehicle was sold, this demonstrates that the "pollution tax" is required only for intra-community acquisitions and it is a tax with equivalent effect of the import duties.

This leads to discrimination between the imported products and the inland and similar ones. This leads to the violation of the Community rules, according to which art.25 CE says *between member states the import and export duties or the taxes with equivalent effect are forbidden. This interdiction is applied also to the stamp duties*, respectively art. 28 CE *Between member states are forbidden the quantitative import restrictions and any other kind of measures with equivalent effect.*

According to the ECJ's jurisprudence, the tax with equivalent effect means the monetary charge imposed unilaterally on goods because they cross the border, whatever the name or the application method would be. A system of taxation suitable with art. 90 CE must expel any possibility to be required for the imported goods bigger taxes than for the national similar ones and not to cause in any way discriminatory effects.

By establishing the "pollution tax", irrespective of the way of its origin, according to art. 6 OUG no. 50/2008 or of classification in terms of pollution, occurs a discrimination of the tax system applicable at the registration of a vehicle in Romania, being actually a similar tax to the "first registration tax" established by art. 2141 Fiscal Code, the only and single difference being its name.

Therefore, the solution in these cases is more than clear, following also from the decision of the European Court in the Simmenthal case: *the national judge is obliged to apply, according to his/her competence, the rules of the Community law, has the duty to assure the accomplish of these rules, against any contrary disposals of the national law, even the subsequent one, letting it*

[2] Constitutia Romaniei, revizuita prin Legea 18/2003, art. 148(2), Ed. All Beck, Bucuresti, p. 38.

unenforced without asking or waiting the prior removal of it through legislation or towards constitutional procedures.

Furthermore, it's well known the opinion of the European Commission regarding the legislation on "pollution tax" from Romania, as not being according to the European Community Treaty, mentioned in the " letter of summon" addressed to Romania, as a first step of violation of the Community law according to art. 226 by the European Community Treaty.

As such, assuring the unitary application and validity of the Community law across the European Union is vital to apply the Community law with priority to the national law (*the principle of the priority rank of the Community law to the national law*).

Although, the litigants win this king of trials in most of our Courts, there still are some Courts which have another vision and have declined the claims for the refund of the "pollution taxes". These litigants still have another chance to retrieve the money they have paid for the "pollution tax" in terms of forwarding civil actions regarding the enriching without unduly or the undue payment, without being in the situation of "res judicata". The only disadvantage being the necessity of paying the stamp duty because these kind of actions are money quantified.

Conclusions

Thus, enforcing the "pollution tax" for the vehicles which are going to be registered in our country, in any of the legislative options existing so far (OUG no. 117/2009), hasn't eliminated the discriminator nature of it. Because, on one hand, it continues to be paid only for the some categories of vehicles, and on the other hand, this tax is paid only for the vehicles which haven't been registered yet in our country, and not for those which already pollute the air and have no obligation in this respect. In conclusion, I consider that the principle "the polluter pays" is discriminatory applied, in the sense that, only "some polluters pay".

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REPERCUSSIONS OF THE EUROPEAN INTEGRATION IN THE CRIMINAL LAW'S AREA

Pîrlac Ana*

Abstract

Achieving a criminal protection at a communitarian level has been a continuous preoccupation of the European Union. It is intended to develop until achieving a balance between the sovereignty of the Member States' national criminal law and the communitarian law, on the purpose of concretizing a background in which cooperation in matters of criminal law has as consequence the efficient combating of the danger presented by the phenomenon of criminality at the European level.

Key words: *criminal law, sovereignty, European integration, distribution of competences, the Treaty of Lisbon*

Introduction

By analyzing the consequences of Romania's integration in Europe, one should insist on the fact that the European communitarian structure has assumed, since the beginning, the problem of delegating one part of the sovereignty to the Member States in areas related to the competence of the European Communities.

Although principally speaking, the criminal matter does not make the object of the legal unification at the European level, criminal law being considered as an expression of the national sovereignty of each of the Member States, which feature doesn't disappear by accessing the EU[1]*, reality has shown the necessity of a continuous nearness of the national criminal provisions in the Member States in order to efficiently face the danger presented by the phenomenon of criminality both at the European and world level.*

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[1] Such conclusion is clearly outlined by the provisions of the Treaty of Rome, signed on 25th of March 1957, entered into force on 1st of January 1958, altered by the Single European Act from 17-28 February 1986, from the content of the Treaty regarding the EU from the 7th of February 1992 (The Treaty of Maastricht). from the Treaty of Amsterdam entered into force on 1st of May 1999 and from the provisions of the Treaty of Nice, documents in which it is underlined that EU Member States do not renounce their sovereignty in what concerns the incrimination and the sanctioning of dangerous facts for the public order; the criminal legislation and the criminal process remain in the competence of the Member States.

The Treaty of Maastricht - exclusive competence of the Member States in matters of justice and internal affairs

Constituting a criminal protection at a communitarian level has appeared once with the necessity of protecting the EU's financial interest.

The first problem of legal matter raised by the edicting of norms in the purpose of protecting the EU's financial interests consists of distributing the competence in criminal matters.

From this point of view, the Treaty of Maastricht over the EU (TEU) from February 1992 has created a background of sharing the competences of action at the communitarian level by structuring them in three pylons: the first pylon - competences of the European Community, the second pylon - competences in matters of security and external affairs and the third pylon - cooperation in matters of justice and internal affairs.

The fight against fraud at the communitarian level presupposes realizing cooperation in criminal matters. In such sense, the starting point in distributing the competences in the criminal law's space consists of the game between the first and the third pylons.

The distinction between the first and the third pylon is relevant when regarding the distribution of enacting and action competences. Thus, the first pylon comprises areas of action under the exclusive competence of the Community, while the third pylon comprises areas of action under the exclusive competence of the Member States. Traditionally, the issues concerning justice and internal affairs are part of the third pylon.

Consequently, the criminal law's space, in the light of the Treaty of Maastricht, is part of the national competences' nucleus. In such context, a uniform or shared approach of criminal law would be difficult, taking into consideration the diversity of the legal systems in the Member States, as long as in the light of the present Treaty, there exists no tight connection between criminal law and European Union.

In this perspective, granting certain competences to the communitarian law in criminal matters means breaking the fundamental Treatises of the European Union, which leaves in the exclusive competence of the Member States the attributions of criminal regulation. Circumstances like this lead to the creation of a supranational criminal law unable to guarantee the abidance of its fundamental principles and would bring into discussion the sovereignty of the criminal law.

Starting from the premise of the national sovereignty in criminal matters, in order to exceed these difficulties, there have been made efforts in three directions, revealing several solutions of work envisaging the criminal protection of the EU's financial interests at the communitarian level.

The technique of the assimilation, in conformity with the Treaty of Maastricht, presupposes adopting a criminal treatment of the facts bringing damage to the Union' budget, similar to the one used in the internal law for sanctioning the fact bringing damage to the national financial interests.

Such provisions of the TEU are confirmed at the jurisprudential level. In such sense, the constant jurisprudence of the European Communities Court of Justice institutes for the Member States the obligation of supplying the silence of the communitarian law.

As a consequence, in the decision pronounced in cause 68/1988, the Court underlines that "whenever a communitarian regulation does not imply a specific provision stipulating a sanction in case of violation or makes reference to this issue in the legal provisions, of regulation or national administrative, article 5 from the treaty imposes the Member States to take all specific measures necessary for guaranteeing the efficiency of the communitarian law".[2]

Prudent in order not to bring damage to the sovereignty of the Member States, the Court reaffirms the freedom of the States in establishing the applicable sanctions, "by keeping full competence in choosing the sanctions, the States must specially survey that any breach of the communitarian law is sanctioned in conditions of fond and procedures, analogue to those applicable to the disobedience of the national law, of similar nature and importance and which in any case offers the sanction an efficient feature, proportional and dissuasive".[3]

From the TEU provisions, there can be distinguished two levels of action: a communitarian level and a national combating level. At its turn, the communitarian action level implies two components: combating fraud by means of proper institutional mechanisms[4] and coordinating the activity of combating fraud brought by the Member States.

The technique of cooperation presupposes specific cooperation action in criminal matters in the Member States. Such technique of work, particular to the third pylon, in the light of the provisions of the Treaty of Maastricht, is the conventional cooperation, consecrated as exclusive competence of the Member States.

On the purpose of the cooperation, several conventions have been issued, under the aegis of the European Union's Council. They have a high level of generality and aim at the cooperation in the purpose of general criminal law, being conventions in the sense of the international law and not having supplementary legal force derived from the European context.

Points of reference in this direction: the Europol Convention[5], the Convention regarding the protection of the European Communities' financial interests as well as the additional protocols accompanying it, the Convention

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[2] CJCE, the 21st of September 1989, cause C- C-68/1988, Commission/ The Helen Republic, pct. 23, in Recuiel 1989.

[3] *Ibidem.*

[4] Competent institutions: European Anti-fraud Office, Advisory Committee for Coordination of the Fight against Fraud, European Court of Auditors.

[5] Based on article K.3 from the Treaty regarding the European Union concerning the creation of an European Office of Police.

regarding the simplified procedures of extradition between the Member States of the European Union, the Convention regarding extradition between the Member States of the European Union.

The technique of cooperation by means of conventional mechanisms under the coordination of certain specialized institutions in such sense[6], particular to the third pylon of communitarian competence, is based on the reason of mutual recognition of legal decisions.

The convention regarding the protection of the European Communities' financial interests forces the States foresee criminal sanctions against communitarian frauds: "each of the Member States shall take all necessary and appropriate measures in order to transpose in the intern criminal law the provisions in paragraph 1, in such manner that the pursued behaviors constitute crimes"[7]. Thus, in the light of the convention, the Member States are responsible of transposing in the national law with content of crimes the provisions regarding fraud at communitarian expenses and fraud at communitarian revenues.

The technique of the harmonization of laws presupposes their nearness by exceeding their most important differences and creating a legal background, if not identical, at least with smaller differences in the domain of material law.

Concerning the provisions of material law, the provisions of criminal law has been received with an obvious reticence by the Member States, the technique of the harmonization by means of directives[8] having results only at the level of the administrative law.

The continuous increase of the infractional phenomenon and the proportion taken by fraud in the damage of the European Union have outlined that the methods used didn't give any result. The harmonization and the assimilation keep coming up against the discrepant differences between the legal systems of the Member States and against the impossibility of their correlation. In the same time, their cooperation turned out to be difficult to accomplish in criminal matters, for instance the multiple projects of international conventions in this matter which haven't been ratified by the Member States.

The Treaty of Lisbon - sharing the competence in criminal matters between the EU and the Member States

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[6] Are communitarian institutions meant to coordinate the activity of legal cooperation: Europol, Eurojust, the *European* Judicial Network.

[7] Article 1, paragraph (2) from the Convention instituted on the grounds of article K.3 from the Treaty regarding the European Union, concerning the European Communities' financial interests.

[8] In the light of article 249 EC (former article 189 EEC), the directive is an obligatory legal document, for each Member State consignee regarding the achieving of the achievable result, but which leaves at the national authorities' latitude the form and the necessary means.

At 1st of December 2009 enters into force the Treaty of Lisbon which intervenes in order to conciliate the radical distinctions of competence and legal technique existent already in the criminal law's area at the European Union's level.

The traditional structure of the third pylons is replaced by a bipartite classification of the communitarian and national competences in exclusive competences and shared competences. In matters of exclusive competence, they reside in the domains in which only the European Union may act, the Member States having left the possibility to intervene only with the approval of the Union or for putting into practice the European policies. In matters of shared competence, the Member States are allowed to intervene as long as the Union hasn't acted yet, consequently on the reason of inverse subsidiarity[9].

In this new sharing of competences between the Union and the Member States, the freedom policy, security and justice, is assimilated in the sphere of shared competences. Such fact allows the direct intervention of the Union in the national criminal policy, or, better said, the creation of a communitarian criminal policy. Thus, the Union's legal instruments of action are enforced at the level of combating criminality of all sorts, implicitly the economical-financial criminality.

Under the circumstances of the actual European structure, a new technique of work has been employed on the purpose of compatibility between criminal and communitarian law.

The normative technique of the unification[10] is highlighted by the consecration of the Parliament and Council's direct competence to establish minimum rules concerning the definition the criminal offences and sanctions, in the areas of particularly serious crimes with a cross-border dimension. In such sense, it is ensured the unification between the first and the third pylons, consecrated by the Treaty of Maastricht.

In conformity with art. 69 B from the Treaty of Lisbon, "there shall be no different legal procedures for the Community and for the Union. The same legal instruments and procedure of decision will be applied in both areas, and the procedure of decision will be extended to issues of criminal law as well".

Yet, even if this normative technique permits us to foresee a new orientation of communitarian law, for the moment being, it has no direct effect in the area of criminal law of Member States, being limited from two points of view.

A first point of view refers to the fact that the instruments by means of which the unification may be accomplished are the directives, which means that the communitarian norm must be transposed to their level in order to be efficiently put into practice in national regulations.

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[9] Costea Ioana Maria, *Combaterea evaziunii fiscale şi frauda comunitară*, C. H. Beck Printing House, Bucharest 2010.

[10] Ensured by the provisions in articles 69A-69E from the Treaty of Lisbon.

The second point of view limits the law-making competence in criminal matters to the infractional areas expressly stipulated in the treaty, regarding the serious cross-border criminality[11].

A particular situation is represented by the area of criminal protection of the EU's financial interests. The criminal offences from this area are not comprised in the action sphere by means of directives. In such sense, the Treaty of Lisbon makes a distinction and imposes as a superior legal force solution the unification by means of regulations.

Thus, in this special domain of interest for the Union, the competence of disposing by means of regulation over the provisions of criminal material law and of procesual material law pertains to the Council.

The technique of the unification, introduced once with the Treaty of Lisbon, has proven to be more efficient than the technique of assimilation, cooperation or harmonization, introduced once with the Treaty of Maastricht.

Such fact has as consequence the attenuation of sovereignty in the Member States in criminal matters, by transfer of competences from the exclusive area of the Member States towards the shared competences' area.

In Romania, during the process of EU accession and adoption of the communitarian acquis, incrimination - in our intern law - of the facts affecting the European Communities' financial interests has been accomplished once with the adoption of Law no. 161/2003 concerning certain measures for the insurance of transparence in exercising public dignities, public functions and in business environment, the prevention and corruption sanction[12]. By Book II, Title I, art. I, pt. 18 of this item of law it has been introduced section IV[1] in Law no. 78/2000 for preventing, revealing and sanctioning corruption offences[13], entitled "Criminal offences against the European Communities' financial interests".

As a consequence, the Romanian enactor opted for the creation of a special criminal protection of the European Communities' financial interests different from the one applicable to similar national values. In such sense, it can be observed that countries like Belgium, France, Portugal, and the Czech Republic have chosen to assimilate the European Communities' financial interests to the national ones and didn't create special incriminating norms regarding the frauds affecting the communitarian budget[14].

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[11] Terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in narcotic drugs and psychotropic substances, money laundering, payment methods counterfeiting. illicit trafficking in narcotic drugs and psychotropic substances and organized crime.

[12] Published in Romania's Official Monitor no. 279 from 21st of April 2003.

[13] Published in Romania's Official Monitor no. 219 from 18th of May 2000.

[14] See, extended, Antoniu George, Reflecţii asupra conceptului de incriminare, RDP, nr. 3/2008, p. 9-31.

In the section "Criminal offences against the European Communities' financial interests" are incriminated offences such as: use or presentation of documents or false statements, inaccurate or incomplete, which have as result unrighteous obtaining of funds from the general budget of the European Communities or from the budgets administrated by them or on their behalf, as well as the exchange, without respecting the legal provisions of the destination of funds obtained from the general budget of the European Communities or from the budgets administrated by them or on their behalf.

The criminal offences against the European Communities' financial interests from Section IV[1] have as particularity a specific legal object limited to the funds from the European Communities' general budget or the budgets administered by them or on their behalf, taking into consideration the fact that communitarian Regulations incident in this matter foresee, for the Member States, the obligation of co-financing the projects by national, private or public financial contribution.

Under present conditions, co-financing national funds, public or private, does not benefit of the same criminal protection as communitarian funds, their fraudulence being sanctioned by the common criminal law norms - Criminal Code[15]. Thus, it can be brought into discussion the issue of contest of offences between the offences in matter from the Criminal Code and the special law mentioned.

I consider that the Romanian enactor should intervene and assimilate the communitarian funds criminal protection as well as in the case of co-financing national public funds[16].

At the institutional level, in Romania, cooperation with the view at combating crimes against the European Communities' financial interests has been accomplished by the foundation of the Bureau of combating the criminal offences against the European Communities' financial interests, by Order no. 1 from the 9th of January 2004 of the general prosecutor of the National Anticorruption Prosecutor Office.

In the European Union, at the institutional level, an ample project, debated at the level of legislative initiative and taken by the provisions in the Treaty of Lisbon at the originary law level, consists of constituting an European Public Ministry, In its actual form, the normative approach is limited to the preoccupation of safeguarding the EU's financial interests, the competence of the European prosecutor being limited at observing the criminal offences affecting the communitarian financial resources.

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[15] Criminal offence such as Fraud (art. 215 Criminal Code), Fraudulent administration (art. 215[1] Criminal Code.), Negligence at the working place (art. 249 Criminal Code) etc.

[16] Taking into consideration the fact that criminal protection of facts affecting the EU's financial interests enjoys a higher sanctionary treatment than the facts affecting the co-financing national funds.

Conclusions

Adopting the Treaty of Lisbon constitutes, on one side, the premise of a new institutional and legal organization at the communitarian level.

On the other side, by introducing the criminal law in the area of shared competences, we come in contradiction with the classic concept of sovereignty and of indivisibility of the Member States, which is based on the impossibility of fragmentation of the sovereignty exercise between two or more holders within a single State. In such context, a new concept is born - the concept corresponding to the idea of the divisible sovereignty[17].

Thus, the consequences of the European integration over the legal systems in the Member States need the analysis of two contrary interests - the one of the integration and the other of the conservation of the national sovereignty. According the sovereignty an absolute value signifies abandoning the idea of interdependence, yet isolation or lack of interdependence make the existence of sovereignty seem useless.

To conclude, I consider that the new dimension of the communitarian law given by the Treaty of Lisbon should be concretized at a legal-institutional level in order to establish with exactitude the competence of legislation and action in the matters of criminal law.

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CRITICAL REFLECTIONS ON SPECIAL SEIZURE IN MATTER OF CORRUPTION OFFENCES

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Mihail-Silviu Pocora[**]

Abstract

Corruption offences evoke through themselves a variety of controversy, but judicial practice has proven these may appear due to corruption subjects. This paper explores some controversy and offers some suggestions regarding the applicability of the security measure of special confiscation as regards corruption offenses generally, and different regime of criminal liability of some civil servants, in particular.

Key words: *Special confiscation, corruption, officers, controversy*

Introduction

Special seizure is regulated as a safety measure both in by Penal Code and special criminal disposals, but the legal practice continues to render different decisions based both on general or special provisions, which determine criticism regarding on applicability of this measure only for certain categories of people.

In the course of trial, often occurs the situation of seizure certain assets, listed in Art. 118 Criminal Code, categories of goods that can be reported in conjunction with other general or special criminal provisions, as follows:

- According to art. 118 letter d and e Criminal Code, are subject to special seizure, *goods that were given to determine the commission of an act or to reward the doer,* as well as those *acquired by committing the crime provided by the criminal law, if are not returned to the person injured and to the extent that it does not serve to compensate.*
- According to art. 254 paragraph 3, art. 256 paragraph 2, art.257 paragraph 2 Criminal Code, *money, values or any other property shall be confiscated and if they are not found, the convict is obliged to pay their equivalent in money.*
- According to art. 255 paragraph 5 Criminal Code, *money, values or any other property shall be returned to the person who gave, if briber*

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denounce to authority the act before the prosecuting authority has been notified, or if there was constrainedly through any ways by who took the bribes.

- According to art. 6 [1] paragraph 2 and 4, in conjunction with art.1 and 8 [1] by Law 78/2000 on the prevention, detection and punishment of acts of corruption, *the perpetrator is not punishable if denounces to authority the act before the prosecuting authority have been notified, and money, values or any other goods are returned to the person who gave them, and are applied to officials with leading or management functions in state institutions, persons with leadership positions in political national or international parties, officials of a foreign country, or by the European Communities, members of parliamentary or administrative assemblies, authorities of a foreign state.*

For that corruption act is not a crime, it must be fulfilled the following conditions: [1]

a) it necessary to be a constraint by any ways by the person who took bribes, which includes a variety of ways to exercise the constraint, essential being that actions of bribed to be unambiguous and have aimed at determining the briber to commit the offense;

b) the constraint exercised must have a real character or appearance of reality, to be able to remove or restrict the freedom or ability to determine the will of the person on whom was exercised, as to compel the alleged conduct or imposed by offender.

Also, the appreciation of the interest protected by the briber, even pecuniary, must be reported to the person himself and his way of perceiving the actions of the person who has exercised constraint.

- the constraint must be previously, so to determine the promise, offering or giving the money or benefits that are the subject of bribery;
- the bribery initiative should not come from the briber, but from the bribed, the provisions of art. 255 paragraph 2 Criminal Code, are not applicable in case of bribery initiative belonged to the briber even if later, the official who received bribes insisted to the briber to bring the goods offered.

As regarding to these legal provisions, the High Court of Cassation and Justice admitting an appeal in interest of law[2], predicted to be binding on other courts, that *the provisions of special law* on non punishment the perpetrator and refund money, values or any other goods that were the subject of crime, *are applicable only to offenses covered by the special law* and *provisions stipulated by the general law, are applicable only to offenses*

[1] Cezar Stefanescu, „*Confiscarea speciala*", R.A. Monitorul Oficial, Bucharest, 2008.

[2] Decision no. 59/24 September 2007, Appeal in interest of law, on pursuance of the disposals art. 6^1 paragraph (2) and (4) by Law no. 78/2000, even and disposals provided by art. 255 paragraph 3 and 5 by Criminal Code.

framed exclusively in the Criminal Code, disposals of special law are not applicable.

Is easy to understand that, in accordance with principle *specialties generalibus derogant*, the special law prevails over general law, although general rules include provisions in add the special norms.

Also, this rule applies in all matters and in all cases, except those where the legislature establishes a special regime and derogatory.

But, returning to decision of High Court of Cassation and Justice, we can say that could not be recognized the ideas which support this resolution, because, under special laws, the buyer of influence will not be punished if denounce the crime, and goods are also released. The natural question would be: this decision is correct and moral? Trying to answer the question above, we can lead as an example, the situation where a citizen wants to build a house, gives a sum of money to obtain a license and after then, denounce the act, thus escaping from criminal liability and taking also the money back.

The distinction made by decision of High Court of Cassation and Justice, occurs when it is given as a bribe, respectively that amount of money, according to a leader or supervisor person, in which the provision of non punishment, the impunity, does not work, meaning that, although briber denounce he will be punished and the assets will be confiscated. A similar example may be the bribery crime, in which the active subject is a person from the European Parliament.

As a consequence, another natural question would be: why was necessary to deviate from the Criminal Code in this special law?

Case of impunity means a situation created by some certain circumstances that put the blamed person outside the punishment, or criminal liability for his actions, even if they are proved, and its initial reason was to discourage the officer to receive, claim or accept money, goods or other values. But, it can see this reason is no valid anymore in opinion of High Court of Cassation and Justice decision, as might be thought to follow discourage people denouncing in case of leadership positions, parliamentarians or other persons listed above.

Conclusions

We believe that in case of corruption crimes in conjunction with impunity, it is necessary, however, keeping the proportion between the sacrificed interest (the possibility of later criminal liability for bribery crime) and the interest saved by the promise, offering or giving a sum of money. It also should be considered the reason and purpose of promoting the cause of impunity and *not to favor a specific category of officials*, namely those with management positions with control responsibilities, or of statesman. In this regard, we propose to not grant the impunity cause to those who denounce, but to provide this situation as extenuating circumstance.

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THE SOCIAL DANGER – THE MAIN FEATURE OF THE OFFENCES IN THE PRESENT PENAL CODE AND IN THE NEW PENAL REGULATION

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Abstract

This article discusses the issue of social danger as an essential feature of its offense from a regulatory perspective in the current Penal Code expressly to exclude from the scope and essential features of the crime in the new Romanian Penal Code.

If in the Penal Code in law, the social danger of the facts constitutes the fundamental criterion for the legislator to incriminate some facts witch, at some point represents a greater social danger or not to incriminate other facts that decreased the social danger so much that no longer reclaim the penal law intervention, in the new Penal Code are provided substantial changes by removing the social danger criterion, the crime being defined a fact provided by the penal law, committed culpable, unjustified and attributable to the person who committed it.

Key words: *social danger, crime, Penal Code, penal legislation*

Introduction

The crime is the manifestation of an antisocial phenomenon and its consequences. It exerts a negative influence on citizens' rights, the rule of law causing wide repercussions antisocial. [1]

The offense, regarded as a manifestation of human social, presents characteristic signs that are essential features of the event, which forms the content of the concept of crime. [2]

Due to the special importance of the institution offense under criminal law, the legislature expressly defined the crime.

The current criminal law, has adopted a general name for any criminal act that combines the features shown in art. 17, par. 1 Criminal Code.

So, according to art.17 Criminal Code offense is socially dangerous act that is committed with guilt and is provided by the law.

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[1] V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, *Explicaţii teoretice ale Codului Penal Român*, Vol. I, Ediţia a II-a, Ed. Academiei Române, Ed. All Beck, Bucureşti, 2003 p. 92.

[2] V. Dongoroz şi colaboratorii, op. cit., p. 93.

Also, the offense is the sole basis for criminal liability.

It produces serious consequences in terms of legal, involving criminal liability which is the highest form of legal liability.

Acts of social danger foreseen in legal rules and if committed, attract criminal liability, thus making crime a legal category. [3]

In other legislation, crimes are divided into misdemeanors, offenses and crimes, depending on whether the punishment prescribed by law for each.

Thus, the offenses are punishable by sentences of police, correctional punishments crimes and crimes with penalties involving infamous punishment or suffering. [4]

Penal Code of 1936 adopted the tripartite system, and since 1954 as the bipartite misdemeanors were removed from the Code.

The actual code uses the general name of crime.

According to art. 2 of the Criminal Code, "the law states the facts constituting the offense, the penalties that apply to measures that can be taken in case of committing such acts".

General notion of crime once the criminal law matters under a threefold aspect:

- is a rule of law which the legislature is used to establish the facts to be entered in the criminal law as crimes and the crime out of the scope of those facts that are no longer dangerous or no longer commit
- serves to delimit criminal offenses other extra facts
- represents a guide for the practitioner to be used in criminal law enforcement activity by observing whether the essential features of the offense, or if they are missing, with the consequence of not consider that particular act as an infraction. [5]

The Romanian Penal Code's definition of the essential features of the offense loose:

- act which presents a danger: the moral and social
- act committed with the guilt: the human aspect, moral, political
- act provided for criminal law: the legal aspect

The definition of the crime shows feature primarily on the social aspect consisting of *social danger* posed by the act.

To constitute infringement, the act of a person must present a danger, that is dangerous to society.

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[3] M. Basarab, op. cit., p. 124.

[4] M. Basarab, op. cit., p. 125.

[5] Constantin Mitrache, Cristian Mitrache, *„Drept penal român. Partea generală”* Ed. Şansa, 2002, p. 86.

By social danger of the acts of conduct we understand their particularity means to affect or threaten some social value of an interest to society.

Not every act of human nature is inconvenient even if an unlawful act may be legal, but only when sanctioned by law is a legal constraint, which presents a danger.

Therefore, the seriousness of the offense is the fundamental criterion for the legislature to criminalize certain acts that, at some point, have a greater social danger or decriminalizing other facts that have declined to such an extent that social dangers no longer requires the intervention of law criminal. [6]

The deed must represent a danger to be offense, namely a high degree of social danger than the contraventions or disciplinary.

The danger of the crime and he is expressly defined by the legislature in the art. 18 which states that "socially dangerous deed for the purposes of criminal law is any act or omission which affect one of the values shown in art. 1, punishment which is necessary for imposition of a sentence.

The contents of the key features of the crime of appropriating that a deed has to be dangerous to society. [7]

A crime is characterized primarily in that it is a crime, ie a manifestation of the perpetrator in the field of social relations, such as to impinge on the integrity or threatening. [8]

But for the offense to a crime, must represent a social danger, to take ownership of being dangerous to society, achieving one of the fundamental social values that Penal Law protects. [9]

Also, as a feature of crime, social danger must be criminal, that is, to some degree, a certain specific gravity of the offense as criminal unlawful, which distinguishes it from other forms of illicit legal (administrative, disciplinary, civil) and justify the criminalization of the offense under the criminal sanction. Penalty provision in the law to prevent and combat the offense is an expression of social danger as a feature of the crime. [10]

The danger of the crime have varying degrees, some crimes with a high degree of social danger (murder, robbery), and attracting a more severe punishment, others have a lower degree of social danger (hitting, threatening), for which the legislature lighter penalties prescribed. [11]

Being dependent on the significance of social values, their hierarchy, social danger varies from one crime to another.

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[6] V. Paşca în M. Basarb, V. Paşca, Gh. Mateuţ, C. Butiuc, *Codul penal comentat. Partea generală, Vol. I,* Editura Hamangiu, 2007, p. 74 .

[7] V.Dongoroz şi colaboratorii, op. cit., p. 96.

[8] A. Boroi, op. cit., p. 101.

[9] G. Antoniu şi colaboratorii , op. cit., p. 49.

[10] C. Bulai, B. Bulai, op. cit., p. 152.

[11] A. Boroi, op. cit., p. 102.

It is also possible that the seriousness of the same offense to be variable from one to the next stage of social development. Therefore, a feat that had previously socially dangerous character can acquire later, just as an act that was socially dangerous character may lose as a result of developments in society.

If the action without prejudice to the minimum one of values specified by the law and its specific features appears to be clearly irrelevant does not show the seriousness of a crime according to art. 18 indicate a Criminal Code.

So there can be no criminal guilt, not being an infringement on our land.

Such a characterization represents, for example, some petty theft from shops or certain acts of negligence at work.

Obviously, in determining the degree of social danger to the way it is and means to commit the crime, the goal, the circumstances in which the offense was committed, the result produced or could have been produced and the person and the conduct of the offence.

Every fact must be through analyzed.

The introduction of this provision in art. 18 index 1 of the Criminal Code is likely to alert the prosecution corps upon the low interest presented so far in this matter.

This text has sought to exclude from the scope of the criminal law of small facts, lacked of seriousness and importance, eliminating the possibilities of artificial increase of the state criminal. [12]

Although the concept of social danger is still in the penal codes of many former socialist countries (eg., Moldova, Poland and Russia) should not forget that it is ideologically marked and is an anachronism in the Romanian penal law in force. [13]

The concept contains an ambiguity: the social danger of the crime can be differentiated only with difficulty by the seriousness of the offender "and contributes nothing to the clarity of criminal law. [14]

There were repeated requests to remove the social danger of the crime from the definition of the crime.

The Penal Law and criminal procedure has been repeatedly changes, changes that fall within the concern for developing new legislation that would provide the legal defense of social values.

On 24 June 2004 it was adopted a new Penal Code by the Romanian Parliament to enter into force on 1 July 2005.

The idea of removing the social danger that the essential feature of the offense has been implemented in other projects of the Penal Code but was not accepted at the time the Penal Code was adopted in 2004. [15]

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[12] A. Boroi, op. cit., p. 104.

[13] J. Rinceanu, *Analiza trăsăturilor esenţiale ale infracţiunii în legea penală română*, în Revista de drept penal nr. 1/2010, p. 24 .

[14] J. Rinceanu, op. cit., p. 24 .

2004 Penal Code takes almost unchanged the definition of the Penal Code in force and shall, in art. 17 that crime is an action by the criminal law, which presents a danger and is committed by guilt.

Only the order of the three key features appear to have been changed: the seriousness of the offense is now second. [16]

It can be argued that this feature is not necessary because when the legislator criminalizes an act as a crime considers the fact that it presents a certain degree of social danger, otherwise the act may constitute a contravention. [17]

The definition of the crime without the danger of social inclusion in the text is found in the new Penal Code of 2009.

According to art. 15 of the Penal Code[18] 'offense is an action under the criminal law, committed by guilt, unjustified and attributed to the person who committed it.

The offense is the sole basis for criminal liability.

The provisions contained in Title II - "The Crime", contain, first, a redefinition of the concept of crime, the two essential features:

- the crime is the act provided by the penal law
- the crime is committed with guilt

The new concept of crime bring substantial changes to the current Penal Code provisions, giving up the social danger criteria being dangerous in this matter. [19]

The request of the fact to represent social danger was eliminated.

This solution underscores the idea that legislatures criminalize only those acts which touch the degree of social danger able to justify the penal law intervention.

The eventual disproportion between generic social threat and danger which was viewed by the legislature of a concrete social facts is next to be resolved in the process of customization of the penalty, by giving the court the penalty in these cases.

From the explanatory motives of the project it results that the definition of crime in the new Penal Code is taken from the description of TraianPoP in the year 1923[20] and that the crime is an antijudiciary, imputable act and punishable by the penal law.

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[15] V. Păvăleanu, *Comentarii asupra proiectului unui nou Cod penal*, în Revista de drepăt penal, nr. 1/2009, p. 25.

[16] J. Rineanu, op. cit., p. 24.

[17] V. Păvăleanu, op. cit., p. 25.

[18] Legea 286/2009 publicată în Monitorul Oficial nr. 510 din 24 iulie 2009.

[19] M. Iordache, *Definiţia infracţiunii în lumina Legii nr. 286/2009 privind Codul penal,* în Dreptul nr. 11/2009, p. 34.

[20] J. Rinceanu, op. cit., p. 25.

Conclusions

In the new criminal legislation have been retained two key features of the crime: the provision in criminal law and guilt and was placed two other key features, namely the unjustified and imputable character of the crime.

The legislator gave the abstract mode assessment of the generic social danger, danger witch is reflected in the punishment provided for each offender.

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MINORITY IN THE NEW PENAL CODE. COMPARISON WITH THE ACTUAL PENAL CODE

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Elena Ana Nechita[**]

Abstract

The current article it wishes to be a comparative study of the incriminating system of juveniles, under the view of the two normative acts (bills) reglementating it: the actual penal incrimination (Romanian Penal Code in force) and the future penal incrimination (Law 286/2009 – The New Romanian Pena Code) witch enters in force most probably in the year of 2011.

Why a new Romanian Penal Code? The explanation starts from the fact that, although the actual Penal Code was the result of a teamwork of prestige specialists, and also after 1989 was brought a series of modifications to the Penal Code witch tried to remove some incompatible reglementations with the exigency of the state law, no modification could remove the discussion upon the necessity of a new Penal Codification.

Why changes in the matter of minority? Because the problem of using ways of judiciary constrain of penal nature with respect to the minors formed and continues to form one of the important preocupations of the penal right science, considering the fact that in the content of general criminal state, a really vast sector of criminal activities done by the juveniles exist.

Key words*: minority, penal code, minors, criminal responsibility.*

Introduction

The actual penal code, adopted by the Law no. 15/1968, in force from 1 Jan 1969, has represented the corollary of a long time work, done by a team of prestige specialists, under coordination of the eminent teacher and researcher Vintila Dongoroz.

After the 1989 revolution a series of changes were brought to the Penal Code witch tried to remove some reglementations incompatible with the state in law exigency, but were not and it could`t be able to determine a structural

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change of the Romanian penal reglementation and they didn`t stop the discussion upon the necessity of a new penal codification[1].

So, in 29 June 2004, by the Law 301/2004, the Romanian Parliament adopted a new Penal Code. Although this new Penal Code wanted to be a modern law, compatible with the similar reglementations from other European countries, so many reckless predictions, lacks and incorelations, that the text is almost impossible to apply in practice.

After postponing the entry into force of new Penal Code, adopted by the Law 301/2004 (the first postpone was until 1 september 2008 and the second postpone until 1 september 2009) it changed to the development of a new Penal Code[2], able to take the elements mentioned in the force Code and from the Law 301/2004 and to integrate it under a unitary concept with elements taken from other reference systems but also from reglementations adopted in the European Union.

In this context, in 24 July 2009 has been published in the Oficial Monitor of Romania, part I, no. 510 from 24 July 2009 the new Penal Code (Law no. 286/2009). The new Penal Code follows accomplishing the next objectives:

- Creating a legislative frame coherent in penal matter with avoiding inutile superpositions of the rules in force existent in the actual Penal Code and in the special laws
- Simplyfing the legal substantial regulations, meant to facilitate the unitary application celerity in the activity of the judicial body
- Assurance of satisfying the exigencies resulting from the fundamental principles of the penal law consecrated by the Constitution and the pacts and treats regarding the fundamental human rights, at which Romania takes part
- Transposition in the national penal legislative frame of regulations adopted at the European Union level
- Harmonization of the Romanian substantive Penal Law with the systems of the other state members of European Union like a premises of judiciary cooperation in penal matter based on recognition and both sides trust[3]

Regarding the important changes brought to the institutions in the new codification the regulations from the minority matter constitutes one of the central points of the reform proposed by the new Penal Code project

Why?

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[1] J. Rinceanu, "Essential features of the crime analysis in the Romanian penal law, the Penal Law Review", no. 1 / 2010, p. 16.

[2] V. Pavaleanu, "Comments on the project of a new Penal Code, in Penal Law Magazine", no. 1/2009, p. 24.

[3] "Reason exposure, The Penal Code", published on www.euractiv.ro.

Because we must consider that:

- One of the new introduced institutions overlapped to the regulation of the sanctionart regim of the juveniles witch remained built on the old principles, lead to the creation of a sanctionary regim more severe in the case of the juvenile that in the case of an adult (for example, in the case of postponing the punishment or suspending the execution of the punishment applied to the juveniles
- The problem of using the means of judicial coercion of Penal nature with respect to the juveniles has formed and continues to form one of the important concerns of the Penal Right science[4]
- In the content of the general criminal state, a vast sector exists of the criminal activities committed by the juveniles
- In our legislation does not exist a juvenile penal code, the dispositions regarding the judicial system applicable to juveniles, can be found in the general part of the penal code[505]
- The juvenile criminality, although it is component part of the criminality generally, it presents certain particularities determined by certain biological, psihological and social of those, witch were considered by the legislator when he regulated their penal responsibility[516]

Regarding the regulation of the penal responability of juveniles, the purpose was complete reformation of the existent system. It is noticed a more rigorous regulation in the matter of minority regarding the dispositions from the Penal Code in force.

In the new Romanian Penal Code, the minority is regulated in the Title V "Minority", articles 113-134.

1. According to the article 113 from the New Penal Code, the juvenile witch hasn`t reached the age of 14 is not criminaly liable. The juvenile with the age between 14 and 15 years old is criminaly liable only if it proves that he committed the crime with discernment. The juvenile who has reached the age of 16 is criminaly liable according to the law

The New Penal Code kept the dividing set in the anterior code regarding the juveniles who are criminaly responsible and criminaly liable, and the juveniles who are not criminaly responsible[7] and liable and kept the inferior age limit of criminal responsibility until the age of 14, but in it`s initial form the project of the New Penal Code took into account the change of the age conditions (the minimum age from

[4] V. Dongoroz a.o. op. cit. p. 217.

[5] D. Semenescu, E.M. Semenescu, "Juvenile Delinquency - between the liability and guarantee the rights of minors", in the Penal Law Magazine, no. 2/2009, p. 55.

[6] V. Pasca, M. Basarab, V. Pasca, Gh. Mateut, C. Butiuc, "Penal Code Commented, Volume I, General Part" Hamangiu Publishing, Bucharest, 2007, p. 508.

[7] C. Rosu, A. Fanu-Moca, "Minority legislation and its system of enforcement of the new Criminal Code in relation to the current Criminal Code" The Law, no. 5/2010, p. 76.

wich the criminal resposability begins) to be criminaly liable in agreement with the general trend in european plan, at the age of 13.

The change was based on two important elements:

1. The continuous growth in the last years of the number of criminal offenses committed by juveniles with the age of 14, they not infrequently reaching to commit very serious offenses or be drawn into organized crime groups work just on account of their inability to draw from criminal liability.
2. Statistical data regarding the expertises done regarding the existance of discernment in case of juveniles with the age between 14 and 16 years that shown that in over 90% of the cases has established the juvenile discernment.

The change was severely criticized by the teorisths.

Such a change would have some authors[8] claim to have a justification in theory, in practice courts, judicial statistics and criminological research.

The author continues his argument regarding that maybe the newer solution could major the boundaries of the criminal liability, because the life shows that juveniles exhibit a lack of education in family, school, environment, reaching the age of 15-16 years completely alienated from our society's moral demands.

Not that serious crimes are committed in isolation at a very young age is crucial in determining criminal liability, but recording the nature of generality, that young people are denied the most basic moral knowledge and skills even after the age of 14 years due to crisis family and school authority crisis[9].

Another author[10] noted that the community states with democratic traditions can that be justified in the age limit of criminal liability under 14 years, but we still have a lot to do in this regard and that legislation is not appropriate.

It should be noted here that it is difficult to say when the child acquires an antisocial behavior. This becomes significant in a family context, school, office, representing a disturbance report child relational objects or people is always a response to the attitude of others.

At preschool age start to appear some signs of hostility toward family members, hostility manifested by disobedience, insolence, rudeness, insults and sometimes blow.

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[8] G. Antoniu, "A second preliminary of the New Penal Code", RDP, no. 4/2007 p. 31.
[9] G. Antoniu, op. cit. p 31.
[10] V. Pavaleanu, op. Cit. p. 27.

At school age behavioral problems can occur ranging from before crime form to the crime itself.

Although in all cases minors do not commit acts of antisocial, undesirable behavior, their attitudes at odds with the demands of school, leaves open the possibility of committing or rush such antisocial acts

Therefore, the new Penal Code has retained the juvenile criminal liability as well as the current legislation.

Although in all cases minors do not commit acts of antisocial, undesirable behavior, their attitudes at odds with the demands of school, leaves open the possibility of committing or rush such antisocial acts.

Therefore, the new Penal Code has retained the juvenile criminal liability as well as the current regulation.

2.Major change to the new Criminal Code is complete surrender to the punishment applicable to juveniles who are criminally responsible, in favor of educational measures.

The new Criminal Code[11] sets the rule to apply to minors educational non-custodial measures (Article 115 paragraph 1), constituted a deprivation of liberty except and reserving assumptions serious crimes or juveniles who committed multiple offenses (115 paragraph 2).

Unlike the new Criminal Code, the current regulation provides a mixed system of punishing offenders consisting of educational measures and sanctions.

According to art. 100 current Penal Code, "with respect to the juvenile intended to criminal charge can take an educational measure or a penalty may be applied. In selecting the penalty to take account of the seriousness of the crime committed, the physical, intellectual and moral development, his behavior, the conditions under which he was raised and where he lived and any other elements capable of representing the juvenile.

The penalty applies only if taking a view that education is not sufficient measures for minor correction.

Current criminal law considers educational measures as their main social reaction to juvenile offenders, punishment was only one subsidiary form, subject to the assessment given by the court to take action that education is not sufficient for the minor correction.

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[11] Article 114. The new Criminal Code "To juveniles who, at the time of the offense, was aged between 14 and 18 take an educational non-custodial measure. (2) to juveniles referred to in par. (A) may make an educational measure in the following cases involving deprivation of liberty:

a) if he committed a crime for which he was an educational measure has been executed or the execution of which began before the offense for which trial

b) when the penalty provided by law for the offense is imprisonment for 7 years or more or life imprisonment.

The legal doctrine[12] was expressed the idea that the renunciation of the regime and establish penalties for minors only an educational system measures is not a viable solution. The author said that Romania has experienced the educational system to the application of measures for juvenile offenders by Decree no. 218/1977, which was repealed by Law no. 104/1992 recalling that in this period there were two schools and correctional work, one at Găeşti and another one at Târgu-Ocna, serious difficulties in embracing the facts very serious cases such as murder, when he ordered the internment of their children in these schools for a period of five years[13]. He maintains that this measure has proven to be outdated, which led in 1992 to reintroduce the punishment for juveniles, for the period that runs through our country must be maintained and will be applied in exceptional cases and only actions seriously. The argument offered by the author refers to the fact that it is conceivable that in serious cases such as murder, robbery, terrorism, their children only apply educational measures, even if they would be deprived of liberty[14].

The formula of punishing the juvenile was reached trough educative measures in the new Criminal Code and by the fact that although the system of enforcement of minors in the current Penal Code is focused on educational measures are prevalent and the only alternative sentence, the phenomenon of legal reality reveals predominant application sanctions[15].

Romanian lawgiver, also is aware of the fact that the penalties applicable to minors, although different from those of the common law regarding adults, both by nature, limits but especially through the application and enforcement manner, no longer correspond to a penal policy aimed to concur in a conclusive way to prevention, re-education, but also to a real and effective social reinstatement of the juvenile in conflict with the rules of criminal law[16].

3. Another important change brought by the new Romanian Criminal Code a different note the content of educational measures to the current Criminal Code.

It was adopted a system of sanctions for minors who focus more on education than on the repressive side, the November educational measures, taking into account the fact that educational measures are defined as criminal sanctions imposed specifically for juvenile offenders and designed to ensure,

[12] I. Pavaleanu, op. cit. p. 28.
[13] Idem.
[14] Ibidem.
[15] V. Pasca, op. cit. p. 513.
[16] M. Iordache, "Evolution of the juvenile offender sanctioning system", The Law, no. 6/2010, p. 193.

in terms of reduced criminal and differentiated constraints, their education and rehabilitation through supervision, training or professional school and their growing consciousness of values and behaviors that involve respect for law and order criminal[17].

The educational division of educational measures was kept in the non-custodial measures and educational measures involving deprivation of liberty, but there is a substantial change in the nature and content of these measures.

In the present Penal Code the educative measures are according article 101 Penal Code:

- Reprimand
- Supervised Freedom
- Hospitalized in a rehabilitation center
- Hospitalized in an medical educational institute

Educational measures, in order of presentation in art. 101 of the Penal Code., Is a milder sanction than criminal penalties juvenile offender, so that, by law, were distinctly individualized educational measures on grounds of criminal penalties applicable to juveniles act or the gravity of the social danger presented by the offender.

Grading the legal effectiveness of educational measures arising from the express provision of law on the application of more stringent measures or punishment (Art. 102 of the Penal Code.), if the juvenile commits an act that combines elements of an offense (the court ordering the internment of minors who received supervised or freedom would be a punishment.

In the regulation of educational measures, either by increasing their gradualism, we find that last measure, hospitalization in a medical-educational institution (art. 101 points. D of the Penal Code.), does not present a serious content, but a specific state content that trigger dangerous behavior to society of juvenile offenders. The measure takes into account the actual situation, namely the production of a crime for which one requires the application of educational measures or penalties, but for the interest of saving the health of the offender, and to avoid the dangerous facts, the law requires hospitalization in a medical educational institute. In this situation, it is estimated that in the interest of society and the juvenile offender to be supervised medical care from the need to double the harmful effects of illegal acts: the social protection and protection of juvenile offender.

In the new Penal Code, sharing educational measurements in non-custodial and custodial deducts from provisions of article 115 according to the educational measurements not imprisoned are:

- Civic forming stage
- Survaillance

[17] www.alternativesociale.ro "Institutional practices guide in handling cases involving minors", 2005, p. 123.

- Record for the weekend
- Daily assist

Educational imprisoned measures are:

a) Hospitalization in an educational centre
b) Hospitalization in a detention center

The mere enunciation of these educational measures, be they non-custodial or custodial order in which the legislature intended to prescribe reflects, in fact, the degree to which they suppress freedom of movement and freedom that effective, offering a wide range judicial body in the eighth for a proper election and the seriousness of the crime.[18]

By comparison of the two legal texts can be easily seen that the range of educational measures offered by the current Penal Code is much lower than that envisaged in the new Penal Code.

Also, although it is retained in the new Penal Code of the educational measure of non-custodial supervision, it is regulated differently from the current regulatory content, because if you are currently supervised freedom consists in allowing the child to freedom for one year under special supervision , the new law, the measure is to control the educational supervision and guidance of the juvenile in its program daily, lasting between two and six months under the supervision of the probation service. In both texts, regulations, supervision can be delegated, as appropriate, minor parents, the one who adopted or guardian. If they cannot provide satisfactory supervision, supervision of juvenile court custody order, the same time, a trustworthy person, preferably a close relative, upon request, or a legal institution responsible for supervising minors.

Article 115. 2 of the new Criminal Code sets out specifically how to measure educational choice to be applied according to specific criteria provided for in art. 74 of the Code:

- circumstances and manner of committing the crime and the means used
- state created danger for the amount of protected
- nature and severity of the outcome product or other consequences of the crime
- reason and purpose offense
- nature and prevalence of crime which the offender is convicted
- conduct after committing the crime and during trial
- education level, age, health status, family status and social

[18] M. Iordache, "*Evolution of the juvenile offender sanctioning system*"

Conclusions

By comparing the two acts, the Penal Code in force and the new Penal Code in relation to minority we see that the new regulation provides for a system of enforcement easier, consisting only of educational measures. It is noted in regard to sanctions as applied to minors in the new Criminal Code, the concern shown by the juvenile criminal law as the main educational measures aimed at its rehabilitation, since the young age of the offender creates greater possibilities for its correction.

The sanctioning of offenders is, therefore, as compared with the common, as is covered for adults, a special system in both criminal legislation, as it is composed not only of punishment but of educational measures in the current Penal Code, or format only educational measures in the current Penal Code, or format only educational measures in the new criminal legislation.

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The new Criminal Code

THE UTILIZATION OF NATIONAL SECURITY INFORMATION IN CRIMINAL PROCEEDINGS

Ovidiu Predescu[*]

Abstract

In trial, the evidence is factual (facts, events, circumstances) and, due to the relevance of the information it provides, serves the truth and the just resolution of the criminal case, however, the means of evidence are the tools by which factual items can be found which serve as evidence in the criminal trial and evidentiary procedures (which do not constitute a category of means of evidence) are ways of proceeding to the use of the means of evidence.[1]

Like any other evidence, information on national security can only be administered during the criminal trial through the means of evidence provided in article 64 of the Criminal Procedure Code. Therefore, the true problem is to establish the means of evidence.

Key words: *penal lawsuit, informations, national security.*

Introduction

Special investigation techniques applied by information services in their specific activity do not constitute evidence in criminal proceedings. But in practice there are many situations where they lead to obtaining information on crimes, which is actually perfectly understandable if we consider the fact that most of the acts which the law describes as threats to national security are also punishable under criminal law.

Given this situation, the Romanian legislature established – either by general or special rules – the duty of the authorities responsible for national security to provide the prosecution with all the information that may constitute evidence in criminal proceedings, regardless of the means by which it was obtained.

1. To this end were elaborated the provisions of article 65 paragraph (2) of the Criminal Procedure Code (according to which at the request of the criminal prosecution body or of the court any person who knows or holds any means of evidence is required to notify the authorities about them or hand

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[1] See *S. Kahane,* Evidence and Means of Evidence. General Provisions, in *V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu,* Theoretical Explanations of the Romanian Criminal Procedure Code. The General Part, op. cit., vol I, p. 168-170.

them over), the provisions of article 66 paragraph (2) of Law no. 304/2004 on the organization of justice (according to which the services and bodies specialized in collecting, processing and archiving information are required to place, without delay, at the disposal of the competent prosecutor's office, at its headquarters, all raw data and information held in connection with crime-committing) or those of article 14 paragraphs (3) and (4) of The Government Emergency Ordinance no. 43/2002 regarding the National Anticorruption Directorate[2] and article 13 paragraphs (3) and (4) of Law no. 508/2004 on the organization and operation of the Public Ministry Directorate for Investigating Organized Crime and Terrorism[3].

So there is no doubt that in so far as through the authorized activities pieces of information relevant for determining the existence or nonexistence[4] of a crime, for identifying the person who committed it and generally clarifying the circumstances of the case are collected, they shall be provided to the competent judicial authorities. It is precisely for this reason that the criminal prosecution bodies are qualified by article 10 point (d) of Law no. 51/1991 on National Security in Romania as recipients of information in national security.

The law does not make distinctions based upon the nature of the offense, so there is an obligation to provide information in all situations (and not just for crimes against state security).

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[2]The quoted texts stipulate that the services and bodies specialized in collecting and processing information are required to provide at once The National Anticorruption Directorate (DNA) with the data and information held in connection with the committing of crimes of corruption, and respectively, that the services and bodies specialized in collecting and processing information will provide all the data and information mentioned in paragraph (3), without processing it, at the request of the Chief Prosecutor of the DNA or of the prosecutor specially assigned by the former.

[3] Both rules provide that the services and bodies specialized in collecting and processing information are required to immediately make available for The *Romanian* Directorate for Investigating Organized Crime and Terrorism (DIICOT) all data and information held in connection with the committing of the criminal offenses referred to in article 12 (those falling within the competence of this prosecuting body – A/N), respectively, that the services and bodies specialized in collecting and processing information, at the request of the DIICOT Chief Prosecutor or of the prosecutor specially assigned by the former, will make available all data and information mentioned in paragraph (3), without processing it.

[4] We appreciate as liable to criticism the legislature's choice of words "raw data and information held in connection with crime-committing", present in article 66, paragraph (2) of Law no. 304/2004, in article 14, pararagraphs (3) and (4) of G.E.O. no. 43/2002 and article 13, paragraphs (3) and (4) of Law no. 508/2004. In fact, the task of providing information subsists whenever it contributes to finding the truth in a case – which stems from the fact that failure to fulfil this obligation attracts, not least of all, criminal liability (for example, according to article 265 of the Criminal Code, the fact of not notifying the judicial bodies about circumstances which, were they known, would lead to *establishing the innocence* of a person unjustly prosecuted or convicted or the release of a person unjustly kept in remand constitutes a criminal offense).

2. In trial, the evidence is factual (facts, events, circumstances) and, due to the relevance of the information it provides, serves the truth and the just resolution of the criminal case, however, the means of evidence are the tools by which factual items can be found which serve as evidence in the criminal trial and evidentiary procedures (which do not constitute a category of means of evidence) are ways of proceeding to the use of the means of evidence[5].

Like any other evidence, information on national security can only be administered during the criminal trial through the means of evidence provided in article 64 of the Criminal Procedure Code. Therefore, the true problem is to establish the means of evidence.

According to article 11 of Law no. 14/1992 regarding the organization and functioning of the Romanian Intelligence Service, the unfolding of the technical surveillance activities indicated in article 20 of Law no. 535/2004 on preventing and combating terrorism "is recorded in the findings which, prepared in compliance with the Criminal Procedure Code, may constitute means of evidence", we find a similar provision in article 14 paragraph (1) point (e) of Law no. 191/1998 regarding the organization and functioning of the Protection and Guard Service. The texts are supported by the general provision of article 90 paragraph (2) of the Criminal Procedure Code, according to which the minutes and findings signed by other bodies (than the criminal prosecution body and the court – A/N) constitute means of evidence if the law so provides. At first glance, one might say that translating this information into evidence is done through a document prepared by intelligence workers, called findings.

There are however a number of clarifications to be made. As shown in the doctrine[6], minutes and findings are means of evidence only if the facts are established *ex propriis sensibus* by the official. Whereas, having in view the specific activities listed in article 20 of Law no. 535/2004, it cannot always be argued that workers of the authorities in the field of national security are in such a position, for example, in the case of interception and recording of communications, pieces of information relevant for criminal law are not the result of direct personal observation but derive from talks with suspects, who are subject to surveillance. On the other hand, mere classification as means of evidence of the findings is not enlightening, as it is known that in the criminal trial two categories of such acts are used: those

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[5] See *S. Kahane,* Evidence and Means of Evidence. General Provisions, in *V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu,* Theoretical Explanations of the Romanian Criminal Procedure Code. The General Part, op. cit., vol I, p. 168-170.

[6] See *Gr. Theodoru*, Criminal Procedure Law Treatise, Hamangiu Publishing House, Bucharest, 2007, p. 382, *I. Neagu*, Criminal Procedure Law. A Treatise, Publishing House Global Lex, Bucharest, 2007, vol. I, p. 396-397.

serving an evidentiary function on the merits of the case and those proving the performance of activities.

Considering the above, we appreciate that an accurate identification of the means of evidence requires reporting every act of technical surveillance in part[7], as follows:

i) in the case of "interception and recording of communications", the means of evidence are the magnetic or optical media on which the recorded conversation or communication (with the note including its transcription) was stored. Even though we are in the presence of the information security process, not the evidentiary procedure, no such evidence in criminal proceedings is permitted under article 91[6] paragraph (2) final sentence, of the Criminal Procedure Code (according to which any other records can contitute means of evidence if they are not prohibited by law). In this case, the findings have only the value of a document attesting to the legality and the manner of carrying out the technical surveillance activity, as an operation for obtaining the evidence; its necessity and usefulness are subsumed to the requirements resulting from the *per a contrario* interpretation of the provisions of article 64 paragraph (2) of the Criminal Procedure Code;

ii) when "searching for information, documents or writings for the obtaining of which access to a place or an object or opening of an object is required", as well as in the case of "removing and restoring an object or document, examining it, extracting the information it contains, recording, copying or obtaining statements by any means", the means of evidence are the very findings of the investigative activity. If there is an objective impossibility to make copies or take extracts, the items of information relevant to criminal law will be written. In other cases, the findings will be accompanied by a copy of the document or of the magnetic tape, the obtained extract or the sample of the object identified. With these investigative techniques, the findings acquire, therefore, a double evidentiary functionality, both on the merits of the criminal case and the legality of the operation of technical surveillance.

3. In matters of national security legislation does not expressly state the content of findings[8], but conditions their procedural validity on "compliance with the Criminal Procedure Code". Taking into account the terms of article 91 paragraph (1) of the Criminal Procedure Code, we appreciate that in the findings the following must be specified:

i) the date and place where the act was concluded, the start and completion time;

ii) the name and status of workers in the intelligence and of the person by whom it is drawn up;

iii) a detailed description of the findings. It will include the

[7] The exception is the measure of placing, maintaining and removing objects from the places where they were laid, which – being only complementary to the interception of communications – is by itself unable to lead to obtaining information.

[8] Despite its name, the finding is actually a record of proceedings.

concrete results of the operations of interception / recording of communications, access to a place or object, the examination of an object or document, extracting the information it contains, etc. (basically, any measure of article 20 of Law no. 535/2004, except for "placing, maintaining and removing objects from the places where they were laid"). Where relevant, evidentiary documents or objects shall be attached, for example, in the case of interception and recording of communications the magnetic / optical media containing the recorded conversation, to which the findings refer, as well as its transcription are attached;

iv) the measures ordered. It will specify, for example, that in the context of the authorized entry (access) into the suspect's home, the investigating body proceeded to the (also authorized) examination of certain documents, the copying or taking of some excerpts being ordered;

v) certain additional information. As this is an interference with privacy, the findings must indicate the number and date of the authorizing mandate, the issuing court, the measure permitted and through the implementation of which items of information legally relevant to criminal law were obtained, the name of the person concerned by the investigative process, and in the case of "access", the place where it was authorized and conducted.

As investigative processes are part of the activity of intelligence to achieve national security, therefore are state secrets, the findings will not include the "objections and explanations" of the individuals concerned by the authorization, being always drafted in their absence. The presence of witnesses is not required either (in fact, it would not even be possible, anyway).

The findings will be signed on each page and at the end by the worker who prepared them, thus becoming an official document.

4. The correct classification in criminal procedure of the document acknowledging the surveillance by technical means imposes some limitations, as well.

On the one hand, the documents in which the results of the operations of interception and recording of communications performed pursuant to Law no. 535/2004 are transcribed cannot be treated as the minutes of the transcript or certification of the records within the meaning of article 91^3 of the Criminal Procedure Code. Likewise, findings related to the degree of access to a place or object are not the minutes of search within the meaning of article 108 of the Criminal Procedure Code.

On the other hand, findings that relate to article 11 of Law no. 14/1992 and article 14 paragraph (1) point (e) of Law no. 191/1998 are not confused with the minutes that the authorities responsible of national security

draw up as fact-finding bodies[9], according to article 214 paragraph (5) of the Criminal Procedure Code[10], nor with findings related to flagrant crimes on the national security system [article 12 paragraph (1) of Law no. 14/1992 and article 29 paragraph (1) of Law no. 191/1998]. Those latter minutes are not aimed at carrying out the activities referred to in article 20 of Law no. 535/2004.

Documents by which special investigative procedures are recorded have the legal nature of documents prepared outside the criminal process by bodies other than those belonging to the judiciary.

5. Romanian legislation does not lay down any express restriction on the use, as evidence in the criminal case, of the information provided by intelligence. The practice is faced however with the problem of incompatibility between the advertising of criminal procedures and the specific secrecy of national security. Even if it reveals the committing of crimes, however, information provided to the judicial bodies is obtained in the carrying out of national security activities, so it has the status of a state secret. We find the same classification level with the findings (which is the means of evidence) and with the mandate authorizing the special investigative process. The provisions of article 17 points (f) and (g) of Law no. 182/2002 on the protection of classified information[11] and article 10 paragraph (1) of Law no. 51/1991[12] are particularly clear in this respect.

Of course, the institution of evidence is not dependent on whether the information is classified as a state secret or not. Evidence means a factual item providing relevant information on those aspects of the criminal case for which the doctrine generally accepts four key characteristics: legality, appropriateness, conclusiveness and usefulness[13] The requirement of the public (unclassified) character is not found among them. Moreover, procedural law includes two provisions expressly allowing the judicial body to manage classified evidence in criminal proceedings.

Thus, article 97 paragraph (3) of the Criminal Procedure Code stipulates that "if the object or document is secret or confidential, its

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[9] I have already explained (see *supra*, ch. II, section 3) that, for crimes against state security and for terrorist acts, intelligence bodies have the capacity of fact-finding bodies in the sense of article 214 paragraph (1) point (a) of the Criminal Procedure Code.

[10] Moreover, the minutes drawn up by the intelligence services as fact-finding bodies always *constitute* means of evidence, while findings of special investigative techniques finding *may constitute* means of evidence.

[11] According to these texts, "in the category of state secret information is included information which is or relates to: [...] (f) the intelligence activity carried out by public authorities established by law for national defense and national security, (g) the means, methods, techniques and work equipment, and specific information sources used by the public authorities that carry out intelligence activities [...]".

[12] According to this article, the intelligence activity for national security has a state secret status.

[13] See *I. Neagu*, op. cit., vol. I, p. 366-368.

presentation or hand-over shall be made in conditions which ensure secrecy or confidentiality", and article 91^3 paragraph (2) second sentence of the Criminal Procedure Code says: "If crimes are committed through conversations or communications that contain state secrets, the recording is done in separate minutes, and the provisions of article 97 paragraph (3) shall apply accordingly". There is, in this regard, no reason why classified information obtained through special investigative national security procedures shouldn't meet all these traits, and therefore, be retained as evidence.

But, on the other hand, the classified nature of the evidence is at odds with some guarantees of the right of defense of the accused or the defendant. It is known that the fundamental right of defense presupposes the possibility for the parties in litigation to know all the evidence prejudicial to their interests, to have access to the file on them[14]. As long as the information provided by the authorities with responsibilities in national security is relevant, meaningful and useful to solving a criminal case, but also has the status of a state secret, the judicial body cannot ensure the observance of these fundamental guarantees.

Thus, for example, during the presentation of the prosecution material, the prosecutor – although required to assure the defendant the right to take cognizance of the case file [article 250 points (b) of the Criminal Procedure Code] – will be, however, unable to provide classified information because, by definition, the accused or defendant has no right of access to such information[15].

If the prosecutor will allow the defendant access to all the material of the prosecution, he will inevitably violate the obligations provided by the legislation on classified information. The court, in its turn, is bound by duty to protect state secrets; even in the conditions of declaring a secret hearing[16] in which classified evidence is given, the parties are present in court [article 290 paragraph (4) of the Criminal Procedure Code] and, obviously, have the right to acknowledge the entire evidentiary material existing in the case. So the problem is not limited to the principle of public hearings, but concerns the very right of the parties to access the file in preparation for a practical and effective defense.

Even if all the evidence must in principle be given in the presence of

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[14] See *I. Deleanu*, Constitutional and Political Institutions. A Treatise, Publishing House Europa Nova, Bucharest, 1996, vol. II, pp. 148-149, I. Neagu, p. 91-99.

[15] of access to classified information is granted only if, following specific checks undertaken, it results that an applicant is not in one of the incompatibility cases referred to in article 159 and article 160 of Annex 1 to G.D. no. 585/2002. However, as long as the judge has authorized, for national security reasons, the application of any of the investigative procedures on the defendant, it is difficult to assume the absence of such situations.

[16] According to article 290 paragraph (2) of the Criminal Procedure Code, the hearing may be declared secret if its disclosure could harm state interests.

the accused in open court[17], the Court in Strasbourg has upheld[18], however, that the right of disclosure of relevant evidence is not absolute, in specific criminal proceedings there may be some competing interests – such as those of national security – which can be weighed against the rights of the accused. In some cases, concealment of evidence from the defense may seem necessary, in order to safeguard a substantial public interest.

In our opinion, such a decision shall not affect the criminal procedure rules. Although the European court case-law and the European Convention rules form a block having constitutional and supra-legislative force, still article 20 paragraph (2) of the Constitution states that in the event of any inconsistency between the covenants and treaties on fundamental human rights to which Romania is party and domestic laws, international regulations have priority, except where the Constitution or national laws co[19]ntain more favourable provisions. The principle is therefore that of the application of the rule more favourable to human rights, whether internal or international[20]. In the case here described, the rule more favourable to the culprit is the domestic one. The provisions of article 250 points (b) and article 294 paragraph (2) of the Criminal Procedure Code uphold the right of the defendant – at the end of the prosecution and in the trial phase – to take cognizance of all file parts, the judicial bodies having the obligation to take the necessary measures in order to ensure the exercise of this right; the Romanian criminal procedure law makes no distinction depending on the classified or unclassified character of the documents in the file. However, *ubi lex non distinquit, nec nos distinquere debemus* (Where the law does not distinguish, we ought not to distinguish). The completeness of the procedural rules results in a more favourable position for the defendant than that provided by the European court case. For this reason we consider that in this particular situation, the judicial bodies are obliged to apply the domestic legal provisions.

6. Under such conditions, state secret information provided by the authorities responsible for matters of national security can be used as evidence in a criminal case in one of the following two ways:

(i) tactical utilization. In this case, the secret information will help organize the necessary framework for obtaining the relevant evidence item

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[17] See also: ECHR, Judgement of 6 December, 1988 in Barbera, Messegue et Jabardo v. Spain, ECHR, Judgement of 23 April 1997 in case Van Mechelen, etc. v. Netherlands, ECHR,

[18] See Judgement of 16 February 2000 in case Davis v. Rowe et Great Britain.

[19] See *C.L. Popescu*, op. cit., p. 266.

[20] See: *C. Bîrsan* European Convention on Human Rights, comment on articles, Volume I, Rights and Liberties, Publishing House All Beck, Bucharest, 2005, pp. 102-104; *M. Udroiu, O. Predescu,* European Protection of Human Rights and Criminal Proceedings in Romania. A Treatise, C.H. Beck Publishing House, Bucharest, 2008, p. 22; *C.L. Popescu*, International Protection of Human Rights - Sources, Institutions, Procedures, Publishing House All Beck, Bucharest, 2000, p. 270, *I. Deleanu*, Bindingness of the Decisions of the European Court of Human Rights and the European Court of Justice, Law (review) issue 2 / 2007, p. 28.

from another source, which is unclassified. For example, if from the intercepted communications relating to national security it results that the suspect is preparing to commit a crime of giving-taking bribe, the prosecutor has the opportunity to set up a flagrante delicto or to invoke the provisions of article 91^1 paragraph (2) of the Criminal Procedure Code for tapping the offender. Similarly, if – after access to the suspect's private space – the intelligence services have obtained information in connection with the committing of a crime of counterfeiting currency, the prosecutor may conduct a search on the premises of the suspect.

This way of using classified information requires – most importantly – a prompt and effective cooperation between the authorities responsible for national security and the judicial authorities.

(ii) procedural utilization, through declassification. According to article 3 of Annex 1 to Government Decision no. 585/2002 approving the National Standards for the protection of classified information in Romania[21], declassification means an operation of an administrative nature which consists in suppressing the mentions of classification and removal of classified information from the competence of the protective regulations stipulated by law. It is done by the public authorities whose competence is to approve the classification and secrecy of such information [article 24 paragraph (10) of Law no. 182/2002], namely the institutions with responsibilities in national security matters.

Situations that may lead to the declassification of information are provided in article 20 paragraph (1) and article 23 paragraph (1) of Annex 1 to Government Decision no. 585/2002: *i)* when the classification time limit has expired[22]; *ii)* when disclosure may no longer harm national security, defense, public order or the interests of the public or private persons holding the secret information; *iii)* when the classified status of the information was given by a person legally unempowered[23]; *iv)* it has been established with certainty that the classified information was compromised or irretrievably lost[24].

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[21] The Official Gazette no. 485 of 5 July 2002, with subsequent amendments and additions.

[22] According to article 12 of Annex 1 to G.D. no. 585/2002, the time limits for classifying state secret information shall be determined by the issuer, depending on its importance and the consequences that might occur as a result of unauthorized disclosure or dissemination. Time limits for the classification of state secret information, by levels of secrecy, unless it requires a longer protection, are up to: 100 years for top secret classified information of special importance; 50 years for top secret classified information; 30 years for classified secret information. These time limits may be extended by decision of the Government, based on a thorough motivation, at the request of leaders of the organizations holding classified information or, where appropriate, senior officials empowered and entitled to award classification levels.

[23] In my opinion, this should constitute grounds for the revocation of classification.

[24] In this case, declassification is based on a research carried out only with the written consent of the issuer [article 23 paragraph (2) of Annex 1 to G.D. no. 585/2002].

As can be seen, the need to administer the classified information as evidence in criminal proceedings does not constitute grounds for declassification. Even if the intelligence services are obliged, on the one hand, to notify the judicial bodies when, in their specific activity, they learn about the committing of crimes, and, on the other hand, to provide them with the unclassified raw information they hold relating to the offenses, however, the relevance and usefulness of such information as evidence in the criminal case information are not legal grounds for declassifying it; the authorities responsible for matters of national security are not required to declassify information on grounds of utilization in a criminal proceeding. Of course, the prosecution or the court may request declassification, but the rejection or acceptance of such a request will build solely on the restrictive grounds provided for in article 20 and article 23 of Annex 1 to Government Decision no. 585/2002.

In the event that, in applying these legal provisions, the intelligence services agree that this is one of the situations mentioned above, they will proceed to declassifying the information obtained through the special investigative procedures, thus, the information becomes public and, as long as it is relevant, useful and conclusive, it can be used as evidence in criminal proceedings.

7. Although declassified, information resulting from investigative techniques in relation to national security can be used as evidence in the criminal trial condition only on condition that the judicial body proves the legality of the way it was obtained. This duty derives from the interpretation of article 64 paragraph (2) of the Criminal Procedure Code, under which means of evidence obtained illegally cannot be used in criminal trials.

Checking the legality of the investigative process involves, first of all, verifying the authorizing act.

According to article 17 point (g) of Law no. 182/2002 and article 21 paragraph (12) of Law no. 535/2004, a mandate is a document classified as state secret. Theoretically, it could not be included in the criminal case file, as it is not accessible to the notified court nor to the defendant.

Practically, however, from the moment of declassifying the information obtained through the special investigative methods, the authorizing act ceases to be secret. The mandate issued by the judge is only a legally binding document allowing the interference of the authorities with an individual's rights. Its classified nature derives, *eo ipso* (in itself), from the classified nature of the investigative process it concerns and subsists only as long as the operation itself remains secret. Once the information becomes public, under one of the legal bases, the investigative operation will be public too, obviously. It is understood that, given the fact that this information is used as evidence in criminal proceedings and is known to the defendants, the investigative process used to obtain them is also revealed.

Under the circumstances, it is my opinion that, having to consider as evidence a series of declassified information, the court must exercise an active role and check the authorization act, which loses *de facto* (in fact)[25] its status of a state secret. From this moment, access to the mandate by persons with no right to know classified information cannot present a danger to national security.

During the check of the legality of the investigative procedure, the court will be set on establishing the following:

i) whether the authorization was given in observance of the rules of jurisdiction (by a judge of the High Court of Cassation and Justice);

(ii) whether the investigative operation is among those which by law can be used by the authorities responsible for matters of national security;

(iii) whether the information of probative value in a criminal case has been obtained by an authorized investigative procedure;

(iv) whether the period in which the information was obtained is the one stated in the authorizing act.

The court, however, is not entitled to determine the merits of the authorizing ruling. The merits presuppose the essential correctness of the substantive conditions referred to in article 53 of the Constitution, article 3 of Law no. 51/1991 and article 20 to 21 of Law no. 535/2004. This condition is a prerequisite in criminal courts, has an extra-penal character and has been definitely settled through the authorizing ruling of the High Court of Cassation and Justice. The provisions of article 44 paragraph (3) of the Criminal Procedure Code, according to which the civil court's final decision[26] on a circumstance that constitutes a prior criminal matter is res judicata in criminal court, thus become applicable.

Secondly, verifying the legality of the way information is obtained involves checking the compatibility and compliance of national legislation with European regulations.

Throughout the study I have pointed out various regulatory provisions which, in my view, do not satisfy these requirements. I must add that, in a case against Romania[27], the European Court found that the provisions of former article 13 of Law no. 51/1991 did not ensure adequate and sufficient safeguards for the citizen against abuse of public authorities in the interception and recording of communications for national security

[25] Even in this case, from a technical standpoint it is necessary to go through the declassification procedure, on the initiative of the issuer (The High Court of Cassation and Justice), by deleting entries in the document classification.

[26] As this is the field of approval of intelligence activities to achieve national security and not an evidentiary process in criminal matters, the High Court of Cassation and Justice appears here as a court vested to solve an extra-penal matter (civil court), not a criminal one.

[27] See ECHR, decision of 3 April 2007 in case Dumitru Popescu v. Romania.

reasons. I will retain from the considerations of the Strasbourg Court two elements[28] that are of current interest:

i) the lack of obligation to inform the person on the circumstance of the interception and recording of his/her communications;

ii) the lack of guarantees on the protection of the intact and complete nature of the records and on their destruction.

Although – as compared to the era of the facts evoked in the European Court decision – a new procedure for the authorization of special investigative techniques for national security reasons has been set up, we have to admit that it does not meet these requirements, either. Basically, Law no. 535/2004 does not cover such guarantees, thus contradicting the European court case.

This unconventionalilty, however, has no effects on the legality of the way of obtaining evidence, as it does not constitute grounds for the exclusion sanction. We support it because intelligence services, like all other public institutions in Romania[29], are required to comply with the European Convention and the European Court jurisprudence, which are directly applicable. At least theoretically, this means that – once notified the omissions of Law no. 535/2004 – the authorities with responsibilities in national security can establish their own measures in the spirit of proper safeguards against arbitrariness. Two examples are relevant in this sense. We have shown previously that the provisions of articles 21-22 of Law no. 535/2004 do not establish a maximum period of time for which interference with the individual's fundamental rights may be allowed (legitimized), which is inconsistent with European requirements in this area. In an actual operation, the intelligence services themselves can impose temporal limitations on the use of special techniques; if, for example, the interception of the suspect's communications lasted 30 days and resulted in obtaining data relevant for criminal law, it seems an excessive measure to exclude it as evidence in the case because the law under which the operation was authorized is not consistent with international human rights norms. The law also does not cover information collected by special procedures, but by the rules disciplining intelligence activity, workers may be imposed the obligation to destroy the information which is not related to the facts for which the individual is suspected, nor to the committing of crimes.

These aspects can and should be evaluated by the court competent in the criminal case, by checking the actual circumstances of the national security investigative process.

But, *de lege ferenda*, it is desirable that the much-disputed legislative package expected to be adopted in matters of national security

[28] ECHR held in this case other reasons as well, namely: *(i)* lack of independence of the competent authority in authorizing the interception (former article 13 of Law no. 51/1991.

[29] See, in this sense: *C. Bîrsan,* op. cit., p. 101; *C.L. Popescu*, op.cit., p. 263.

should take into account the results of the European Court decisions and state expressly and exhaustively adequate safeguards for the full respect of fundamental human rights, thereby removing the uncertainties that continue to hover over such a sensitive area[30].

8. The law [article 91^6 paragraph (1) of the Criminal Procedure Code] provides the possibility to subject the records of communications, of all special investigation techniques in national security matters, to technical expertise, at the request of the prosecutor, of the parties or ex officio by the court. Expertise is not mandatory, it will be ordered when the above-mentioned subjects of the procedure have suspicions about the authenticity of information provided by this procedure, or where the party does not acknowledge the voice or speech as their own. It is an important guarantee of the fairness and accuracy of the interception and recording operations because forensic expertise of voice and speech is included as evidence in criminal proceedings[31]. Expertise can be performed both on audio tape recordings and recordings made on hard-drives, CDs or various other types of magneto-optical or digital media. We may retain some aspects of interest in the specialty literature[32]:

(i) technical operations meant to establish the authenticity of audio recordings consist, according to the AES43-2000 standard, in analysis of the physical integrity of the magnetic tape, analysis of the waveform and of the spectograms of recorded audio signals, and of the technical characteristics of the equipment used in their recording;

(ii) presenting the original magnetic media on which the recording was made is required, since records on the hard disk of a computer may be counterfeit or truncated, subsequent copying on an audiotape leading to loss of

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[30] See, for a detailed critical examination of various legislative proposals regarding the matter, *C.-L. Popescu*, National Security versus Democracy, Rule of Law and Human Rights? A Critical Study of the Pre-Draft Law on National Security, Human Rights (review), issue 2 / 2006, p. 3.

[31] See *Gh. Mateuţ,* About the New Regulations on Audio and Video Records as Criminal Evidence, Law (review) issue 8 / 1997, p. 75.

[32] See: *C. Grigoraş*, Expertise in Sound Recordings, Law, issue 1 / 2003, p. 162-167; *D.I. Cristescu*, Techniques for Obtaining the Materials Necessary for Comparison of Findings and Expertise Ordered on the occasion of Investigating Crimes against National Security and Terrorism, Law, issue 7 / 2005, pp. 191-208, *C. Grigoraş*, Application of the ENF Criterion in the Legal Expertise of Audio and Video Recordings, Means of Telecommunication and Computers, in "Methods and Techniques of Forensic Identification", Romanian Society for Legal Medicine, Bucharest, 2006, pp. 101-111, *H. Măndăşescu*, Audio Tape Expertise, in ""Methods and Techniques of Forensic Identification", Romanian Society for Legal Medicine, Bucharest, 2006, pp. 279-290, *M. Mircea, I. Enache*, Voice Print, Forensic Science (review), issue 4 / 2000, pp. 3-4. The last two authors show that in the United States of America, the method of identifying an individual by his voice characteristics has been applied in over 400 court cases, without recording any error.

fidelity[33];

(iii) samples of voice and speech presented to the expert will be taken in compliance with methodological rules, consisting in that the speaker will be prompted several times to pronounce sounds, words, phrases or sentences subject to the expertise ordered, while maintaining the intonation used in the phonogram and print media at issue;

(iv) voice and speech expertise can establish a variety of factors, such as: voices heard, their number, if they belong to one or more persons, pronunciation, speech defects, peculiarities or defects of the person's hearing-speaking apparatus, sex and approximate age of the speaker, whether the voice is real or imitated, concealed, disguised or technically modified, etc.

Conclusions

Consistently with the principle of free assessment of evidence, as enshrined in article 63 paragraph (2) of the Criminal Procedure Code, information obtained through national security investigative procedures does not have a value established before the criminal trial. Their assessment will be done by the prosecution or the court, after examining all the evidence in the case.

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The Criminal Procedure Code.

THE MATERIAL RESPOSIBILITY OF THE MILTARY STAFF

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Abstract

In the article it is shown that the material responsibility (repairing) is a form of legal responsibility specific for the military staff, derogatory from the provisions of the common law in question, which regulates the patrimonial responsibility – proper to the contract staff (who carry out their activity on basis of an individual work contract) or the civil responsibility – proper to the public office workers.

The features which characterize the material responsibility of the military staff, the situations which they deal with, the background conditions which allow to deal with this form of responsibility, the way to establish and recover the damages, to contest the imputations, as well as to operate the committees for the investigation of complaints and the committees for the jurisdiction of imputations are presented.

The analysis is made from the perspective of the community law, concluding that the setting up of the jurisdiction administrative bodies we have referred to is not in contradiction with a person's right to a public trial, and during a reasonable term of his/her cause by an independent and impartial instance, as long as the decision of the jurisdiction administrative body can be open to attack in front of a legal instance, in which sense is the jurisprudence of the European Court for the Human Rights.

Key words: – legal responsibility, patrimonial and material responsibility, military staff, damages, complaint and jurisdiction committees for imputations

Introduction

The material responsibility[1] *was removed in the legal law, being replaced by the patrimonial responsibility regulated by a distinct chapter in the Labour Code (Chapter III in the 11th title – "The Legal Responsibility") – art.269-275.*

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[1]As it was regulated by the art.102-110 in the Labour Code – approved by Law no.10/1972 and cancelled by art.269 in the present Labour Code – approved by Law no.52/2003, published in Romania's Official Journal, Part I, no.72 from February 5, 2003, modified and later on completed.

The reciprocal patrimonial responsibility of the parties *belonging to the labour legal relationship (employer and employee), has a restoring character and it is based, according to art.*269 and 270 in the Labour Code, on "the norms and principles of the contract civil responsibility". *Therefore, it can be said that the patrimonial responsibility regulated by the Labour Code is, from the legal point of view, a variant of the contract civil responsibility, but having certain characteristics determined by the specific of the legal work relationships*[2].

With the same idea in view, that is of replacing the material responsibility, regulated by the previous Labour Code[3], we mention that the Statute of the public office workers – Law no.188/1999, establishes deliberately – at art.77, that the responsibility of this category of employees is **civil** and it binds: for the damage made intently to the authority patrimony or to the public institution where they work; for not paying back in due time the amounts of money which were wrongly given; for the damaged paid by the public authority or institution, as a principal, to a third person, on basis of some final and irrevocable legal decisions.

On way of exception, from the stipulations of the common law to which we have referred, the active military staff are materially responsible for the damage, made intently, concerning the forming, administration and management of the financial and material resources, as well as concerning the fulfill of the military service or of the job duties within the public institutions/authorities where they work[4].

The essence of the subject as concerns the material responsibility of the active military staff[5] is *the Government's Decree no.121/1998 concerning the material responsibility of the military staff*. A normative act with a special character, derogatory from the provisions of the common law in the field, represented by the regulations applicable to the employees hired on basis of individual work contract or to those who have, under the law conditions, the quality of public office workers.

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[2]To see in this sense, I.T.Stefanescu, Treaty for the Labour Right, vol.1, Lumina Lex Publishing House, 2003, pp.679-680 and 683. For another opinion, according to which the patrimonial responsibility regulated by the Labour Code is a specific form of legal responsibility, Al. Ticlea, Andrei Popescu, Constantin Tufan, Marioara Tichindelean, Ovidiu Tinca – The Labour Right, ROSETTI Publishing House, Bucharest -2004, p. 690-692.

[3] V. Patulea, *Some reflections concerning the material responsibility*, in the "Law" no.2/1999, pp. 62-66; A. Athanasiu, C.A. Moarcas, The Worker and the Law, The Labour right, Oscar Print Publishing House, Bucharest, 1999, p. 26-27.

[4]Art. 2 in *the Government's Decree no.121/1998 concerning the material responsibility of the military staff* – published in Romania's Official Journal, Part 1, no.328 from August 29, 1998, approved by Law no.25/1999, published in Romania's Official Journal, Part 1, no.34 from January 28, 1999.

[5] According to the provisions in art.7 and 9 from the Government's Decree no. 121/1998, its provisions also apply to the military staff who fulfill the military service as term or reduced term military staff, to the concentrated or mobilized reservists, to the volunteer soldiers and corporals, to the pupils and students in the military education institutions and to the civil .

A first aspect which must be clarified refers to the constitutionality of the Government's Decree no.121/1998, especially as the normative act under discussion is anterior to the Labour Code – approved by the Law no.53/2003, come into force on March 1, 2003. In this sense the Constitutional Court has pronounced their opinions several times, both concerning the provisions of the normative act, totally, and concerning some articles in its contents, establishing the conformity of the former with the fundamental law[6].

The features which characterize the material responsibility of the active military staff are the following:

a) it is conditioned by the existence of the work juridical relationship between the responsible military staff and the damaged public institution/authority. The work juridical relationship derives from the order by which the person has acquired, under the legal conditions, the quality of active military staff – officer, military master or non-commissioned officer.
b) the **guilty** (the blame) of the involved is at the basis of the material responsibility. As a rule, the presumption of guilty does not operate, except for the shortages in the administration in case of the staff who act as administrators, in which case a simple presumption of their guilty operates.
c) *in case the prejudice was made by several military staff*, and the measure to which they contributed to produce it cannot be established (i.e. the guilty degree of each person cannot be determined) the material responsibility of each military staff is established, according to art.15, indented line (2) in the decree, *proportionally to the net pay at the date the damage was found out.* In case the manipulation of the goods in an administration is done collectively or in successive shifts without handing over the administration between shifts, *the material responsibility is established proportionally with the time worked by every administrator from the last inventory of the goods* – art. art.15, indented line (3) in the decree;

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[6] Ex.: *the decisions of the Constitutional Court no.366/2003* (published in Romania's Official Journal, Part 1, no.781 from November 6, 2003) and *no.281/2004* (published in Romania's Official Journal, Part 1, no.720 from August 10, 2004). Applying to a systematic interpretation of the provisions in the Government's Decree no.121/1998, the Court has mainly found out that its dispositions do not institute any kind of discrimination, they stipulate some special conditions applicable to the military staff, which do not exclude the free access to justice. In addition, the setting up of some jurisdictional administrative procedures "*does not contravene the constitutional dispositions as long as the decision of the jurisdiction administrative body can be attacked in front of a legal instance, and the existence of some jurisdiction administrative bodies does not lead to the removing of the intervention of the legal instances, in the same sense being the jurisprudence of the European Court for the Human Rights (the case of Le Compte, Van Leuven and De Meyere against Belgium, 1981)".*

d) *the repair of the damage made by the military staff is achieved, generally, by money equivalent*, by retaining from the pay, respectively – art. 27 in the decree[7];

e) if in case of the patrimonial responsibility regulated by the Labour Code, besides the causes of patrimonial non-responsibility in the civil law, the normal risk of the job operates – specifically – as well, what particularizes the material responsibility of the military staff as compared to the patrimonial responsibility is that, besides the normal risk of the job it is mentioned as a cause of material non-responsibility the situation when the damage is made when executing the order of the commander or of the unit chief, in which case the material responsibility belongs to the latter[8] – art.6 indented line (1) letter d) in the decree;

f) *the parties cannot establish situations of aggravation of the military staff's material responsibility* – as compared to the legal norms, which have an imperative character as concerns the latter's responsibility;

g) unlike the patrimonial responsibility, *whose establishing is achieved*, in case the parties' agreement is missing, *by means of the procedure which solves the rights conflict – the judgment instance*, in case of the military staff's material responsibility, this is established by the hiring public institution/authority (represented by the military unit where the involved military staff is hired) through an imputation decision[9], which is an executory title;

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[7] The exception is regulated at art.28 in the Government's Decree no.121/1998, according to which the covering of the damage can be also made by "*depositing in nature the goods whenever the damage is not the result of a felony, in the following conditions:*

a) the goods should be identical and should correspond qualitatively;

b) they should be bought with legal documents;

c) they should be handed over to the unit where the damage was made."

[8] In an exceptional way, at the indented line (2) in art.6 in the Government's Decree no.121/1998 it is stipulated that there will not be exonerated from the material responsibility for the damage made in executing the commander/the military unit chief's order, that military staff, who having the possibility of removing partially or totally the damaging consequences of the order received, have not reported in written, within 24 hours from coming back from the mission, and have not taken, because of carelessness or ill-will, measures to avoid the damage, cases in which they are responsible together with commanders or the chiefs of the military units.

[9] Just like in the case of public office workers. We take into consideration that, according to the provisions of art.73 indented line (1) in Law no.188/1999, the repair of the damage made to the public institution/authority is done by the leader of the public authority who issues an order or an imputation disposition.

h) **from the point of view of the forced execution**, it **has**, just as the patrimonial responsibility, **a limited character**, being made, as a rule, according to art.27 in the decree, on one part of the active military staff's monthly net salary (at most one third of the net monthly salary, without being possible to exceed, together with the other cuts, half of these rights). For certain rights, specific to the activity of the military staff, *this limited character of the material responsibility is more emphasized than in case of the patrimonial responsibility*. We take into consideration that, according to art.13 in the decree, *for the damage made to the military unit in the process of preparing for fight*[10]*, the material responsibility is limited to three monthly net salaries, calculated at the date of finding out the damage*;

i) from the point of view of the material responsibility object, on one hand, just like in case of the patrimonial responsibility, it aims, from the point of view of the legal regulation, only at the repair of the material damages[11], and, on the other hand, it is limited, concerning only the effective damage – damnum emergens, and not the non-achieved benefits, as well – lucrum cessans, like in case of the patrimonial responsibility – regulated by the Labour Code or in case of the contract civil one (to see in this sense the provisions of art.11 indented line (1) in the decree).

When the damage was made by a fact which is an offence, the military staff (offender) *will be responsible, under all the aspects, on basis of the norms in the common law which regulates the delinquent civil responsibility*, the provisions in the Government's Decree no.121/1998 (art.11 indented line 2 in the decree) not being applied.

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[10] If within the Ministry of the Military Defense, the activities carried out during "the process of preparing for fight" do not raise problems of identification, for the other public authorities/institutions which have active military staff among their own staff, it is to be mentioned that at art.8 in the Government's Decree no.121/1998, it is stipulated that by "preparing for fight" it is understood "the operative work activities, as well". The leaders of the respective public authorities/institutions are enabled to establish, through internal regulations, "the missions and job tasks which are considered operative".

[11] In fact, in the civil law as well, in the hypothesis of the civil contract responsibility, the rule is the repair of only the material damage, the repair of the moral damage caused by the non-execution or inadequate execution of the contract being accepted only in exceptional circumstances.

By continuing the analysis, through reporting to the common law in matter, we think that the following remarks are to impose:

- the dispositions of the decree referring to the military staff who have positions of administrators are in accordance with those in the labour common law represented by Law no.22/1969 concerning the hiring of administrators, the setting of guarantees and the responsibility concerning the administration of the goods of the economic agents, the public authorities/institutions, as it was altered by Law no.154/1994. In fact, the provisions of the decree, as a special normative act, are completed, in the situations which are not included in its contents, with those in the common law in matter[12].
- the background conditions of the military staff's responsibility are similar to those necessary for committing the patrimonial responsibility of the employees hired on basis of an individual work contract, in this way:

- the quality of an active military staff within the public authority/institution where the damage was made;
- the illicit and personal fact of the respective military staff, made in connection with his work;
- the damage[13] made to the hiring public authority/institution;
- the causal ratio between the illicit fact and the damage;
- the guilty of the military staff involved.

The material responsibility is committed by meeting all these conditions, the absence of one of them removing this responsibility[14].

The establishing and recover of the damage [15] is made by an administrative investigation committee in the unit the damage was made, or by the superior echelons or by the specialized control bodies.

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[12] According to the provisions in art.51 in the Government's Decree no.121/1998 in "*the situations not provided by this decree the dispositions of the labour legislation and of the civil legislation will be applied".*

[13] The damage conditions are the same with those provided in the labour legislation: to be real, certain, actual, direct, material and not to have been repaired.

[14] The causes of the active military staff's material non-responsibility are provided in art.6 in the Government's Decree no.121/1998:

"a) for the inherent losses in executing the missions or in the process of preparation for work, in the household and production activities, which range in the limits stipulated in the legal dispositions in force – n.n., in other words, a specific form of "job risk";

b) for damage made because of causes which could not be foreseen and removed;

c) for damage caused by the normal risk of the job or by force majeure;

d) for damage made in the execution of the commander's/the military unit chief's order, in which case the material responsibility belongs to the latter."

[15] Regulated in Chapter III, art.22-29 in the Government's Decree no.121/1998.

The term to do the investigation is of 6o days from the date the commander/the military unit chief has found out or has been informed about the damage. For right justified reasons, on request, the commander or the chief of the superior echelon can extend this term with at most 60 days, by written order.

In all the situations, *the investigation of the circumstances under which the damage was made is done by calling the involved persons***,** for written explanations and presentation of evidence in defense.

The declining terms, concerning the committing of the military staff's material non-responsibility are:

- for the damage made to the institution where the involved person carries out his/her activity – 3 years from its causing;
- in case of obliging to give back the amounts charged without a right, the counter value of the goods or of the non-owed services – 1 year from the date the amounts or the goods were received or from when they benefited from the non-owed services. In case of finding out the damage after one year from receiving the amounts/goods or from when they benefited from the non-owed services, but not later than 3 years from this date, the material responsibility will be established in the charge of those guilty for the damage:
- if the military staff involved were not of good-will, they will be obliged to give back the amounts or to pay the counter value of the goods or of the non-owed services, in a term of at most 3 years.

In the situation in which the military staff does not consent by written, payment engagement, to cover the damage or, as the case may be, to give back the amounts or to pay for the goods or the non-owed services, he will be forced to do it by an imputation decision.

The imputation decision is issued within at most 30 days from the registration of the administrative investigation minutes and it is notified to the person who will pay within 30 days.

The commander or the chief of the military unit who has issued the imputation decision, or whose financial body has received the payment engagement, as well as the commander or the chief of the superior echelon, when he finds out that the imputation is totally or partially non-founded or illegal, can cancel it or can reduce it, within at most 3 years, by means of another decision, if meanwhile a sentence has not been given for the legal contest made against the imputation decision or the payment engagement. We rally to those opinions16[16] which appreciate this solution of the legislator as being totally logical and opportune, as long as a jurisdiction body has not pronounced itself.

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[16] I.T.Stefanescu, *The military staff's material responsibility*, in "Work relationships" no.11/1998, p. 44-47.

The military staff who consider that the imputation or the cut was made without a reason or by breaking the law, as well the person who, after he has signed a payment engagement, finds out that in reality he does not owe, partially or totally, the amount demanded by the unit, may make *an appeal*, within at most 30 says from the date of notification with signature of the payment decision or from the date of signing the payment engagement – art.30 in the decree.

The appeals are submitted to the unit which has the debit in the evidence and they are solved by the commander or the chief who has issued the imputation decision or whose committee has made the administrative investigation concerning the damage for which the payment engagement was signed. The decision on the appeal is pronounced within at most 30 days from its registration and it is notified in written, within at most 15 days from the passing, to the unit which has the debit in evidence, and to the involved person, as well.

The decree stipulates that *the appeal soundness* may be checked by *a committee for the investigation of appeals*, appointed by the commander/chief responsible for solving the appeal. It is mentioned, in an express way, that the members of the administrative investigation committee, who have initially established the value of the damage, may, as well, be members of this committee. In an opinion17[17], these provisions have been criticized, mentioning that they are "in a clear contradiction with the provisions in art.7 item 1 in the *Agreement for the defense of the human rights and of the fundamental freedoms*[18]. Starting from the provisions of art.6 item 1 in the *Agreement*, according to which any person has the right to the judge, publicly, and in a reasonable term, of his/her cause by an independent and impartial instance, set up by the law, the author of the critic points out the fact that it is not allowed that the same body, who has issued the imputation decision, to study the appeal, as well, because, evidently it cannot be an impartial instance.

We do not share the same point of view, *on one hand*, on the reason that the jurisdiction administrative bodies cannot be put on the same plan and, in no case can they substitute the legal instances, and *on the other hand*, as we have already shown, the Constitutional Court has noticed[19] that the dispositions of the Government's Decree no.121/1998 are according to the fundamental law, the setting up of some jurisdictional administrative procedures does not exclude the access to justice "*as long as the decision of*

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[17] Teodor Bodoasca, *Some critical aspects concerning the new regulation regarding the military staff's material responsibility,* in "The Law" no.2/1999, p. 67-77.

[18] *The Agreement for the defense of the human rights and of the fundamental freedoms* was ratified by Romania through the Law no.30/1994, published in Romania's Official Journal, Part 1, no.135 from May 31, 1994.

[19] By the Decision no.366/2003, published in Romania's Official Journal, Part 1, no.781 from November 6, 2003.

the jurisdictional administrative body can be attacked in front of a legal instance, and the existence of some jurisdictional administrative bodies does not lead to the removal of the legal instances' intervention, in the same sense being the jurisprudence of the European Court for the Human Rights…"

The unsatisfied military staff may make a complaint against the verdict given about the appeal, within at most 15 days from the verdict notification, at the unit which has the debit in evidence. This unit is forced to submit the complaint, within at most 5 days from its registration, to *the imputed people's jurisdiction committee*, consisting of 3-7 members. The setting up, the organization and the operation of the imputed people's jurisdiction committee are established by means of internal regulations, approved by the orders of the leaders of the public institutions/authorities within which they are set up. The committees are organised and operate in panels of 3 members, of which one is, compulsorily, an officer of military law or a graduate of a law faculty.

The imputed people's jurisdiction committee solves the complaint within at most 60 days from its registration date (with the committee). The solving of the causes by the imputed people's jurisdiction committee is made by summoning the persons who have to pay, assuring in this way the right to defense – art.18 in the decree.

The imputed people's jurisdiction committee, on the occasion of solving the causes, may decide the total or partial admission of the complaint, its rejection or they may suggest that the damage for which a material responsibility is not established should be diminished from the accounting evidence – art. 39 in the decree. The verdict of the committee is considered definitive and it is notified to the unit which has the debit in evidence, as well as to the involved ones, within at most 15 days from its passing.

As concerns the terms established by the Government's Decree no.121/1998 for the administrative investigation and the issuing of the imputation decision, at art.33 indented line (1) in this normative act it is stipulated the competence of *the imputed people's jurisdiction committee of admitting or not the reinstatement in term.* When, from well-founded reasons, the administrative investigation was not made or the imputation decision was not issued within the terms established in the decree, as well in case the imputation decision was issued against another person than the one who caused the damage or for a smaller damage than the real one, the commander or the chief of the competent unit may ask the imputed people's jurisdiction committee the reinstatement in term. The request is made within at most 15 days from the date the cause, which prevented the performing of the administrative investigation or the issuing of the imputation decision, ceased, or from the date when the commander or the chief of the competent unit took knowledge that the imputation decision was re-issued against another person than the one who caused the damage or for a smaller damage than the real one. *The verdict of the imputed people's jurisdiction committee* through which the request to reinstate in term is admitted or is rejected *is definitive* and it is

notified within 15 days from its passing to the commander or the chief of the unit who has asked the reinstatement in term.

A very special importance has the fact that, in case the reinstatement in term request is admitted, the terms for performing the administrative investigation or the issuing of the imputation decision *start from the date the decision was registered with the involved unit.* In case the reinstatement in term request is rejected, the damage will be imputed to those guilty of non-performing the administrative investigation or of non-issuing the imputation decision within the established terms – art.34 in the decree.

In the situation in which, after finishing the attack causes stipulated in the Government's Decree no.121/1998, the military staff, obliged to repair the damage, *consider that they have been wronged in a legitimate right may appeal to the competent legal instances, according to the law*.

According to the provisions in art.6 corroborated with those in art.10 in Law no.554/2004 of the administrative disputed claims, the background instance is represented by the administrative and fiscal disputed claims departments of the appeal courts, and the appeal against the verdicts given by these legal instances is judged by the Department of the Administrative and Fiscal Disputed Claims of the High Court of Cassation and Justice. The claimant may address to the instance nearby his place or to the one nearby the place of the accused. If the claimant has chosen the instance nearby the place of the accused, the exception of the instance's territorial non-competence cannot be put forward.

Conclusions

As concerns the relationship between the military staff's responsibility and other forms of juridical responsibility, it is allowed to cumulate with the disciplinary responsibility of the military staff, if the prejudicial fact is at the same time a disciplinary one, too.

In case the prejudicial fact is at the same time a contravention, as well, found out, according to the law, by the right authorities, the military staff involved will be responsible, both materially and contraventionally (and maybe disciplinarily, too).

The accumulation of the military staff's material responsibility with the offending civil responsibility is not yet allowed (just as in the common law – the labour right). In this sense, unlike the regulations in the Labour Code, the Government's Decree no.121/1998 contains an express text – art.11 indented line (2) - according to which "*for the damage caused by a fact which is an offence, the responsibility is established by the legal instances, according to the penal law".*

It is not allowed either the accumulation of the military staff's material responsibility with the patrimonial responsibility – regulated by the Labour Code. The classical relationship between *a special regulation* - the Government's Decree no.121/1998 and *the general regulation* – art.269-275

in the Labour Code is found in this hypothesis. Taking into consideration the *specialia generalibus derogant* principle, the two forms of responsibility – both repairing – exclude each other reciprocally, *in case of the military staff, and therefore the provisions of the special norm are to be applied*.

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SETTLEMENT OF DISPUTES BETWEEN CONSUMERS AND BUSINESS OPERATORS BY ALTERNATIVE MEANS

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Abstract

Settlement of disputes between business operators and consumers raises difficulties, especially for parties belonging from different states.

Constantly pursuing the consumer protection, the EU adopted a series of measures designed to guarantee the existence of adequate and effective out-of-court means of settling disputes between business operators and consumers.

Key words: *settlement, alternative, consumer, dispute, European.*

Introduction

We can say that the matter of consumer disputes represented the starting point for the establishment of alternative dispute resolution in all other areas, important initiatives being recorded in the United States of America, Canada and Australia.

We need to emphasis that in most countries, consumer protection is not a preferred domain for the use of out-of-court methods of solving disputes; this situation is different in countries where consumer protection is established as an independent branch of law.

Undoubtedly, consumers are faced with considerable difficulties regarding the settlement of disputes, especially when purchasing goods and services from another state. This situation had forced the European Commission to organize and support the cross-border cooperation between consumer associations.

Thus, in the last decade, the amicable settlement of consumer disputes has seen a great development; this evolution is primarily due to the two recommendations[52] that the European Union has adopted in late 1990,

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[52] Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer dispute, published in the Official Journal no. L. 115 of 17 April 1998, p. 31 and Recommendation 2001/310/EC of 4 April 2001 on principles for out-of-court bodies involved in the consensual resolution of consumer disputes, published in Official Journal no. L. 109 of 19 April 2001, p. 56.

recommendations that structures the procedure and organizes the out-of-court settlement of consumer disputes resolution.

In the Recommendation 2001/310/EC of 4 April 2001 on the principles for the activity of out-of-court bodies involved in the consensual resolution of consumer disputes, the Commission has established the minimum quality criteria that out-of-court bodies involved in the consensual resolution of consumer disputes should provide to litigants.

The European law does not prescribe the structure of institutions in the Member States, but requires careful observation of minimum criteria that are formulated by the Recommendation no. 98/257/EC. The acceptance of these institutions mainly depends on their reputation, transparency and effectiveness of the procedures offered. These procedures replace most court proceedings.

Pursuant to the recommendations mentioned, Member States were to adopt the measures necessary for the holding of such alternative dispute resolution mechanisms, facilitating access to work.

On the grounds of the mentioned recommendations, the Member States were to adopt the measures necessary for the organization of such alternative dispute resolution mechanisms, facilitating the access to this activity.

According to the Economic and Social Committee notification on the Green Paper on consumer collective[2] redress, the Commission recognizes that alternative consumer dispute resolution systems currently existing vary widely both nationally and from one Member State to another, even in those jurisdictions in which such mechanisms are available, that there are significant disparities in the sectoral and geographical coverage. Moreover, most of the alternative dispute resolution systems in the EU address mainly the individual applications.

As regards the existing EU instruments, namely Recommendation 1998/257 and Recommendation 2001/310, the report "*Analysis and Evaluation of Alternative Means* of *Consumer* Redress *other than* Redress through *Ordinary Judicial Proceedings*" conducted at the request of the European Commission show that the principles of independence and impartiality of the third parties involved in the mediation / arbitration systems set out in those instruments are not respected even in the CEE-Net database[3].

[2] Published on 05/18/2010 in Official Journal no. C128/97.

[3] European Extra-Judicial Network "ECC Net European Consumer Centres Network (ECC Net European Consumer Centres Network) is a structure that provides support and information to consumers, composed of national contact points in each EU member state and Norway and Iceland. Each contact point acts as an information exchange for the 400 bodies which Member States consider as complying with the two recommendations of the Commission on the principles for bodies responsible for solving disputes out of court. On 1 January 2008, Romania joined the ECC Net network to assist EU citizens in cross-border acquisitions.

For this purpose, the Economic and Social Council considers that the existing recommendations on the alternative dispute resolution systems should become binding legal instruments.

The extent of consumer access to alternative mechanisms for the settlement of disputes and small claims may lead to a prompt, fair, efficient and relatively low cost of consumer protection issues.

In parallel with this whole quasi-legislative activity, the European Union provides financial support for certain initiatives, particularly in terms of resolving consumer disputes online.

Thus, the Commission has been financially involved in the launch of ECODIR (Electronic Consumer Dispute Resolution), an electronic platform for dispute settlement.

Responding to EU requirements, the mediation - as an alternative means of dispute resolution can be used too in the Romanian law for settling disputes between traders and consumers.

According to article 16 paragraph (2) of the Government Ordinance no. 21/1992 on consumer protection[4], "the solving of payment request for moral prejudices or damages related to the remediation or replacement of defective products or inadequate services requested by consumers or economic operators belongs to the jurisdiction of the competent court or competent mediation body."

According to article 2. (2) of Law no. 192/2006 on mediation and mediation as a profession[5], the dispute resolution is possible through a mediator "if the consumer claims that there is a prejudice as a result of the purchase of faulty goods or services, or non-compliance with contractual terms or the provided guarantees, the existence of abusive clauses comprised in the contracts between consumers and economic operators[6] or other rights violations under domestic or European Union law on the consumer protection."

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[4] Published in the Official Gazette of Romania, Part I, no. 292 of 28 August 1992, republished in the Official Gazette of Romania, Part I, no. 208 of 28 March 2007 and amended by Law no. 363 of 21 December 2007 on combating unfair traders practice with customers and regulatory harmonization procedure with the European legislation on consumer protection, published in the Official Gazette of Romania, Part I, no. 899/28 December 2007, legislation which in turn was modified by OUG no. 174/2008, published in the Official Gazette of Romania, Part I, no. 795 of 27 November 2008.

[5] The Law no. 192/2006 was published in the Official Gazette of Romania, Part I no. 441/2006 and amended several times, the most recently being the adoption of Ordinance no. 13/2010 for amending and completing certain normative acts in justice to transpose Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market, approved with amendments by Law no. 128/2010. This last bill was published in the Official Gazette of Romania, Part I, no. 70/30 January 2010.

[6] See Law no. 193 of 6 November 2000 on unfair terms in the contracts concluded between traders and consumers, published in the Official Gazette of Romania, Part I, no. 560 of November 10, 2000, as amended by Law no. And Law No. 65/2002. 363/2007, republished, last reprint was made in the Official Gazette of Romania, Part I, no. 305 of April 18, 2008.

Systems through which the cross-border financial transactions are much more complex than the national funds transfer systems because involves one or more intermediate institutions, networks using different compensation from countries that still have different currencies, including operations exchange.

The European Community is constantly concerned about improving cross-border payments but also the protection of the consumers of these services, so, in order to ensure the same conditions for cross-border services and services and to stimulate national and cross-border investments, the Directive 97/5/ EC of the European Parliament and the Council on cross-border credit transfers[7] was adopted, abrogated by Directive 2007/64/EC.

The Article 10 of Directive 97/5/EC established a series of minimum requirements and measures regarding the cross-border credit transfers; theses measures are meant to guarantee the existence of adequate and effective schemes for the settlement of claims and compensations in the conditions initially established between the institution providing such services and consumer.

These schemes represent, in essence, out-of-court means of dispute settlement that should involve lower costs, a greater security and guarantee the rights of the consumer of financial services.

The provisions of Directive 97/5/EC of the European Parliament and Council on cross-border credit transfers require the affiliation of the credit institutions and other institutions[8] carrying out cross-border credit transfers to at least one settlement scheme for solving the complaints and compensations, the simultaneous participation in several schemes is not excluded.

In Romania, the provisions of Directive 97/5/EC of the European Parliament and Council on cross-border credit transfers were applied by adopting the Government Ordinance no. 6 / 2004 on cross-border transfers[9].

In an effort to transpose the Directive 2007/64/EC, the initiatives for the organization of structures for the alternative dispute resolution continue.

Furthermore, at European level was adopted on 23 April 2008 the Directive 2008/48 / EC of the European Parliament and the Council on credit agreements for consumers and repealing the Directive 87/102/EEC of the

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[7] The Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 ¬ regulating the cross-border credit transfers was published in the Official Journal no. L 043 of 14 February 1997, p. 25, Directive, which, according to article 93 of Directive 2007/64/EC on payment services in the domestic market and amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC, 2006/48/EC and repealing the Directive 97/5/EC (published in Official Journal no. L 319, 05.12.2007, p. 1), was repealed on November 1, 2009.

[8] According to article 2 of Directive 97/5/EC, other institutions engaged in cross-border credit transfers shall mean any person or entity other than credit institutions, which by nature of their business perform cross-border credit transfers.

[9] Published in the Official Gazette of Romania, Part I, no. 82 of 30 January 2004, approved by Law no. 119/2004, published in the Official Gazette of Romania, Part I, no. 357 of 23 April 2004.

Council[10]; the art. 24 provides the obligation of Member States to ensure the availability of adequate and effective procedures for out-of-court consumer dispute resolution regarding the credit agreements with recourse to, where appropriate, existing bodies. At the same time, the Directive requires Member States to encourage these bodies to cooperate in order to also solve the cross-border disputes concerning credit agreements.

In our country, at legislative level, we mention the adoption of Emergency Ordinance no. 113/2009[11], which has already undergone a change during 2010[12], this change aims primarily to ensure users' right to seek out-of-court dispute resolution procedures.

This regulation provides that "the National Bank of Romania shall ensure the application of out-of-court procedures for the adequate and effective resolution of complaints brought before the payment service users who consider themselves harmed by the payment service providers operating on Romanian territory. The users of payment service may use these procedures to solve the complaints on a voluntary basis" (article 179).

To this end, in the structure of the National Bank "shall be created a specialized compartment to ensure the mediation of disputes arising between the categories of service providers provided at article 2[13] and the users of payment services according to the regulations issued by the National Bank of Romania[14]."

Please note, however, that such a structure does not exclude the possibility for interested parties to approach the National Authority for Consumer Protection or the court.

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[10] Published in the Official Gazette of Romania, Part I, no. 685 of October 12, 2009. This Ordinance repeals O.G. no. 6 / 2004.

[11] Published in Official Journal no. L 133/66 of 22 May 2008.

[12] See OUG no. 61/2010 for amending Government Emergency Ordinance no. 113/2009 regarding the payment services published in the Official Gazette of Romania, Part I, no. 446 of July 1st, 2010

[13] Article 2 of the OUG no. 113/2009 provides that the ordinance's provisions "shall apply to services rendered by the following categories of payment service providers:

a) credit institutions within the meaning of art. 7 para. (A) section 10 letter. a) Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, approved with amendments by Law no. 227/2007, as amended and supplemented;

b) institutions issuing electronic money within the meaning of art. 7 para. (A) section 10 letter. b) of Government Emergency Ordinance no. 99/2006, approved with amendments by Law no. 227/2007, as amended and supplemented;

c) giro postal service providers providing payment services under the applicable national legal framework;

d) Payment institutions under this ordinance;

e) The European Central Bank and National Central Banks when not acting in their capacity as monetary or otherwise involving the exercise of public authority;

f) "Member States or their regional or local authorities, when not acting in their capacity as public authorities".

[14] Article 179 para. (1) of OUG no. 113/2009.

According to article 178 of the Emergency Ordinance No. 113/2009[15], in order to ensure compliance with this ordinance by payment service providers, the consumers and other parties, including consumer associations, may refer the National Authority for Consumer Protection, and the users – legal persons - may refer the Financial Guard of cases of failure of payment service providers to the provisions of Titles III and IV of this law or to initiate legal action against the payment service providers who violated the provisions of this regulation.

Where appropriate, the National Authority for Consumer Protection, respectively the Financial Guard, shall inform the applicant, in reply to it, the existence of extra-judicial dispute resolution procedures.

In order to solve any disputes amicably and without prejudice to the rights of consumers and users-legal persons to take legal action against payment service providers who violated the provisions of the said regulation or their right to notify the National Authority for Protection Consumers, respectively the Financial Guard, the consumers and the legal users can call out-of-law dispute settlement procedures.

Prior to the adoption of OUG no. 113/2009, the specialty literature has argued[53] that the transposition into national law of the provisions of the Directive 2007/64/EC could lead to the extinction of the mediation commission competence organized under BNR Regulations no. 3 / 2004[54] and the examination of disputes arising within the mechanism of carrying out a cross-border payment service.

At this point, it is not clear to which alternative structures will be the consumer – natural or legal person - directed, when ANPC, respectively the Financial Guard, shall meet their obligation to provide information to consumers, obligation imposed by the provisions of OUG no. 113/2009, article 178 (as amended), as long as the structure of BNR specialized compartment that should be in charge of mediating disputes does not exist yet.

We believe that there is no impediment that the parties to the agreement for the providing of payment services to use the services of a mediator, which operates under Law no. 192/2006, an authorized mediator specialized in such disputes who can support the parties in reaching an amicable settlement.

However, we can see that this manner does not provide the purpose of the Directive mentioned above, much less of the Directive 2008/48 / EC of the European Parliament and the Council. The reason behind such assertions is that always an authorized mediator shall provide this service for a fee, so that the consumer is not only protected, but is exposed to additional costs.

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[15] As amended by OUG no. 61/2010 for amending the Government Emergency Ordinance no. 113/2009 regarding the payment services.

[53] See R. Vartolomei, *Regimul juridic al plăţilor transfrontaliere în cadrul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2008, p. 225.

[54] National Bank of Romania issued on March 25, 2004, the Regulation no. 3 / 2004 on the procedure for mediation of disputes arising in the performance of cross-border transfers.

If the interested parties assume these expenses, such dispute mediation is possible, however, the existence of the specialized BNR compartment does not eliminate the rights of the payment service provider and the beneficiary to request the assistance of a mediator, someone who, by their competence, integrity, impartiality, is enjoying their confidence.

Similarly, any consumer, other than a signatory of an agreement for payment services providing, has the possibility to approach a mediator to settle the dispute amicably. We note that at this moment does not exist mediators specialized in certain types of litigation, so choice possibilities of the parties are more difficult.

Conclusions

The Directive 2007/64/EC of the European Parliament and the Council of 13 November 2007, and Directive 2008/48 / EC of the European Parliament and the Council of 23 April 2008 on credit agreements for consumers require the obligation of Member States to create a legal and institutional framework for settling out-of-court the claims made by individuals and businesses.

Within the Romanian legislation, the insurance of the legal framework has established the obligation of ANPC and Financial Guard to inform consumers -natural and legal persons - about the possibility of out-of-court settlement of their disputes.

However, the provisions of OUG no. 113/2009, article179, refers to the establishment within the structure of NBR of a specialized department meant to provide mediation of disputes arising between categories of service providers comprised in the article 2 of the regulations above mentioned and the users of payment services.

This service, which ought to have free character, has not been established yet.

We appreciate that the solution proposed by legislators is not viable, since the requirement for confidentiality of mediation and mediator impartiality are not met.

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STATE SOVEREIGNTY IN THE CONTEXT OF GLOBALIZATION

Iuliana Savu*

Abstract

The beginning of the third millennium is accompanied by profound and necessary transformations in the global society, putting the states in the situation of reconsidering their role and functions. The globalization phenomenon does not prefigure the disappearance of the nation-state, but a reconstruction of the powers of the modern nation-state, whose constituents are analyzed - sovereignty, population, territory as they are accepted today. Caught in the crossfire of the current battle over globalization and the multitude of regional nationalisms, the national state, holder of sovereignty, does not feel in danger. Driven by the present realities the state is remodelling itself, adapting, and integrating with the current trends.

Key words: *sovereignty, globalization, regionalism, nation, nationalism*

Sovereignty *– a quality of state power, able to organize, to solve internal and external issues freely, without any interference, respecting the sovereignty of states and of public international law.*

Globalization *– all those processes by which peoples of the world are embedded in a world society, global society.*

Regionalisation *– a search tool that may overcome the difficulties caused by the very small size of national states created in post-Westphalia period.*

Nation *– a human community form, historically stable, characterized by community of language, territory, economic life, politics and culture.*

Nationalism *– the most sacred duty, the noblest sense of any man who claims to be part of a nation.*

Introduction

The beginning of the third millennium is accompanied by profound and necessary transformations in the global society. Moreover, all these put the states in the situation of reconsidering their role and functions. The globalization phenomenon does not prefigure the disappearance of the nation-state. However, it implies a reconstruction of the powers of the modern

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nation-state, whose constituents we will further analyze – sovereignty, population, territory as they are accepted today.

The principle of sovereignty was born at the same time as the State, with roots in the monarchs' and the papacy's fight against the excessive power of the Roman-German Empire in the era of absolutism. The concept of sovereignty has undergone changes over time, being within limits which do not interfere with current politics. Sovereignty has been a concept closely linked to the State. From the public international law point of view, the state has been and continues to be the only matter of law that is, at the same time, sovereign and directly subordinate to the public international law. Until the state does not waive its direct subordination to international law, it keeps the sovereignty statehood.

Sovereignty, however, – as forms of achievement, scope, competencies – is permanently changing, depending on the state's tasks, its assumed international obligations, various integration relations, internal and external situations, planned or unplanned situations (e.g. economic crises, natural disasters, or national or global incidents, etc.).

Today's society trends suggest that sovereign states should join forces to meet new challenges, fact which requires a reconsideration of the concept of sovereignty.

Globalization is the term that renders the international reality after the end of the Cold War, and most of those who analyze it refer to it as an "evolutionary process", a "historic transformation" or as "a multidimensional reality", arising from the "diversity that is part of its intrinsic nature". The constant of all these approaches is recording the increase of interdependencies, on the one hand, and the increase of the degree of openness and transparency, on the other hand.

Thus, "globalization involves complex processes that internationalize domestic policy, but, at the same time, shape foreign policy, depending on the increasing internal pressure", which is reflected in the fact that "nation-states have learned to share their sovereignty with regional and global institutions and, at the same time, to open their economies to global and regional dimensions".

To survive a State must "put on a new coat" that of a post national state.

The post-modern state is a consequence of the transformations suffered under the pressures of globalization that led to the modification of two of the central features of the state: sovereignty and territoriality.

The complexity of some phenomena such as regionalization, globalization is not in conflict with the state, with its existence. Affirming one's belonging to a particular community does not abolish the state as a whole of social, political and territorial entity, but invites it to an association of well oriented goals, to collaboration, to joint efforts, to a common future.

Accepting this invitation requires from the state a new vision on the concept of sovereignty, the concept of nation, the concept of territory defined by borders.

"Romania is a sovereign and independent national state, unitary and indivisible" (Article 1, Romanian Constitution). Thus, looking at the state institution one can draw the conclusion that sovereignty is one of the defining features of the Romanian state. The sovereign state lies, as it should lie, at the heart of every political and legal construction of a society.

What does the change of the classic meaning of sovereignty represent for the Romanian state? Does this mean that the state should cease to be sovereign? The correct answer is negative, because the authority can not be conceived without sovereignty. It only takes several things: sovereignty must be redefined, a new content should be found, the state's authority must be redefined, as well as the role of state as an actor on the international scene. Security risks need to be redefined; the use of force should be controlled and directed in order not to give rise to abuses.

For the Romanian state at the dawn of the third millennium all these represent the imperative to adapt to a world got by the fever of integrations; they represent radical internal changes, the power to connect to new structure, the reconsideration of the concept of power and its enforcement.

The above-mentioned issues were taken into account by the Romanian state, which became an EU member state, understanding that shared sovereignty does not mean total loss of some attributes of national sovereignty, but develops new capabilities to regulate economic and political issues in a more coherent and effective manner.

The transfer of certain attributes of sovereignty does not allow European institutions to act differently from the decisions taken at a national level, specific to each and every member state. The transfer of sovereignty from member states towards the EU institutions is an irreversible process because the costs of a reversal would be unbearable and the collapse of the European construction would be tantamount to the collapse of Europe.

Sovereignty disappears only with the nation. The European Union's motto is "unity in diversity", so it does not aim at dismantling a nation and what is national, the United Europe continuing to be a "Europe of homelands". Each member state continues to assert their cultural, linguistic, religious, moral, material identity, and the sense of belonging to a nation acquires new meanings, being related to values such as those of democracy, human rights, market economy. It is just that states must define their identity and preserve it, not through prohibition and autarkic models, but through contact, cooperation and respect for the values of the others.

It is recommended that the member states should not lose their identity in an anonymous sea, nor practise a narrow and anachronistic nationalism. It is also required that states gradually open their economy to the continental and international structures, and, at the same time, develop their own institutions

and fast and effective reflexes capable to cope with and overcome a different kind of crisis, other than they were used with.

The new vision of the post national state on borders refers to their permeability, their flexibility, the possibility of carrying out some processes of a trans-boundary nature with effects on the economy, society, and national policy. This does not mean that the borders disappear; they continue to be the basic political institution of a state. Without borders there can be no legal organized social life. Borders are a sine qua non factor for the state. Furthermore, a nation can exist without borders (for example, the Kurds, the Palestinians and the Tibetans), but a state can not exist without borders.

As for sovereignty, there is a transfer of functions of the borders of a nation-state towards the external borders of the regional organizations (EU), having a strengthening effect on the latter. Thus, the border does not play the role of intangible territorial limits, the state inevitably becoming a part of the whole where goods, capital, information, culture, and people move freely. Within this enlarged area, i.e. the European Union, a state's citizens become citizens of Europe enriching their heritage of rights and obligations. In the created context, social life has new shades, mutations which the state must provide an organized framework for development and evolution.

All these have advantages and disadvantages, each state's art consisting in the way of mastering them, directing them, giving them a meaning and not considering them as a fatality.

At the same time the post-national state is offered a new challenge: to assert itself at a higher level, in regional political institutions and in intergovernmental organizations.

Conclusions

Although caught in the crossfire of the current battle over globalization and the multitude of regional nationalisms, the national state, holder of sovereignty, does not feel in danger. We strongly believe that, driven by the present realities, the state is remodelling itself, adapting, and integrating with the current trends.

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THE GLOBALIZATION OF FLOWS, MAJOR TRENDSETTER OF INTERNATIONAL MIGRATION

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Abstract

The globalization of migration is connected to the new types of mobility and migration. Within the globalized parameter migration, development and international relations are closely linked, while the distance and the targetted direction of migration are aspects which are to be taken into account as far as the migrational phenomenon is concerned.

Key words: *migration, globalization, trendsetters, stage, regions.*

Introduction

The 70s bring forth not only the phenomenon of globalization but also the phenomenon of crossnationalism, network division and emergence,diaspora. As a result of globalization, migration undergoes major transformations. Migration flows develop tremendously, keeping a steady balance as compared to those belonging to the previous stage of globalization, that is those at the end of the 21st century.Some basic data allow the evaluation of recent trends in globalized mobility.First of all, the number of immigrants has risen in the last thirty years:77 million in 1965, 111 million in 1990, 140 million in 1997, 175 million in 2000. In 2005, 61% of the total amount of immigrants lived in developed countries (34% in Europe, 23% in North America, 28% in Asia, 9% in Africa and 4% in Latin America and the Carribeans).

Recent data from 2010 show that there are 214 million international immigrants worldwide[1]. Almost 200 million people are immigrants.The rise in migration is faster than that of the global population, at the same time representing only 5% of the latter.

Furthermore, the unequal distribution : 90 % of immigrants reside in only 55 countries.Noteworthy is the fact that between 1975 and 2000 the total number of international immigrants doubled and then in 2005 it scored a figure of 200 million people,that is 3% of the global

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[1] http://www.iom.int/jahia/Jahia/lang/fr/pid/1

population, a percentage which proves rather limited and similar to the levels registered at the beginning of the 20th century. All continents are involved in migration, and the existance of new input and output premises tends to gradually lessen the importance of the old colonial relations and the bilateral nature of flows.

Even if the Western target countries (Western Europe, the USA, Canada, to which we can add Australia and Japan) are liable to multiple analyses ,more than 60% of immigrants do not go beyond the southern hemisphere.

Subsequent to all the above mentioned, the globalization of immigrant flows will keep occurring due to the continuous imbalance in development level and to a more precise awareness of the ways of entry in the targetted countries , for which border control policies have little effect.

The lack of international agreement concerning migration triggers limited national solutions which are severely influenced by reluctant policies. Migration flow, however, does not keep count of policies and will be compulsory in certain regions of the world,such as Europe,where population expectations are overwhelming. According to Steven Castles, researcher at the International Migration Institute[2], international people flow is closely related to the other flows of globalization, turnovers and merchandise ,and as far as they are concerned,migration represents one of the propelling forces in social transformation in nowadays' society.

In „The Globalization Files'' it is shown that five stages in the evolution of international migration are to be distinguished[3]:

a. migration globalization
b. migration flow increase
c. distinction between different types of migration
d. feminization of migration flow
e. the political involvement of the phenomenon

The first stage mentioned above is to be dealt with as follows:

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[2] Steven Castles, « Necessaires migrations » in http://www.courrierdelaplanete.org/81-82/article1.php.

[3] File No.5, « Globalization and International Migration » under the supervision of Bruno Herault (The Department of Strategic Analysis) reuttered the data put forth by Catherine Wihtol de Wenden (CNRS-CERI) , Yves Chassard (The Department of Strategic Analysis), Gildas Simon (University of Poitiers, Migrinter), Patrick Allard (CAP-Ministry of Foreign Affairs), Sébastien Jean (OCDE, CEPII) and Anne Epaulard (DGTPE), presented at the seminar Debate Club on Globalization from the 12th December 2006 in www.rdv-mondialisation.fr.

Migration globalization

The database on international migration registered on 6th April 2010 (OECD) is shown in the chart below. Migration globalization is a recent issue.Not long ago it was restricted to a number of countries of destination and districts of origin,within a space more often than not bearing the stigma of a colonial past. At the beginning of the 1980s,a new division of migration emerged,migration which was closely linked to new kinds of migration and new immigrants, coming from geographical backgrounds ,which,up to that point were involved in population flow at a limited scale : Central and Oriental Asia,Eastern Europe and Central Africa.One of the major changes of the perspective upon the worldwide migration depends on « the interchange of migration flow »,as population researcher Alfred Sauvy[4] stated,[4] between north and south, southern countries being,from now onwards,the main provider of departure flows. Mobility,however is not only geographical,but it targets the range of flows by sex and profession,duration and objective.

International migration as shown by the data from 6th April 2010:

[4] Alfred Sauvy, in Gildas Simon - *Géodynamique des migrations internationales dans le monde*, P.U.F., 1995.

Anul/Ţara	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Australia	94.198	101.016	111.31	131.162	121.174	125.862	149.992	167.319	179.807	191.907
Austria	59.229	72.379	65.954	74.786	92.567	97.164	108.947	101.455	85.384	91.95
Belgia	50.693	57.784	57.295	65.974	70.23	68.8	72.446	77.411	83.433	93.387
Canada	174.195	189.957	227.459	250.641	229.051	221.351	235.824	262.239	251.649	236.758
Cehia	7.943	6.81	4.227	11.323	43.648	57.438	50.804	58.576	66.125	102.511
Coreea	...	...	185.407	172.535	170.873	178.251	188.84	266.3	314.677	317.559
Danemarca	21.277	20.28	22.903	25.202	22.032	18.742	18.799	20.13	23.979	..
Elveţia	74.949	85.838	87.448	101.353	101.876	94.049	96.27	94.357	102.657	139.685
Finlanda	8.34	7.937	9.108	11.037	9.972	9.432	11.511	12.744	13.868	17.504
Franţa	110.728	82.753	91.875	106.878	124.233	136.37	141.554	135.866	135.087	128.865
Germania	605.5	673.873	648.846	685.259	658.341	601.759	602.182	579.301	558.467	574.752
Grecia	38.151	...	...	...	...	...	...	...	...	...
Irlanda	21.7	22.2	27.8	32.7	39.9	42.4	41.8	66.1	88.9	89.5
Italia	110.966	268.007	271.517	232.816	388.086	..	319.331	206.84	181.495	252.415
Japonia	265.455	281.889	345.779	351.187	343.811	373.918	371.983	372.329	325.621	336.646
Luxemburg	10.605	11.776	10.792	11.055	10.988	12.554	12.245	13.759	13.731	15.766
Marea Britanie	214	239.479	260.424	262.239	288.77	327.405	434.322	405.111	451.702	455
Mexic	25.314	22.693	24.163	26.149	24.649	29.063	33.987	39.286	47.566	50.783
Norvegia	26.747	32.23	27.785	25.412	30.788	26.787	27.864	31.355	37.425	53.498
Noua Zeelandă	27.376	31.01	37.642	54.412	47.492	42.957	36.196	54.124	49.846	46.795
Olanda	81.701	78.365	91.383	94.507	86.619	73.566	65.121	63.415	67.657	80.258
Polonia	5.181	17.323	15.897	21.466	30.243	30.325	36.851	38.512	34.21	40.637
Portugalia	6.485	10.541	15.932	151.433	71.974	31.754	34.096	28.092	22.457	32.599
Slovacia	6.445	5.861	4.622	4.723	4.784	4.562	7.919	7.665	11.309	14.848
Spania	57.195	99.122	330.881	394.048	443.085	429.524	645.844	682.711	802.971	920.534
Statele Unite ale Americii	653.206	644.787	841.002	1 058.902	1 059.356	703.542	957.883	1 122.373	1 266.264	1 052.415
Suedia	35.701	34.573	42.629	44.117	47.603	47.988	47.58	51.297	80.398	83.536
Turcia	142.984	154.327	162.255	154.892	151.772	147.2	148	169.717	191.012	174.926
Ungaria	16.052	20.151	20.184	20.308	17.972	19.365	22.164	25.582	19.367	22.607

This tremendous application of mobility is distributted unequally: more than 60% of immigrants do not leave the southern hemisphere and the three thirds of refugees are relocated in the third world countries,that is in the neighbouring countries.It is estimated that 90% of immigrants live in only 55 countries.Developed countries are the ones that have been influenced by migration ,while the most consistent immigrant percentages as compared to locals is to be found in Oceania (17,8 %), followed by North America (8,6%) and Western Europe (6,1%), as opposed to 1,4 in Asia, 1,7 in Latin America and 2,5 in Africa.

When it comes to geographical background,80% of the immigrants that live in the developing countries come from other developing countries and only 50% of the immigrants that live in the developed countries come from other developed countries. Since Asia is the largest provider of population ,the average immigrant is of Asian origin,lives and moves about Asia , in a developing country.

International migration has become a key stake starting from the 1990s,as a result of the fall of a bipolar world,due to the frontier opening in the east,refugee flows from south to the north,the rise in the fear of invasion ,the rise of Islam,the development of crossborder

mobility,the vitality of diaspora leading to the increasing number in population drawn by global cities in a more significant extent than by countries in general.

Some geographical frontiers disappear confronted with the „disentanglement" of population (ethnic migration) and the widespreading of migration flow. Others close as a result of the increased monitoring of borders(visas) or are to be formed along the main rupture areas of the world: The Mediterranean, Rio Grande. At the same time institutional frontiers « overlap» between economic and political immigrants, between countries of destination and countries of origin, between internal and external migrations, for we are often in a period of transition from one category to the other.

Two aspects are to be taken into account: migrations, development and international relations are closely related within this globalized space, The Nation State with closed borders and homogenous national population is at a loss throughout this process.

The large areas of the world which are affected by migration at present are as follows:

Europe, which is not deemed as an immigrant region, has become, almost against its will, one of the most widespread areas of worldwide attraction, with 1,4 million legal entries per year in the Union (as opposed to 900 000 entries for North America); the first country of destination being Germany.

Asia is the main population provider of the world, having two prevailing diasporas (the Indian and the Chinese) and a consistant infiltration of these within all the countries of the region.

The Russian world, not long ago outcast behind frontiers, is going through a stage of intense mobility with a multitude of profiles when it comes to immigrants ;

The Arab world experiences a demographical transition in terms of migration configuration between countries of origin and destination.

The globalization of migrations can have demographical, economic, historical, juridical, sociological, and political explanations and leads to the idea that international migration will continue to expand. One can count on :

-a decrease in fertility in rich countries that will maintain customs control as regards poorer or less qualified countries ;

-a growing exclusion of certain world regions where the only hope lies in leaving (Latin America, Sub-Saharan Asia, certain parts of Asia) in order to get rid of poverty, conflicts and ecological disasters, counting thousands of dead in the oceans, mountains and deserts ;

-the emergence of intermediary countries, such as Brazil, Mexico, India, China, with huge resources of increasingly skilled work force who do not find employment there and export their competencies abroad ;

-the development of clandestine migration (the « three Ds » : difficult, dirty, dangerous work) to compensate for the lack of employees, partly fueled by asylum requests and by the pendulating migrants with limited labor contracts ;
-a highly qualified migrancy authorized to accommodate and live with their family in rich countries, a category that is growing older.

The consequences concern the developing of new forms of social relations – transnational communities, multiple citizenship, multiculturalism, religious diversity – and as many means of incorporation in the countries of destination.

As shown above, publications regarding globalization refer mostly to the circulation of goods, capital and services. These publications, however, need to be complemented by an analysis of population flows, because globalization is accompanied by the multiplication of issues regarding migration, issues that preoccupy the government and the public opinion respectively. Involving faraway or nearby countries, being free or constrained, penrmanent or temporary, these human movements are directly connected with contemporary society dynamics and affect its equilibrium in profound ways.

Migration Distance and Direction

As regards migration distance and direction, one has to mention that, according to research done by E. G. Raveinstein[5] (in his work, *The Laws of Migration)*, it results that the great mass of migrants only circulate on short distances. But migrancy takes into account not only *geographical distance* and *technical distance* (through which distance is affected by the available means of transport and communication), but also *social distance*. Aspects of social distance, such as differences in religion and language, can seriously affect the migratory movement, in the sense that some migrants are not accepted.

As shown above in connection with the two migration types, the difference between international and internal migration is given by the physical and the social distance. International migration covers great physical distances and must confront a different cultural environment and foreign language. Immigrants can suffer from a misbalance that can lean towards the psychopathological.

Romania is greatly a country of immigrants. From the year 1993, statistics indicate a decrease of Romanian migrancy up to the year 2000, when an increase occurred. Migrancy was provoked by:
-an increase in unemployment and the continual decrease of living standards;
-the labor force deficit in certain fields in some European countries;
-the right to free circulation in the Schengen space.

[5] Vert, Constantin, *Geografia populaţiei şi aşezările umane*, Timişoara, 2000.

But the tendency to reject strangers from certain European countries will determine that Romanians go back home or forego leaving.

A special type of migration connected to distance is the *stage migration*. This is a wide-span geographic migration, even if each individual who is part of the movement may move only a short distance. It is migration in rural areas towards great cities through small and medium cities. Acknowledged around the year 1900, it continues to play an important role in the present internal migration movement. Moreover, the reverse phenomenon has been registered: migration from city center to the suburbs.

The Values of Global Migrations

The migratory flows are not a new phenomenon and we should attempt to situate them historically. And yet, never before have so many individuals and families circulated between coutries and continents as today, so that mobility has become one of the major characteristics of our age. There are several factors that explain this powerful rise in migrancy registered in the last 20 years or so. Besides the quantitative increase, the nature of flows is modified and causes the appearance of new stakes. Finally, if we analyze the receiving countries from the Northern hemisphere, it results that the impact of immigration on labor markets is limited and temporary.

Migrations, placed by their nature at the heart of cultural exchanges and of social life, are a good indicator of the successive phases of globalization. Every significant stage of this evolution was marked by new types of human mobility[6].

The first phase of migration globalization, fuelled by the rivalry of European maritime powers goes back to the great „New World" discoveries, of the 16th and 17th centuries. Population movements were associated with colonial and territorial expansion and with the implementation of commercial bases. This is the age of origin for realities that are as lively today as in the past: the myth of Eldorado, the structuring of a transatlantic space, the black diaspora, etc.

The second phase in the globalization of migrancy took place in the 20th century and it was caused by the development of the capitalist system and by technical progress especially as regards transportation. The planet generally opened up to mass migrancy, the Americas being instrumental in the polarizing of this specifically European-origin movement. Between 1820 and 1914, 60 million Europeans embarked for the Americas, one million per year between 1900 and 1913. Among the other significant trends let us remind ourselves of the forced or chosen accommodation of the Europeans in the North and South of Africa, of the Indians in the Carribbees, of Russians in

[6] Regarding the historical relation between globalization and migration, see Berthomière W. et Simon G. (2006), « La mondialisation migratoire au coeur des territoires et des sociétés », în Carroué L. (éd), La mondialisation, Paris, CNED-SEDES,p. 63-98.

Alaska, of the Chinese in North America, and then in Latin America, etc. On the whole, in the eve of the First World War, migrants represented at least 5% of the world population; never had there circulated so many people and we had to wait another century (1990) in order for the United States to regain their level of migrancy from 1913.

The consequences of the second phase of migration globalization were numerous: the expansion of the greatest present diasporas (Chinese and Indian), the initiation of preferential strategic connections, establishing new colonies, the convergence of economic systems found on one and the other sides of the Atlantic, as well as inside Europe, the spreading of western values, the emergence of „migratory couples", namely privileged human movements from a departure to an arrival country.

The third phase of migration globalization, commenced more than 20 years ago, corresponds to the unprecedented acceleration of the historical process of economic interdependence of countries, which in its turn derives from the improvement of transportation means (increase in speed and decrease in prices), from the democratizing of political systems and the development of new information technology.

What is the perspective of migration in the global context? The generalizing of aspects that were initially limited to migrancy is extending to a planetary evolution scale. For example, the relationship certain migrant communities entertain with nation-states: with those of origin, of residence, or with those that offer shelter to people from the same area. We can notice that the connections between diasporas and territorialized states are growing increasingly lax while secondary circuits and freight networks are developing, which can be informal, are frequently highly structured, either cybernetic, media or cultural, or destined to the circulation of goods. These new ways of inhabiting space, these transactions operated beyond the states' reach (and certainly without social, commercial or penal legal protection) seem the precursors, for better or worse, of a certain type of relation with the nation state, a relationship ready to appear and to grow in time with globalization[7].

To conclude, migratory values are destined to cycles, as the economic and political crises, whose consequences they frequently are. From the first half of the 19th century, Europe opened and closed, alternatively, to immigration. At times such values were fueled by economic expansion, by a decrease in nativity or by demographic deficits as a consequence of world conflicts, at other times they were influenced by recession and/or a xenophobic closure of the spirits.

[7] Badie Bertrand (1995), *La fin des territoires.Essai sur le désordre international ; et sur l'utilité sociale du respect,* coll . »L'Espace du politique «, Fayard, Paris.

Conclusions

The great planetary tendencies – globalization and the new life means that it is generating – the economic, political or ecological cataclysms that delineate the history of humanity, as well as the interests of the relatively rich societies up North could combine to facilitate the return to a new „desired" migration period, that could even be initiated by the governors of both departure and arrival countries.

We need not preemptively condemn a centuries-old phenomenon, as if population movements were a scourge that we needed to counteract as vigorously as we condemn mafia expansion or planetary organized criminality. Migrations have accompanied and even triggered the progress of humanity, starting with the Neolithic, and will continue to contribute, in the future also, to the spread of knowledge, the meeting of experiences, and to the dialogue between nations, regardless of the expansion of cyber-reality.

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WHO ARE THE MIGRANTS OF TODAY?

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Abstract

Globalization determines new types of migrants, installation migration and the economic one, based on a rational choice and distinguished from forced migration. There is no region of the globe that has not known the migration phenomenon.

Keywords : *migrants, profiles, mobility, factors, regions.*

Introduction

In analyzing the phenomenon of migration historical conditions, socio-economic and political development of states in precisely these circumstances that show the main causes of international migration in the contemporary period must be taken into account. The assembly of large population movements is a primarily concern for countries of the South that combines at the same time the most powerful levels of emigration with strong currents of internal redistribution directed mainly towards large crowds. Migration, affecting all developing countries, may be perceived as a component of national development in each country but also as a response to demographic pressure and environmental degradation.

Migrants' profile

Among the factors determining migration I mention: demographic burst, urbanization, wage inequalities between countries, underdeveloped economic sectors in the country of origin, trade and international trade structure, a weak human capital, environmental fragility, the colonial legacy. Following that dismal context, people seek solutions to a better life or simply survival solutions. Some of them choose to emigrate.

For the person who wants to emigrate we must mention several reasons: *professional* (for a person who wants to study abroad or to conduct business there for a long time), *political* (political refugee who fled from persecution); *security* (if there is a war going on in the country of origin), *economic* (thee poor inhabitant of a country who aspires to a better standard of living, even for a limited period of time, in rich countries), *personal* (willingness to settle in a country whose values are identified with) *the family* (to be near husband / wife) or even *tax* related (staying in a country where the tax is lower).

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If migration to Western Europe is not new in scale, it acquires its novelty by diverse forms of mobility. Thus, we can talk about the nature of flows: asylum seekers, displaced candidates for family reunification, business migrants, ethnic migrants, cross-border migrants, seasonal nomads; regarding the scale of illegal immigration, Europol data show that annually enter the EU 500,000 people, for which we proceeded to regularization, the settled people profile is evolving.

Also in Central and Eastern Europe there is great diversity: swinging migration related to transit and traffic and is accompanied by a "long haul" immigration of those who come forward and remain briefly in Russia before moving towards West; ethnic migrations (Finns "from abroad" or Aussiedler who are ethnic Germans came to Germany after the fall of the Berlin Wall) is added to all this "unraveling of nationalities" in Central Europe (ex. Turks from Bulgaria are going to Turkey).

Also, in this area have appeared new types of migrants such as frontier, seasonal, swinging; 'the suitcase' migrants, shuttle-people. They represent the transit migration, access to which was facilitated by the suppression of visas in these regions. But they promote illegal immigration and illegal work.

In Southern Europe, Italy, Spain, Portugal and Greece, which were countries of origin for migrants, they have become receiving countries. During Europe's economic growth have appeared new types of migrants: the settled immigrant, asylee, second generations from the original immigrants, new immigrant from the middle classes (all related to travel as a way of life), a migrant with a diploma. Many of them leave with the idea of return.

The idea that migration can be organized after a simple scheme, that they were caused by poverty and loathing environments and the immigrants go and have a single destination country (country of immigration) which would be the final destination, that the migrants are in no case masters of their social condition (but they are dependent on labor market needs), that their links with their countries of origin were supposed to disappear (integration) or to be achieved through a final return (help to return) is obsolete. Migration today does not fit into this scheme from 1974 and never could be judged using such simple formulas. Migrants are no longer passive subjects of the policy of "flux management", they are *autonomous social actors*[55] (except in cases of forced displacement), have a certain level of information and skills, capacity for economic investment, innovation and learning social code and, in particular, a strong desire for social mobility and change. For these reasons, only a very small part of the population of a country of origin can formulate and implement a migration project.

The migrations' actors are not only different people in developing countries, who decide to leave at a given time, but family, village or

[55] Baricco, Alessandro, *Next,* ed. Albin Michel S.A., 2002.

community is part of this as well. Installation migration is based on a rational choice and is distinguished from the forced migration and refugee movements. In the study of migration is essential to know the individual, family, or collective reasoning that encourage or hinder the phenomenon.

In many cases, demographic factors and poverty are no longer essential. The poorest do not leave, but those who are part of the middle classes, those with diploma, aspiring to economic and personal independence, well-qualified elite, those who are connected to a network, with a family abroad who have an amount of money necessary for crossing borders when the legal stipulations forbids it, single women, minors, youth, low-skilled, ready to offer all their capacity for work, ethnic or regional groups - such as farmers in Mali, Chinese from Wenzhou, people from Oaş in Romania, refugees whose home region varies depending on the major areas of marital conflict and immigration are the ones to leave.

The poorest are moving to other Third World countries, which are producing and receiving streams (three-quarters of migrants) who are mostly refugees, asylum seekers or displaced.

In particular, but definitely people are leaving for short periods: this would swinging migration. This aspiration is strongly hampered by the visa policy: the borders are closed, the better they are close the better people can settle without thinking of going back. Co-development and free movement of goods are rather short, they represent an enabler of mobility rather than a brake.

In order for mobility to exist it needs transnational networks. They develop ignoring closed borders or they feed on this legally or not.

In this type of mobility there are people of all kinds. All want more, economic, social, political, cultural, religious, well-being etc. For some, Europe is not the final destination. They go to countries like the United States, Canada, etc.

In recent years, Asia and the Pacific have triggered a chain migration that can be controlled with much difficulty: rural exodus, migration of women, migration of skilled workers, students, refugees and asylum seekers. Their destinations are diverse: the United States, Canada, Europe, Middle East, Australia, New Zealand[2].

The migration is enormously influenced by socio-economic factors. Therefore:

- Married couples without children or with young children migrate;
- Those that migrate have a certain IQ, education and higher socioeconomic status, more recently; there is the so called "brain drain", a selective migration

[2] Michelle Guillon, *Les principales régions d'accueil, l'attrait maintenu des pays riches .De plus en plus de migrations asiatiques vers les pays de l'OCDE* (SOPEMI) in « Cahiers francais », *Les migrations internationales* nr.307,2002, p. 8.

of highly skilled people from underdeveloped countries towards developed countries;
- The selection of migrants in relation to ethnicity or race is evident in many societies; it is a way to discriminate migrants.

The Logic of Migration

We have seen that current migration is based on a rational choice, and despite the local living conditions sometimes very harsh, it is easily distinguishable enough from migrations and movements of refugees under duress. We need to know now the individual logic, the family's or collective logic that encourage or hinder migration because it determines the profile of migrants, the destination of their choice, the length of stay, the decision to return and money transfers[3].

Starting from the observation that migration is a rational choice made by actors taking into account a classic cost-benefit equation, which allows them to judge the profitability of departure; we try to analyze the social factors which determine the feasibility of migration:
- First comes the assessing of the gain from migration, the migrant is expected to gradually increase his income over time, for this he is ready to accept a difficult initial period of stay, but which precedes a First goal: a good job with satisfactory wage level;
- Then the "costs of migration" are considered which takes into account the distance between the place of origin and destination, these are multiform costs (travel, installation, employability), they depend on the age and density of the network on which the migrant my relay, but encompass social and psychological costs related to alienation and possible loss of social, origine environment (family, community, religious group, etc.)

Then, the potential migrant will judge the migration based on individual characteristics, given that he departs from a tight local market divided into sectors, which communicate with each other and having little regard to social polarization (eg ethnic), and so migrants can be sorted according to their origin, they were torn from some sectors dominated by other social groups. They form the so-called "ethnic enclaves" labor markets. In rich countries, knowing this, and jobs requiring specific skills, employers use information about individuals as cues to identify individuals they want to recruit.

The current migration of Third World countries is a migration "against risk" [4] because, on the one hand, it is a collective mechanism, and on the other, it is part of family income diversification strategies. Detailing the first argument shows the fact that the migrant is part of a close social unit, the

[3] Catherine Wihtol de Wenden, Logiques migratoires, figures de migrants, in « *Cahiers francais », Les migrations internationales* nr.307,2002,p. 3.
[4] Guilmoto ,Christophe Z. , Sandron, Frederic, *op.cit*.,p. 32.

family migration decision is the result of a collective strategy which should benefit the whole group. The migrant will benefit from a collective investment of different origin, a sort of local borrowing to cover travel expenses and installation. It is thus bound by a tacit agreement with those he left behind and who will, through his work, regain the borrowed funds. In addition, he will have to gain for himself, both in order to live in the country of destination as and in order to accumulate. A second argument can be illustrated with examples of a Romanian emigrant who had just made a migration project in order to diversify the family income[5].

New Factors of Mobility

The old mobility factors such as demographic pressure (overcrowding), poverty, political crises, environmental disasters, ethnic grouping, religion, the attraction of Western lifestyles have remained valid today. To them others were added in the past twenty years.

A new prime factor is extremely important *metropolitanisation*. Rapid urbanization in developing countries has today *metropolitanisation* trends. Migrants are no longer illiterate and poor villagers, but educated city dwellers who have accumulated an amount of money and based on that they may try a new experience.

Today, the factor of attraction (the pull) is more powerful than the expulsion (the push). *The imaginary of migration* is made under the influence of the media and especially television, which creates by using the film and information an Western "Eldorado" means consumption and liberties, which provides employment and wages significantly different from those in countries of origin. This dream is fueled by migrants themselves, and quasi-diasporas from abroad (about 50 million of Chinese in the world, nearly 3 million of Turks and 2 million of Moroccans in Europe) who transfer funds back home and come back home during the holidays holding symbols of prosperity. So we are not speaking of those factors that determine the migrants to leave their home (demography and poverty). In contrast, the pull factors are the first priority (the desire to succeed, to thrive, the attraction for the West).

The progressive generalization of passports was determined, however. If in the 1970s and 1980s many countries made it difficult for their citizens to go abroad (the communist bloc countries, authoritarian regimes and dictatorships), today few countries prohibit exit with few exceptions (China, North Korea, Cuba). This "right to go abroad" associated with a lower cost of transport, caused the desire for mobility.

The creation of large areas of *free movement of persons and goods* (European Union, United States / Canada, the Nordic market) resulted in significant human movement seeking better economic, cultural, political, etc.

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[5] Remus Gabriel Anghel, Istvan Horvath, « *Sociologia migraţiei* » Polirom Iaşi, 2009, p.160 şi 163.

Likewise the fracture zones of economic, political and social changes generated clandestine migration (Gibraltar, Ceuta and Melilla, the Canaries, the US-Mexican border, the eastern limits of Russia with China, etc.).

The *evolution of host countries laws and policies* should be, in turn, taken into account. For example, asylum has been widespread in the 1990s (African Great Lakes crisis in Algeria, the Balkans, the Kurdish issue, Afghanistan, Iraq, Iran, Sri Lanka, Central America) and then it was restricted. To those who have obtained refugee status by the Geneva Convention we have to add displaced persons (7 million in 2004) as these from Africa who were often received by countries in crisis as poor as those from which these people had left.

Finally, international migration and other factors are explained less than new: the existence of a *transnational solidarity* of familial, associative (joint development) or cultural (particularly linguistic) or religious (Christian or Muslim pilgrimage) origin; the development of a real " *transition economy* ", where borders remain closed, building *new networks*, the result of globalization, without regard to the colonial past, nor to the geographical or cultural proximity (as it is the case of new Asian migrants).

Worldwide mobility is governed by transnational networks of familial, economic, commercial origin, as mafia (prostitution), they are affected only superficially by border control policies initiated by countries of destination for migrants' because their decision is often more powerful than deterrent strategies.

A World on the Move: Region by Region

Western Europe[6] **-** On May 1st, 2004, from 380 million people, there were nearly 20 million migrants, of which 15 million non-EU. Germany is the first country with 7.3 million foreigners, about 9% of the total population, followed by France (3.2 million aprox.7%) and the United Kingdom (2.4 million, 4%), Switzerland (1.3 million, nearly 20%), Italy (1.5 million, 2.8%) and Greece 760 000, 10%).

Eastern Europe[7] **-** The fall of the Berlin Wall has caused the ethnic migrations of returning (Aussiedler in Germany), the migration from the neighborhood countries (in Hungary, Romania, Czech, Slovakia, Ukraine to Poland) and swinging migration, the return of people who choose mobility as a way of life.

United States, Canada, Australia[8] – They are countries faced with increasing Asian migration, Latin American and the United States. Regional free trade agreements (Alena) had no strong effect on reducing migration.

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[6] Catherine Wihtol de Wenden, *Atlas des migrations dans le monde* (Refugies ou migrants volontaires), Ed. Autrement 2005, 75011 Paris.

[7] idem.

[8] idem.

Latin America[9] - Internal and international (Colombians and Peruvians, Argentines, Mexicans) migration (Brazil) and the return of Nikkeijins (former Japanese emigrants to Latin America) in Japan, and the Argentinians in Italy. Mexicans crossing the border to United States is the biggest movement of population on the planet.

Asia and the Middle East[10] - In Asia, countries of destination with developed economies (Japan, Hong Kong, Korea, Taiwan) are opposed to countries where migration is a form of survival (1 Filipino of 11 lives abroad). Middle East has become, from the 1973 oil crisis, a strong attraction regarding labor market (35% of the working population are foreigners in Saudi Arabia, 72% in Kuwait, 90% in the United Arab Emirates). It is also one of the largest areas of migration in the world.

Africa. North Africa has become an immigration country and crossing for sub-Saharan migrants tempted by the Strait of Gibraltar or the Sicilian islands. Some countries of origin become destination countries (Senegal) and vice versa (Ivory Coast, Zimbabwe), others are both at the same time (Senegal, Nigeria, Ghana). South Africa draws a neighborhood migration, Africa Great Lakes and East Africa are areas of origin and destination of refugees for more than ten years.

Conclusions

The analysis presented shows that there are social factors which determine the feasibility of migration, the so-called logic of migration, and new factors of mobility (metropolitanisation, imaginary of migration, widespread progressive passport use, free movement of persons, changes in laws and policies, transnational solidarity, new networks, etc.) added to old ones such as demographic pressure, poverty, political crises, environmental disasters, ethnic grouping, excessively long transition to democracy of countries in the world. All these factors determine migration flows in all areas of the world.

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[9] idem.
[10] idem.

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THE ROMANIAN LEGAL SYSTEM IN THE CONTEXT OF EUROPEAN INTEGRATION

Tătăran Anca*

Abstract:

Romania's integration into the European Union has led to a series of changes on all levels: social, economic, and especially those in the legal system. This is because the EU intervenes in all spheres of action of a state (internal and international affairs, education, human rights, culture, health, justice, etc.). This article outlines the way in which our country has adapted and committed to aligning itself with the legal standards that the EU approves of. It follows the evolution or, better said, involution of the Romanian law, in relation to European requirements and highlights the positive and negative consequences of the implementation of the norms imposed by the EU.

Key-words: legal system, integration, evolution, corruption, reform.

Introduction

The idea that, following integration into the EU, in each Member State, European law takes precedence over national legislation, is widely known and accepted. The essence of the principle of primacy of Community law over national legislation is that where there is a contradiction between the two, the national court is obliged to apply Community law, placing national law in a subsidiary position. It also includes the prohibition on Member States to create a law contrary to Community law or to adopt laws in areas strictly devolved to Community law.

All that is left for the Member States to do is to transpose Community law into their own. In this way they commit to respecting European legislation and to intervening promptly where EU believes that there are some gaps or deficiencies.

Community Law and National Law

So, reiterating what was said above, in the context of joining the European Union, the Romanian state has become a recipient of the Community acquis and has also pledged to align the legal standards that the EU approves of and adopts. Therefore, 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

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of the legal systems of the Member States.

In turn, the EU's mission is to "check" through its delegates, whether or not each Member State fulfils the requirements mentioned above. In this sense, there have already been a series of accusations made by the executive and judicial bodies of the Community against the judicial system in our country.

The European Union – Principles

The principles underlying the European Union are those of the rule of law, human rights and democratic institutions. A space has been created where three elements are prevalent: freedoms, security and safety. This space will include issues like EU citizenship, personal mobility, asylum, immigration, visa policy and EU external border controls[1]. It will also encourage closer cooperation between the police, judicial and customs authorities. This area will ensure that the legislation that applies to EU citizens, visitors and immigrants from other regions of the globe – as well as to criminals and terrorists – will be uniformly enforced across the Union[2].

Romania in the EU – the Reasons for Integration

The decision to launch the invitation for our country as well to participate in negotiations on EU integration was somewhat required, imminent, due to several factors. One of them was Romania's economic and demographic potential, and the natural resources at our disposal, which, once our country is integrated into the Community, would be available to the EU. Not least of all, we occupy an important geostrategic position. In this way, our country would become one of the most important barriers in Eastern Europe in terms of threats to the EU's security.

Consequences of Integration – Advantages and Disadvantages

Integration has been somewhat beneficial for both the Romanian state and the Member States, resulting in a surge of capital inflow for us, while for the other countries it meant the opening of new markets. We may note that a high proportion of European companies have opened branches in Romania, leading to intensified competition. They saw Romania as a major outlet market and at the same time as a source of quite cheap labour.

Among the advantages of membership, even if Romanian citizens do not feel them for the time being, I could list quite a few: economic and strategic security, political stability, prosperity and higher living standards, a general increase in living standards. In other words, a modernization of Romanian society so as to project a very different image of our country abroad. Virtually all Member States have benefited from these advantages, they have not lost them, but it is up to each country to manage them so as to bring them benefits and welfare.

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[1] europa.eu/index_ro.htm.

[2] Idem.

Economic growth and foreign investors increasingly interested in Romania, the creation of new structures of production, the manufacture of high quality products in accordance with EU standards, greater attention directed toward consumer protection, are benefits that the Romanian state would not have enjoyed otherwise. In the private sector some improvements have also been noted, namely business development, easier access to the labour market of the Member States. Romanian citizens are gradually starting to be perceived as belonging to the EU, and are no longer seen as outsiders, only prone to committing crimes.

Another positive effect is the free movement of persons. It is probably the most important achievement that Romanian citizens have enjoyed, because it had an immediate effect.

Romania's modernization is possible by accessing European funds which might lead to rural tourism development. The share of hotels and guesthouses that were built in recent years, in many of the major tourist sites, is the result of access to EU structural funds. In this way, employment opportunities are created, especially in places that until now were dead, economically speaking.

Labour Migration

The European Union was based on an economic policy, intended to promote a balanced economic and social development, while the Member States undertake to develop a coordinated policy in regard to employment, as the growth in the number of workplaces should truly be a matter of common interest. The Community shall contribute to achieving a high level of employment by encouraging cooperation between the Member States and by supporting them.

The main problems that the world economy is facing and whose solution requires an effort from the national community are: underdevelopment and its liquidation, external debt and financial assistance, restructuring of currency relationships, population and international migration, agriculture, and malnutrition, the international transfer of technology, energy and raw materials, the effects of arming and disarming, ecological balance on a planetary scale[3].

Labour migration is counted as a major advantage for host countries because it leads to economic growth. In some areas of the world, such as Europe, increased migration flows have been recorded, the issue of international migration is for many countries in the world a contextual, even residual, matter, of response to certain developments, rather than management or estimation of the movement of people[4].

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[3] R. Lazoc, N. Bugnar, *International Economic Relations*, University of Oradea Publishing House, 2004, p. 13.

[4] D.L. Constantin, V. Vasile, D. Preda, L. Nicolescu, *Migration from the Perspective of Romania's Accession to EU*, European Institute of Romania, 2004, p. 11.

Inexpensive and unpretentious, Romanians were greeted with open arms by some Member States. Massive migration of labour has allowed access to the generous job offer of the Western countries, but consequently resulted in a shortage of workers in certain Romanian sectors of activity. This has caused a big income gap and has become a general concern for the EU.

Common Foreign and Security Policy

Once included in the EU, Romania obeys the EU policy in foreign and security issues and acts for its implementation. Foreign and security policy, democratically developed, is common, it commits all Member States and demands their effective contribution to its practical implementation[5].

The Legal System

Thanks to free movement across the EU, all citizens of the Member States should have confidence in justice, not lose access to it, but they should not evade it either. They should feel safe even if at a given time they are not in their homeland. It is due to this principle that we talk of common foreign and securitypolicy.

There is a cooperation between national legal systems, which allows, for example, for decisions made in one Member State to be recognized and enforced in another Member State. These principles are important, particularly in civil proceedings for divorce, child custody and alimony or even bankruptcy cases, where those involved live in different countries[6]. The EU has established a so-called judicial network, designed precisely in order to combat serious crimes such as corruption, terrorism, trafficking of persons, drugs, influence, etc.

The European arrest warrant has replaced long extradition procedures so that suspected or convicted persons, who fled abroad to escape justice, can be quickly returned to the country where they have been or will be judged[7].

Vulnerabilities of the Romanian Judicial System Corruption

Even before the accession, Romania faced a series of major issues regarding the functioning of its judiciary and fighting corruption.

Poor implementation by Romania of EU-imposed rules vulnerability leads to vulnerabilities extended both in the legislative sphere and in the courts. Practical inconveniences are reflected particularly in the administration of justice and are causing a number of difficulties[8].

Justice is the backbone of a democratic state and its citizens must have confidence in it. In present-day Romania, that trust is increasingly

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[5] www.ccj.ro/.../integrarea-romaniei-si-**politica-externa**-si-de-**securitate-comuna**-a-uniunii-europene (www.ccj.ro / ... / romania's-integration-and-common-foreign-and-security-policy-of-the-European-Union).

[6] europa.eu › *EUROPA* › *În domeniul politic* – (europa.eu> Europe> In the political field -).

[7] europa.eu/index_ro.htm .

[8] (www.juridice.ro/.../noi-tendinte-in-sistemul-juridic-romanesc.html (www.juridice.ro / ... / new-trends-in-the-romanian-legal-system.html).

diminished, a state of things due to a weak legal system, doubtful, flawed and leaving space for interpretation.

Corruption is a phenomenon that has managed to infiltrate into all areas of activity. However, the worst aspect is that it has spread among high level authorities, i.e. judges, prosecutors, lawyers, the professionals involved in a dispute: fact-finding bodies in a crime or offense, professional support staff of courts and prosecutors, mediators, insolvency practitioners, etc.

This abuse of power to obtain private benefit, called in short – corruption, is unfortunately at present, characteristic of Romania's image abroad.

The causes of corruption and the factors favouring corruption are numerous and diverse: legal (legislative instability, incomplete regulations, mismatch between the rules, unpredictable judgments, inconsistent judicial practice), political, administrative, social, economic[9].

To address these deficiencies, the Romanian state needs a reform of the entire judicial system, leading to the eradication of this phenomenon and to obtaining a unified, uncorrupted legal system.

Vulnerability to corruption is apparent when certain tasks are under the monopoly of certain authorities or bodies, when discretionary decisions are made under conditions of opacity, and the system and individuals are deprived of responsibility and integrity[10]. So, if for attorneys, notaries and executors there is a certain freedom, this is not the case for the activity of judges, who by law have a monopoly of the administration of justice, which they must apply correctly.

Therefore, one can say firmly that there is need for a reform of the Romanian judicial system to ensure speedy trials and create a consistent jurisprudence, guaranteeing freedom of expression, the creation of effective mechanisms in order to accelerate the process of restitution of property, etc.

Efficiency and predictability of justice – in Romania these principles are affected by lengthy procedures and lack of uniform practices, which resulted in sanctions in many cases. Despite growing awareness of these issues, until now little has been done to change this situation[11].

Resorting to mediation may be a way of extinguishing a conflict as quickly as possible, of amicably dealing with it outside the courtroom. In other words, there are chances not to reach any longer the trial stage, in some cases, as mediation might be used either during the process, in which case the court shall suspend the proceedings, or before getting there.

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[9] Cristi Dănileț, *Corruption and Anticorruption in the Judiciary*, C.H. Beck Publishing House, Bucharest, 2009, p. 41.

[10] Idem, p. 101.

[11] Suzana Dobre, Dragoș Bogdan , *The Role of the European Court of Human Rights in Strengthening the Judicial Power in Romania: Recommendations*, 2009 www.juristras.eliamep.gr/wp-content/.../policyreportromaniaro.pdf .

What would be the advantages of mediation? First, it would considerably reduce the volume of cases to court, relieve them of many cases, the interests of parties to a conflict would be satisfied and the quality of justice would also increase. Courts costs would be avoided: stamp duties, fees of experts; and if a dispute can be resolved through mediation, during a civil process, the court may order the refund of the stamp duty, at the request of the parties.

Family conflicts, trade relations, inheritance can be resolved this way. Mediation law may also apply in criminal cases involving crimes for which, by law, the withdrawal of prior complaint or reconciliation of the parties removes criminal liability.

Conclusions

Independence of the judiciary is fundamental, and this translates into responsibility. Judges, prosecutors, lawyers, and especially those seeking justice need a transparent, clean and efficient legal system.

This transitional phase of Romania, with the EU imposing its own rules over ours, has caused deficiencies in our legal system. The overloading of the courts with too many cases, the excessive duration of case resolution, the lack of confidence in the judiciary on the part of the population are only a few of the issues that should be solved.

In order to address this judicial and legislative stalemate that Romania is facing, the creation of an unambiguous, coherent legal system, that doesn't leave space for interpretation, is required.

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LL.M EUROPEAN DIRECT TAXES: PROS AND CONS

Weber Florentina Iuliana*

Abstract

Approximately 60 years after the first kernel on the EU constitution, the idea of tax integration for all community members is more often circulated at official meetings of the representatives of Member States .

The fiscal integration is made by reference to the four fundamental freedoms covered by the Treaty on European Union, namely: the free movement of goods, services, persons and capital. To this doctrine it should be added also the free movement in relation to payments within the Union, which is essential to support the four basic freedoms.

Time has to decide if this idea, which now seems to be just in the early stages, will revolutionize the history of the European community.

Key words: *direct taxes, taxes, EU budget, contributions, economic government, economic policies and budget, expenditure, collection*

Introduction

The present paper tries to express an opinion on the more often circulated idea of implementing, since 2012 , direct taxes on taxpayers, and lowering taxes to the budget allocated by the EU Member States, followed by an appearance *of an European economic government.*

The above mentioned idea appears on the ground of the economic crisis and the recession, that affected and is affecting a number of Member States. To face this crisis, many countries in the euro zone have left their public spending and public debt without supervision and have moved from the criterion of convergence. Other countries such as Greece, passed by bankruptcy, put the European currency into difficulty.

In early June 2010, at a meeting of officials of the 27 EU member states in Brussels, the EU executive announced his intention to reduce contributions from Member States to the EU budget by reducing spending. An absolutely laudable initiative, especially for countries such as Romania, which is in great financial trouble.

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Unfortunately, the proposals did not stop there but continued by announcing the introduction of new taxes.

The press started to release a lot of speculations, which have not found, so far, a legislative outline in the European Parliament.

Concrete proposals in this regard are expected to be made during this month. It is known however, that, increasingly more countries, including Germany, want to reduce contributions to the budget. All governments are in favor of a reduction in national contributions, especially in this time of budget austerity. This situation allows searching of own revenue sources over which ministries of finance cannot lay claims.

In an interview in Financial Times Deutschland, the European Commissioner for Budget, Janusz Lewandowski, said they would consider introducing a new tax, that would fuel directly the EU accounts. There are three variants of increasing the EU income:

- A tax on financial transactions;
- A tax on air transport;
- A tax on income from the sale of certified emissions reduction of greenhouse gases, currently collected by Member States

In his opinion, the taxation of flights justifies the fact that refers to domestic and liberalization of travel within the Union. And auctioning carbon emissions has a European motivation, existing the possibility of integration into an effective policy on ecological economy.

In our opinion, these charges would only find their place, indirectly, into the pocket of ordinary citizens directly involved in these activities.

All this seems to be applied from the first half of 2012, during the Danish EU Presidency.

Circulated for some time by the European Commission, the idea to allocate directly a part the taxes collected at national level to the Union Budget, began to gain more and more. Thus, the European Parliament has already formed a majority that supports the supply of the Community budget with a percentage of collected taxes and fees nationwide. The Belgian EU Presidency considers, in turn, that a debate on this topic, it is absolutely necessary, while other states are skeptical about the new taxes and about the using of EU funds collected at the national level during this period budget austerity.

Until recently, the political opposition for taxes was categorical, however, currently, many EU countries feel the decrease of the budget by paying contributions to EU finances.

Analysts expect, on the other hand, that the proposal will attract vehement opposition of the Member States, who are struggling with internal problems stemming from economic and financial crisis. Currently, Britain is the only one who expressed the opinion totally against this project.

What happens now?

Now, European Union citizens are not charged directly by the Community, about 75% of the funding being achieved through voluntary contributions from Member States. All 27 states pay a fixed amount, in proportion to GDP. The Commission is preparing a series of options regarding the future EU budget and they will be presented to the Member States: these options will cover both revenue and expenditure.

Another perspective would be to impose a tax on banks. This opinion is shared also by us, and, until now, it seems the only alternative to the European authorities not to enter, directly or indirectly, their hand in pocket, and so quite narrow, of its own citizens. But it would be effective with one condition: Banks should maintain a maximum interest and fees imposed on customers, because, otherwise, this measure would be indirectly, a measure against itself by violating the maximum required and would be drastically punished by the community authorities.

It is thought by the European Commission, that such a tax on the profits of banks and bankers' remuneration could generate 25 billion Euros for the budgets of the Member states. But it is considered that taxes shall be considered in this moment and that banks are under taxated, and these should be the recovery of economies affected crisis. Moreover, in many Member States banks received significant amounts of grant money from the state budget during the crisis period.

Of course, countries which have had to help his credit institutions, severely criticized the proposal. Thus, the Czech Republic said they will not accept such a bank fee. In addition, it is stipulated that Member States may decide to push it or not.

Even in our country, some experts have described this fee as "ineffective" because banks will pass this cost on to the client. So it will be the client, who will pay for irresponsible behavior, but mostly for failing to regulate the financial markets, which nationally are sometimes protected and promoted, instead of fighting against their abuse. In fact, European policy in this area, did not save the Greek and Spanish citizens, but the banks that irresponsibly extended generous funding to Greek and Spanish governments. Almost the same situation is our country. European policy has protected banks, which were not able to do their jobs. Except now, when it wants to charge them all. How can we interpret this attitude to charge responsible conducts to finance those which are missing? What legislative proposal would this outline receive and under what conditions?

In early October, the committee presented the draft of a tax on financial activities. Assuming that the financial sector should have a fair contribution to public finances and that governments urgently need new sources of income in the current economic context, the Commission filed a two-component approach:

1. worldwide, the Commission supports the idea of a levy on financial transactions (TTF), which could help finance areas like development and climate change, which represents international challenges;
2. at European Union level, the Commission recommended that the preferred option is a tax on financial activities (TAF). It would focus on profits and remuneration of bankers. In this way, it would tax the corporations and not every participant in a financial transaction (such as TTF).

From our point of view, we don't accept any tax on financial activities. The explanation is simple. And this fee leads to lower income of businesses and individuals involved in such transactions, so with direct repercussions on their financial sector. Such a move would pose a risk on EU competitiveness and would create huge imbalances in financial markets.

The Commission wishes to present this proposal to the European Council in late November at the G20 summit. EC will conduct an impact study before it could become a legislative initiative next year.

However, at European level is working to centralize all businesses, possible direct contributors, through their registration in the Register of Community. In Romania, companies carrying out economic activities in the European Union are obliged to register in the Registry. We already put the natural question (and we can also shape the response to it) what will happen with private business, already very poor, in Romania, after introducing this tax on financial transactions?

Was the European Union was not created just in order to sustain economic activity and alleviating transactions within the common market? We can observe somehow, its destruction or the destruction of the actual work of people who invest their own time and financial resources to succeed a stable channel which supports a very diverse community device but sometimes burdensome for the ordinary citizen?

If what I have presented so far are further proposals made during this meeting, here, however, at this meeting there were discussed not only ideas but the Twenty-Seven have set up a "government", alleged to better coordinate their economic policies, namely "economic government" of the euro zone.

Heads of State and Government will be those who will coordinate economic and budgetary policies, and not the Commission. Thus, the European Council will become the "alfa and omega" of economic policy coordination. States, in fact, will not be committed to the debate major issues, because at this level decisions are taken unanimously. Community method is the exact opposite (and majority and forced decisions), which, however, over time, have proven useful.

What will happen in our country? We could already name a few negative effects of direct taxation, which is outlined immediately.

So:

- For such a delicate market, which is still in formation, the effect of a more substantial taxation may be inhibitor;
- For a very feebly business environment in Romania, it would tighten taxation, which is already in most cases very burdensome;
- Promote saving - in banks, but also long-term scholarship (along key development) - will end

Severe taxation of interest can be ruinous for the economy. 10% tax on deposit interest, which barely covers inflation and brings not any net income, sending money back to the mat, tumbling into all efforts were made to "bank" economy..

Some analysts believe that when saving, the real problem is negative interest rates and charge earnings interest.

To what vulnerabilities are we exposed to? A short summary can include: increasing the budget deficit, a widening trade deficit, possibility of increasing the current account deficit up to 10% in coming years, inflationary pressures, an inflation rate of 9%; the decrease of the credibility National Bank of Romania.

Lower interest rates on deposits and interest tax increase will cause increased consumption and reduce saving. Due to the decrease of household deposits at commercial banks, they would push to increase the reference interest rate

Potential GDP growth is much smaller than that of GDP in the short term, obtained by stimulating aggregate demand. It turns out that on a long term, tax revenues collected from the state budget grow at a rate much lower than the rate of decline in revenues to the budget as a result of applying the flat tax, increase the budget deficit, inflationary pressures appear stronger. In the long term, the inflation rate increases.

What steps should be taken to avoid increasing the budget deficit and inflation, leading to the flat?

First, improving the financial system by reducing public spending and reduce government, a prudent wage policy (hard to do, because Romania needs a stimulus for growth and investment in infrastructure is the handiest tools, consistent with the objectives modernization). Secondly, we need a higher legislative stability and an established force able to exercise governance, rigorous determination of property rights, state aid only in accordance with European legislation.

Conclusions

By this way we want to attract attention on the decision makers of Romania, involved at European level, to analyze these proposals made by European institutions with full responsibility and to think of completely negative economic effects for our country, with immediate effect but also on long term.

But the EU cannot accept a fee to have negative effects on the population. However, any fee will be adopted, it will alter the ordinary citizen, if he will not be protected by special amendments approved at European level